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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: Commercial Filming in Wilderness, RIN 0596-AD20**

*Introduction*

The Motion Picture Association of America's members have enjoyed a long and mutually beneficial relationship working with federal agencies to depict the splendor of America's wilderness areas to members of the public in the United States, and to those around the world. As our long-serving former Chairman and CEO Jack Valenti stated before Congress, our films and television programming "advertise to the world the unduplicatable beauties of our national parks, irreplaceable treasures which belong to the American citizenry."<sup>1</sup> American movies and television shows that have been filmed on U.S. public lands represent "the most enticing kind of tourism ad you can imagine, and we are enticing millions of people to come here as a kind of global free advertising."<sup>2</sup>

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA's member companies are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment, Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home entertainment markets.

The MPAA certainly believes in responsible stewardship of our natural treasures. It acknowledges the need to preserve the environment in areas under the Forest Service's jurisdiction and, in particular, wilderness areas it oversees. To that end, the MPAA has long supported the government's ability to seek reimbursement for movie and television filming on federal lands without burdening taxpayers. That support dates back to H.R. 154, enacted as

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<sup>1</sup> Valenti, Jack, Statement to the House Subcommittee on National Parks and Public Lands, *H.R. 154, a Bill to Provide 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*, Feb. 4, 1999, at 25 ("Testimony on H.R. 154").

<sup>2</sup> *Id.*

Public Law 106-206 in May 2000, which established the authority to charge a reasonable fee for commercial filming on land under the jurisdiction of the Forest Service and other agencies. This has allowed for a successful partnership between the MPAA's member companies and federal agencies charged with safeguarding and maximizing the value of wilderness areas and other federal lands.

Because Public Law 106-206 regulates filming and photography it necessarily implicates significant constitutional concerns. The same is true of the proposed directive in the current Federal Register Notice, which raises First Amendment issues surrounding the licensing of the press and of the entertainment industry, discretionary fees, and government regulation of content. It is for these reasons that the MPAA respectfully submits the following in response to the request for public comment titled "Proposed Directive for Commercial Filming in Wilderness; Special Uses Administration."<sup>3</sup>

### *The Current Proceeding*

The artistic opportunities provided by the ability to film in U.S. wilderness lands present unparalleled creative choices to the motion picture industry. For example:

The 400-year-old fortification known as "El Morro" in San Juan National Historic Site was used in the movie "Amistad" to depict a slave-trading market; the white sands of White Sands National Monument were used in the movie "Star Wars" to depict an otherworldly landscape; and the Linville Falls Trail in Blue Ridge Parkway was used for the ambush scene in "Last of the Mohicans." These are but a few of the hundreds of memorable films that have been filmed in national parks over the years. The list includes "Dances with Wolves," filmed in part in Badlands National Park, "The Deer Hunter," made in part in Lake Chelan National Recreation Area, and "In the Line of Fire," filmed at several NPS sites throughout the National Capital Region. FWS units have also played host to memorable motion pictures. The exciting chase scene at the opening of "The Raiders of the Lost Ark," in which Harrison Ford narrowly escapes a rolling boulder, among other things, was filmed in Hanalei National Wildlife Refuge. The movie "Uncommon Valor," a story about a Vietnam War veteran, was filmed in part in Hanalei and Huleia Wildlife Refuges in Hawaii, because these refuges have features that are similar to those found in areas of Vietnam.<sup>4</sup>

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<sup>3</sup> Published in Federal Register Vol. 79, No. 171 on Sept. 4, 2014 ("FRN").

<sup>4</sup> S. Rep. 105-202, Pub. L. 105-391, *Vision 2020 National Parks Restoration Act*, Statement of Destry Jarvis, Assistant Director for External Affairs, The National Park Service, Department of the Interior.

The Federal Register Notice's proposed directive seeks to make permanent Forest Service guidance for special use permits (and associated fees) for still photography and commercial filming on National Forest Service lands. The proposed directive seeks to update rules governing such special use permits promulgated through a series of interim directives that implement Public Law 106-206.

