

ORIGINAL

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Attorneys for the Federal Defendants

U.S. COURTS

01 JUN 28 PM 4:14

REC'D FILED
CAMERON S. BURKE
CLERK IDAHO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

_____)	
BARRY ADAMS,)	No. CIV 01-0295-6-BLW
)	
Plaintiff,)	
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
et al.,)	
Defendants.))	
_____)	

DECLARATION OF WALTER B. ROGERS

I, Walter B. Rogers, District Ranger, Lowman Ranger District, Boise National Forest, USDA,

Forest Service, declare that:

1. I am employed by the United States Department of Agriculture, Forest Service, as the District Ranger for the Lowman Ranger District in the Boise National Forest. My duties in this position involve administration and management of natural resources in the Lowman Ranger District, including authorization of special uses conducted in that ranger district. I have held this position since February 1995.

2. On June 12, 2001, I spoke with Electric Ed Tunis and Marken about resource concerns associated with site selection for this year's annual Rainbow Family gathering in the Lowman Ranger District. Mr. Tunis and Marken told me at that time that a site for the gathering had not yet been selected. I informed them that a complete application for a noncommercial group use permit and proposed operating plan must be submitted for the gathering. I offered to provide the standard application form for noncommercial group uses. They said they did not need one, as they already had one.

3. At no time on June 12, 2001, or on any other date did I imply or state that only an application and operating plan, not a permit, would be required for the 2001 annual Rainbow Family gathering. To the contrary, on June 12, 2001, I informed Mr. Tunis and Marken that a complete application for a noncommercial group use permit must be submitted for the gathering.

4. No application, oral or written, was submitted on June 12, 2001, for a noncommercial group use permit.

5. On June 16, 2001, I received an application for a noncommercial group use permit for the 2001 annual Rainbow Family gathering from Mr. Tunis. Plaintiff's Complaint, Attachment

4. I denied the application on the same day, on the grounds that, in violation of regulatory

requirements, it did not specify the estimated number of participants and spectators for the proposed activity or the name, address, and day and evening telephone numbers of the person who will sign a special use permit on behalf of the group. My letter also noted concerns about the proper disposal of waste and the extreme environmental sensitivity of the proposed site for the gathering. Plaintiff's Complaint, Attachment 5.

6. On June 16, 2001, I also received a letter dated June 15, 2001, from Barry Adams. Plaintiff's Complaint, Attachment 3. I did not treat this letter as an application for a permit because it did not state or indicate that Mr. Adams was applying for a permit. Rather, the letter noted that Mr. Tunis was applying for a permit and discussed Mr. Adams's viewpoint concerning the Rainbow Family and the noncommercial group use permit requirement. On June 18, 2001, in a telephone conversation with Mr. Adams, I told him that I did not view his letter dated June 15, 2001, as an application and explained that the letter did not state or indicate that Mr. Adams was applying for a permit.

7. On page 3 of Mr. Adams's June 15, 2001, letter, he stated that he is joining in Mr. Tunis's application. Plaintiff's Complaint, Attachment 3. As noted above in paragraph 5, I denied that application on June 16, 2001. Plaintiff's Complaint, Attachment 5.

8. Mr. Adams submitted his own application for a noncommercial group use permit in a letter dated June 17, 2001, which I received that same day. In that letter, Mr. Adams reiterated that he was joining in Mr. Tunis's application. Plaintiff's Complaint, Attachment 6.

9. On June 18, 2001, I denied Mr. Adams's June 17 application, on the grounds that, in violation of regulatory requirements, it did not specify the name, address, and day and evening telephone numbers of the person who will sign a special use permit on behalf of the group.

(Neither the information contained under the heading FS-2700-3b nor the information contained under the heading FS-2700-3c specified the required data as to who will sign a permit on behalf of the group.) My letter also noted concerns about the proper disposal of waste and the extreme environmental sensitivity of the proposed site for the gathering. Plaintiff's Complaint, Attachments 1 and 6.

10. On June 18, 2001, at approximately 6:45 p.m., I received from Jeff Kline a complete application for a noncommercial group use permit for this year's annual Rainbow Family gathering in Bear Valley in the Lowman Ranger District. Plaintiff's Complaint, Attachment 9.

