

HOME (/)
ABOUT
JOURNAL (/ABOUT)
MASTHEAD (/NEW-PAGE)
PROSPECTIVE MEMBERS (/PROSPECTIVE-MEMBERS)
SUBSCRIBE (/SUBSCRIBE)
STAFF RESOURCES (/STAFF-RESOURCES)
PUBLICATIONS
PUBLICATION ARCHIVE (/PUBLICATION-ARCHIVE)
VOLUME 1 (2009) (/VOLUME-1-2008-2009)
VOLUME 2 (2010) (/VOLUME-2-2009-2010)
VOLUME 3 (2011) (/VOLUME-3-2010-2011)
VOLUME 4 (2012) (/VOLUME-4-2011-2012)
VOLUME 5 (2013) (/VOLUME-5-2012-2013)
VOLUME 6 (2014) (/VOLUME-6-2013-2014)
VOLUME 7 (2015) (/VOLUME-7-2014-2015)
VOLUME 8 (2016) (/VOLUME-8-2015-2016)
VOLUME 9 (2017) (/VOLUME-9-2016-2017)
VOLUME 10 (2018) (/VOLUME-10-2018)
SYMPOSIUM
INFORMATION (/SYMPOSIUM)
BLOG
FULL BLOG (/FULL-BLOG)
BLOG ARCHIVE (/BLOG-ARCHIVE-1)
SUBMISSIONS (/SUBMISSIONS)

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Take Nothing but Pictures; Leave Nothing but Your Rights: Proposed USFS Regulations May Violate First Amendment (/full-blog/brown)

By: Joseph Brown, Staff Member

The U.S. Forest Service manages hundreds of National Forests and Wilderness Areas, nearly 30% of America's federal lands.^[i] Each year, millions of Americans visit areas under USFS protection to camp, picnic, sightsee, and enjoy nature. However, a new proposed regulation may have a significant impact on those who want to snap pictures in designated wilderness areas.^[ii]

The new rule requires a permit for any photography that "uses models, sets, or props that are not a part of the site's natural or cultural resources."^[iii] Failure to obtain the proper photography permit could result in up to \$1,000 per unpermitted photo.^[iv] The proposed rule has provoked an outcry that it would violate the First Amendment.^[v]

Alaska Senator Lisa Murkowski called the regulation "just one example of the kind of federal overreach that comes when we lock up our public lands in wilderness designations."^[vi] Wyoming Senator John Barasso called the rule "a direct violation of Americans' First Amendment rights."^[vii] In reaction to the uproar, the USFS tried to clarify the rule and pacify public outcry in a news release, promising that "[t]he proposal does not apply to news coverage... [or] gathering information for a news program or documentary."^[viii] USFS Chief Tom Tidwell told the press that the agency "remains committed to the First Amendment."^[ix]



(<https://www.flickr.com/photos/asilemvacha/7504297066/>)

While the Supreme Court has not yet specifically defined the First Amendment protection afforded to certain types of photography, some courts have suggested that private recreational non-communicative photography is not fully protected by the First Amendment.[x] Others have said that photography only falls within the purview of First Amendment protection when it has both a message to be communicated and an audience to receive that message.[xi] Nonetheless, the proposed regulation is not very well taken among the American public.[xii]

[i] *General Information About the Forest Service*, Wilderness.net, <http://www.wilderness.net/forests-service> (<http://www.wilderness.net/forests-service>). (last visited Oct. 20, 2014).

[ii] Bill Fink, *Don't Take That Photo! The U.S. Forest Service Might Fine You \$1,000*, Yahoo Travel. (Sept. 26, 2014), <https://www.yahoo.com/travel/dont-take-that-picture-the-u-s-forest-service-might-98484656432.html> (<https://www.yahoo.com/travel/dont-take-that-picture-the-u-s-forest-service-might-98484656432.html>). (last visited Oct. 20, 2014).

[iii] Proposed Directive for Commercial Filming in Wilderness; Special Uses Administration. (proposed Sept. 4, 2014) (to be codified at FSH 2709.11, ch. 40, § 45.1.c), <https://www.federalregister.gov/articles/2014/09/04/2014-21093/proposed-directive-for-commercial-filming-in-wilderness-special-uses-administration#page-52626> (<https://www.federalregister.gov/articles/2014/09/04/2014-21093/proposed-directive-for-commercial-filming-in-wilderness-special-uses-administration#page-52626>).

[iv] Fink, *supra* note 2.

[v] *Forest Service clarifies proposal on news photos in wilderness, after First Amendment outcry*, FoxNews.com. (Sept. 27, 2014), <http://www.foxnews.com/politics/2014/09/27/forest-service-clarifies-proposal-on-news-photos-in-wilderness-after-first/> (<http://www.foxnews.com/politics/2014/09/27/forest-service-clarifies-proposal-on-news-photos-in-wilderness-after-first/>). (last visited Oct. 20, 2014).

[vi] *Id.*

[vii] *Id.*

[viii] U.S. Forest Service News Release (Sept. 25, 2014) <http://www.fs.fed.us/news/releases/us-forest-service-chief-i-will-ensure-first-amendment-upheld-under-agency-commercial> (<http://www.fs.fed.us/news/releases/us-forest-service-chief-i-will-ensure-first-amendment-upheld-under-agency-commercial>). (last visited Oct. 20, 2014).

[ix] *Id.*

[x] *See* Larson v. Fort Wayne Police Dept. 825 F. Supp. 2d 965, 980 (N.D. Ind. 2010).

[xi] *See* Porat v. Lincoln Towers Community Assoc. 464 F.3d 274 (2nd Cir. 2006).

[xii] Scott Martelle, *Parving the Forest Service's (bad) proposed photo regulations*, LATimes.com (Sept. 30, 2014), <http://www.latimes.com/opinion/opinion-la/la-ol-forest-service-parks-photography-first-amendment-20140930-story.html> (<http://www.latimes.com/opinion/opinion-la/la-ol-forest-service-parks-photography-first-amendment-20140930-story.html>). (last visited Oct. 20, 2014).

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