In this proceeding, the Forest Service proposes to modify Chapter 40 of the Forest Service Handbook ("FSH") 2709.11 to codify "permanent guidance for the evaluation of proposals for ... commercial filming on National Forest Service Lands."<sup>5</sup> This would establish national criteria for special use permits for National Forest Service ("NFS") lands, based on the understanding that the previous directive "did not provide adequate guidance to review commercial filming in wilderness permit proposals."<sup>6</sup> The proposed action arises under Public Law 106-206, which authorizes the Secretaries of the Interior and Agriculture to require permits and establish reasonable fees for commercial filming on federal lands under their respective jurisdictions.<sup>7</sup> The Departments, which have adopted regulations under this grant of statutory authority, are governed by the statutory mandate that wilderness areas are to be "devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."<sup>8</sup>

The proposed directive, setting out additional criteria for activity "other than noncommercial still photography" in congressionally-designated wilderness areas, seeks to ensure that commercial filming will not cause unacceptable resource damage, disrupt public use and enjoyment, or pose health or safety risks.<sup>9</sup> The proposed directive would require special use permit applicants to 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."<sup>10</sup> Applied-for uses must be "wilderness-dependent"—that is, among other things, there must be "no suitable locations outside of a wilderness area"—and additionally, the use must "preserve the wilderness character of the area," "leave it untrammled, natural, and undeveloped," and "preserve opportunities for solitude of a primitive and unconfined type of recreation."<sup>11</sup>

Permits granted under the authority of Public Law 106-206 and the FSH directives at issue here relate specifically to the regulation of film-making on public lands, and call on the Forest Service to decide: (1) whether a permit is required; (2) the conditions under which it is granted or withheld; and (3) how much to charge. Empowering the Forest Service to make such decisions makes it necessary to examine the constitutional implications of its policies. As Forest

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<sup>5</sup> FRN, 78 Fed. Reg. at 52,626.

<sup>6</sup> *Id.* at 52,627.

<sup>7</sup> 16 U.S.C. § 4601-6d, Pub. L. 106-206, 114 Stat. 314.

<sup>8</sup> Wilderness Act of 1964 § 4(b).

<sup>9</sup> FRN at 52,627.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Service Chief Thomas Tidwell acknowledged in a Memorandum issued November 4, 2014, the proposed directive has “raised significant concerns ... about access [to wilderness areas] and the first amendment.”<sup>12</sup> Accordingly, Chief Tidwell sought to reassure those affected that the proposal “never intended to restrict the appropriate use of [NFS] lands for personal and commercial filming or photography activities.”<sup>13</sup>

The MPAA agrees with Chief Tidwell that whether a permit is required should be tied to impact on the land, and that where the activity “presents no more impact on the land than that of the general public,” it should be exempt from permit requirements.<sup>14</sup> But as Chief Tidwell observed, the significant concerns raised in this proceeding go “beyond the intended scope of the directive.”<sup>15</sup> These concerns even transcend the jurisdiction of the Forest Service because any the permitting system for speech activities raises constitutional issues common to all federal agencies with enforcement authority in this area. By authorizing the government to issue (or deny) permits, determine who needs a permit in the first place, and collect fees from those who do, Public Law 106-206 charges the Forest Service and its sister agencies with a delicate responsibility to balance the duty to preserve natural resources with the obligation to respect constitutional limitations imposed by the First Amendment.

### *Underlying Constitutional Principles*

The proposed directive and its authorizing statute implicate several facets of core First Amendment doctrine. Inasmuch as the statute and proposed directive contemplate a permitting scheme, any final rule must recognize that the power to deny or withhold permits cannot be exercised arbitrarily. This is of particular import because the Forest Service has discretionary authority to grant or deny special use permits, which are “required for all commercial filming (sec 45.5) activities on National Forest System lands[.]”<sup>16</sup>

The First Amendment does not allow government officials to have unlimited discretion to permit or deny speech or press-related activities.<sup>17</sup> And where, as proposed here, government permission to engage in filmmaking requires a permit, it amounts to a prior restraint if approval is delayed or denied.<sup>18</sup> These principles apply to grants of access to public lands.<sup>19</sup> Accord-

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<sup>12</sup> Chief Thomas L. Tidwell, Memorandum, “Commercial Filming and Photography Permits” (Nov. 4, 2014).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See 36 C.F.R. §§ 251.50-251.51; FSH 2709.11 (Special Uses Handbook).