11. On June 20, 2001, before 6:45 p.m., I sent Jeff Kline a letter denying his application on the grounds that it did not satisfy one of the eight evaluation criteria, contained in 36 C.F.R. 251.54(g)(3)(ii)(C). This criterion requires me to make a determination that the proposed activity does not materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Service Handbook (FSH) 1909.15, chapter 30. Conducting this year's annual Rainbow Family gathering in Bear Valley implicates two of the environmentally sensitive resources or lands identified in FSH 1909.15, chapter 30: threatened and endangered species or their critical habitat, and Native American religious or cultural sites, archaeological sites, or historic properties or areas. FSH 1909.15, sec. 30.3, para. 2(b) and (g). Because of the legal requirements associated with implicating these environmentally sensitive resources or lands, I could not make a determination that they would not be materially impacted by the proposed activity and denied the permit application on that basis. Attachment A to this Declaration.


12. On June 23, 2001, at approximately 3:25 p.m., I received from Mr. Kline a second

application for a noncommercial group use permit for this year's annual Rainbow Family gathering. Attachment B to this Declaration.

13. On June 25, 2001, before 3:25 p.m., I sent Jeff Kline a letter denying his second application. In that letter, I reiterated the basis for denial stated in my June 20 letter, under 36 C.F.R. 251.54(g)(3)(ii)(C). I stated that the agency would continue to conduct the requisite environmental analysis in the hope of issuing a permit for the annual Rainbow Family gathering. Attachment C to this Declaration.

I declare under penalty of perjury in accordance with 28 U.S.C. 1746 that the above is true and correct to the best of my knowledge.

Executed on 28 June 2001.


WALTER B. ROGERS
District Ranger, Lowman Ranger District
Boise National Forest
USDA, Forest Service



File Code: 2300

Date: June 20, 2001

Mr. Jeff Kline
Chairman and Chief Executive Officer
Hispanic Radio Network, LLC
740 National Press Building, Suite 74
Washington, D.C. 20045

Dear Mr. Kline:

This is to acknowledge receipt of your faxed application for a noncommercial group use permit. You have applied for a permit for the annual gathering of the Rainbow Family of Living Light (Rainbow Family) in the Bear Valley in the Lowman Ranger District in the Boise National Forest. This application was received in my office at approximately 6:45 p.m. on June 18, 2001.

First, I would like to express my appreciation for your efforts in completing this application, and commend your good faith in trying to meet the requirements of the noncommercial group use regulations. This is an important step forward, and we look forward to working with you on issues of mutual concern to the Rainbow Family and the Forest Service.

However, I am denying a permit for this Rainbow Family gathering. The noncommercial group use rule requires that a permit application satisfy eight evaluation criteria. One of these criteria is that the authorized officer must make a determination that:

The proposed activity does not materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Service Handbook 1909.15, chapter 30.

36 C.F.R. 251.54(g)(3)(ii)(C). Your proposed activity implicates two of the environmentally sensitive resources or lands identified in Forest Service Handbook 1909.15, chapter 30: threatened and endangered species or their critical habitat, and Native American religious or cultural sites, archaeological sites, or historic properties or areas. FSH 1909.15, sec. 30.3, paragraphs 2(b) and (g).

1. The noncommercial group use rule is consistent with the obligations imposed on the Forest Service and all federal agencies under the Endangered Species Act (ESA). Section 7 of the ESA instructs each federal agency to act in consultation with the appropriate agency, the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) regarding potential effects of a proposed action on threatened and endangered species (50 C.F.R. 402.01(b)). Once an agency discovers that a proposed action "may affect" listed species, it must consult with the consulting agency. All Forest Service planned, funded, executed, or permitted programs and activities are to be reviewed for possible effects on endangered, threatened,



proposed, or sensitive species per Forest Service Manual direction (FSM 2672.4).

There are six threatened species in Bear Valley: Chinook salmon, steelhead, bull trout, bald eagle, Canada Lynx, and the Ute Ladies Tresses, as well as an experimental/non-essential population of gray wolves. We are completing a biological assessment under the ESA for your application. We have made a "may affect but not likely to adversely affect" determination for the Ute Ladies Tresses. We are still conducting an assessment for the bald eagle, Canada Lynx, and the gray wolves. We have made a "may affect but likely to adversely affect" determination for the chinook salmon, steelhead, and bull trout. Consequently, we have had to consult with and seek a biological opinion from the FWS and NMFS. Therefore, under the noncommercial group use regulation, the authorized officer cannot make a determination that the proposed activity does not materially impact the characteristics or functions of these environmentally sensitive resources and lands and is denying the permit on that basis.