<sup>17</sup> *E.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).

*E.g.*, *FW/PBS v. City of Dallas*, 493 U.S. 215, 226 (1990); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965).

*E.g.*, *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012) (photojournalist may assert First Amendment right to observe horse roundups conducted by Bureau of Land Management).

ingly, any directive the Forest Service adopts here must provide adequate standards to guide official decision-making, under standards that are narrow, objective and definite.<sup>20</sup>

The Forest Service also cannot incorporate into its directive—or allow its application to foment—content-based judgments as to whether permits issue. The First Amendment imposes the strictest limits on government when it seeks to regulate based on content, and subjects such efforts to strict scrutiny.<sup>21</sup> When put to the constitutional test, “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.”<sup>22</sup> Content-based government decisions on whether, as is relevant here, to issue a permit necessary to engage in expressive activity, violate the First Amendment and serve no legitimate government purpose. That is especially the case in the present context, where the only concern—as dictated by statute—is whether wilderness areas will be properly preserved and kept available for public use. While projects by MPAA members companies have done a great deal to showcase America’s natural beauty and promoted tourism, as noted above, and thus have had the effect of promoting “wilderness values,” it is inappropriate for government agencies to use such content-based criteria in making permitting decisions.

And insofar as the proposed directive entails permit fees, any costs imposed must be content- and speaker-neutral, and must generally adhere to First Amendment requirements.<sup>23</sup> The government may not impose inconsistent or discriminatory fees on First Amendment activities,<sup>24</sup> and content-based taxes or fees are particularly infirm.<sup>25</sup> Moreover, the First Amendment does not permit the government to impose a fee that amounts to a tax on expressive activities.<sup>26</sup>

#### *MPAA Recommendations*

In view of the applicable constitutional limits, the MPAA submits that the Forest Service should incorporate the following elements into its final directive. As an overarching matter, the directive should presume that a permit will issue for any use that does not impact wilderness areas or the public’s enjoyment of them. Regarding the “impact” a use would have, the Forest Service must specify—and apply—solely objective criteria. Ultimately, permit grants must be based on minimizing environmental impact, and cannot be based on content.

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<sup>20</sup> *Shuttlesworth*, 394 U.S. at 150-51.

<sup>21</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000); *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (“The essence of this forbidden censorship is content control.”).

<sup>22</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (quoting *Playboy*, 529 U.S. at 818).

<sup>23</sup> *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

<sup>24</sup> *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987).

<sup>25</sup> *Simon & Schuster, Inc. v. New York Crime Victims Board*, 502 U.S. 105, 116 (1991).

<sup>26</sup> *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 583-84 & n.6, 587 n.9 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Nor may permits be conditioned on whether the film into which wilderness footage is incorporated takes a particular viewpoint or serves any particular purpose. Whether a film 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,” as the proposed directive contemplates, could be construed to require the Forest Service to judge the message of a proposed film in evaluating a permit application. This invites unconstitutional content-based discrimination, and is contrary to the purpose and intent of the law. As Jack Valenti testified in expressing support for Public Law 106-206, the law “should not be construed by nor does it confer rights upon the Secretary for script approval or censorship.”<sup>27</sup> Permitting decisions cannot in any way consider the work into which footage will be incorporated, but rather must focus only on the act of filming, and how that process will or may affect wilderness areas. It is critically important in this respect for the Forest Service to clarify that decisions on permits will consider only the proposed use’s impact on the physical environment and its use and enjoyment by the public.

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The MPAA appreciates this opportunity to provide our views on the proposed directive, and would be pleased to provide any additional information that your office may request.

Respectfully submitted,



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<sup>27</sup> See Testimony on H.R. 154.