2. In addition, the proposed activity would take place on lands subject to off-reservation Tribal treaty rights of the Shoshone Bannock and Shoshone Paiute Tribes. These lands are considered sacred to the Tribes and essential to their lifeways. The proposed activity implicates traditional cultural resources on National Forest System lands. The Boise National Forest is required to consult with federally recognized Tribes on any action that may affect off-reservation Tribal treaty rights, cultural resources, or the ability of the agency to meet trust responsibilities established under public laws and implementing regulations. The Forest must honor its responsibility and legal obligations for consultation with the Tribes. The Forest Service has not completed consultation with the Tribes regarding the proposed gathering. Therefore, under the noncommercial group use regulation, the authorized officer cannot make a determination that the proposed activity does not materially impact the characteristics or functions of these environmentally sensitive resources and lands and is denying the permit on that basis.

At this point, we have not been able to identify any alternative sites in the Boise National Forest that would not pose the same obstacles in terms of 36 C.F.R. 251.54(g)(3)(ii)(C). Although we cannot completely foreclose the possibility that there is an appropriate site in the Boise National Forest, we believe that threatened species are present throughout the Forest. If you have an alternative site on the Boise or a different Forest, please let us know so we can work with you.

Per 36 C.F.R. 251.54(a), we encourage you to apply as soon as possible in advance of the gatherings, and in a timely manner, per 36 C.F.R. 251.54(g)(2)(iv), at least 72 hours before the gathering begins. There are already more than 75 people at your gathering (over 1000), and you have not obtained the required permit. Therefore, your gathering is unauthorized. If you had consulted with the agency sooner, we would have had a better chance of locating an appropriate site for this year's annual Rainbow Family gathering.

Page 3 – Jeff Kline

If you have any questions, please contact me at the Lowman Ranger District at (208) 259-3361.

Sincerely,


WALTER B. ROGERS
District Ranger

Cc: Acting Forest Supervisor

ATTACHMENT B

FAX COVER SHEET

**TO: WALT ROGERS
FAX: 208 259-3366**

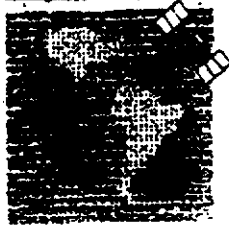
**FROM:
JEFF KLINE**

ENCLOSED ARE FOUR (4) PAGES:

- 1. COVER LETTER APPLYING FOR SPECIAL USE PERMIT AND AGREEING TO FULLY COMPLY WITH ALL SIXTEEN (16) RESOURCE RESTRICTIONS WRITTEN BY YOU ON JUNE 22ND, AND AGREEING TO FULLY COMPLY WITH THE TWO (2) SPECIAL ORDERS ISSUED BY ACTING FOREST SUPERVISOR ARCHIE ON JUNE 17, 2001.**
- 2. APPLICATION FULLY SIGNED AND EXECUTED.**
- 3. PERMIT FULLY SIGNED AND EXECUTED BY CONTACT PERSON FOR APPLICANT.**

PLEASE CALL MY CELL PHONE IF YOU DO NOT RECEIVE ALL FOUR PAGES.

HISPANIC RADIO NETWORK, INC.



LA RED PASADENA

National Press Building
Suite 740
Washington, DC 20045
(202) 637-8800
Business Fax: (202) 547-2976
Editorial Fax: (202) 637-8801

June 23, 2001

Mr. Walt Rogers
District Ranger
Lowman District
Boise National Forest

Dear District Ranger Rogers:

I am pleased to submit with this letter a fully executed "special use application and permit for non-commercial group uses" that includes full acceptance of and compliance with the sixteen (16) Resource Restrictions for Cache Creek, Sack Creek and Bear Valley Creek Areas written by you and transmitted by your office to Mr. Garrick Beck on June 22, 2001. The enclosed application also specifically includes agreement to fully comply with Order Number 0402-0&U-01-2 and Order Number 0402-0&U-01-3 issued June 17, 2001.

I have arranged communication with participants now in Idaho, and they have agreed that any changes that need to be made to their campsites or infrastructure pursuant to the Resource Restrictions and Special Orders listed above will be made voluntarily by them. They have indicated that should any individual inadvertently not be in compliance they will be happy to make needed changes if such is pointed out to them, and need no coercion or threat to do so.

Per our discussions with Regional Forester Jack Blackwell and Forest Supervisor Anne Archie, I have assurance that individuals whom I have reason to believe are responsible and trustworthy, will work with all participants who come in June & July to the 2001 Rainbow Gathering to ensure that they fully understand the importance of compliance with the orders issued by Forest Supervisor Archie, and the Resource Restrictions issued yesterday by you.

Please accept this fully signed application. Should you require further consultations, we trust that you will view this as a **valid application that is under review**, in a manner that allows the participants gathering for this recreational and educational activity to enjoy this multi-use of our National Forest Resources while fully conforming to the Resource Restrictions and Orders you have issued.

Sincerely,



Jeff Kline

Signing as a Private Citizen

Cc: Anne Archie, Jack Blackwell

Authorization ID _____

Contact ID _____

Use Code _____

Forest Service SPECIAL-USE APPLICATION & PERMIT FOR NONCOMMERCIAL GROUP USES (Ref.: 36 CFR 251.54) Authority: Organic Act of 1897, 16 U.S.C. 1	FOREST SERVICE USE TYPE 311		
	DATE RECEIVED _____ (mm/dd/yyyy)	CONTACT ID _____	EXPIRATION DATE _____
	TIME: _____	_____	_____
	APPLICATION GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/>	DATE _____	TIME _____

PART I - APPLICATION

APPLICANT INFORMATION:

Name of Group: INDIVIDUALS ATTENDING 2001 RAINBOW GATHERING Address of Group or Contact: SUITE 740 NATIONAL Press Bldg WASHINGTON, DC 20045
 (whichever is applicable)
 Name of Contact: JEFF KLINE
 Day Phone: (202) 637-8800 Evening Phone: ()

DESCRIPTION OF PROPOSED ACTIVITY: 2001 RAINBOW GATHERING: CAMPING, COOKING, ENVIRONMENTAL EDUCATION, PRAYING AND OTHER ACTIVITIES FREE AND OPEN TO ANYONE

LOCATION & DESCRIPTION OF NATIONAL FOREST SYSTEM LANDS & FACILITIES APPLICANT WOULD LIKE TO USE:

BOISE NATIONAL FOREST, LOWMAN RANGER DISTRICT CACHE CREEK MEADOWS, MACE CREEK MEADOWS JACK CREEK AREA ALL SUBJECT TO AND IN COMPLIANCE WITH SPECIAL ORDERS 0402-04U-01-2 AND 0402-04U-01-3 AND THE SIXTEEN CIG RESOURCE RESTRICTIONS PRESCRIBED BY THE LOWMAN DISTRICT RANGER.

ESTIMATED NUMBER OF PARTICIPANTS & SPECTATORS FOR PROPOSED ACTIVITY:

Participants: 20,000 Spectators: _____

STARTING & ENDING DATE & TIME OF PROPOSED ACTIVITY:

Start 6/16/01 End: 7/31/01
 Date Time Date Time

NAME OF PERSON(S) WHO WILL SIGN A SPECIAL-USE PERMIT ON BEHALF OF THE GROUP (May be same as contact listed in item 1.):

Name: JEFF KLINE Name: _____
 Address: 740 NATIONAL PRESS BLDG, WASH, D.C. 20045 Address: _____
 Day & Evening Phone: () () Day & Evening Phone: () ()
(202) 637-8800
 Signature: _____ Signature: _____
 Date: _____ Date: _____

Amended Application Filed 6/23/01 APPLICATION NOT VALID UNLESS SIGNED BY CONTACT

Signature of Contact: _____ Date: 6/23/01

18 U.S.C. 1001 makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations; or to any matter within its jurisdiction; Anyone knowingly or willfully makes or uses any false writing shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

PART II - PERMIT

1. Use under this permit shall begin on 6/16/01 (date) and end on 7/31/01 (date). The permit shall not be extended.
INDIVIDUALS ATTENDING 2001 RAINBOW GATHERING BY JEFF KLINE - WASH, D. C.
2. (Holder Name) (the holder) is hereby authorized to use, subject to the terms of this permit, National Forest System lands described as _____, as shown in attached Exhibit(s) _____. This permit covers approximately _____ acres and/or _____ miles.
3. The holder is authorized to conduct the following activities and install the following improvements in the permitted area: _____
*TEMPORARY KITCHENS
TEMPORARY FIRST AID CENTERS
TEMPORARY SANITARY FACILITIES
TEMPORARY ADMINISTRATIVE + INFORMATION CENTERS*
4. The holder shall conduct the authorized activities according to the attached approved plans and specifications, Exhibit(s) _____. The holder shall not install any improvements not specifically identified and approved above or in exhibits.
5. No soil, trees, or other vegetation may be destroyed or removed from National Forest System lands without specific prior written permission from the authorized officer.
6. The holder shall comply with all federal, state, county, and municipal laws, ordinances, and regulations which are applicable to the area or operations covered by this permit.
7. The holder shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the authorized officer. The holder shall fully repair and bear the expense for all damages, other than ordinary wear and tear, to National Forest System lands, roads and trails caused by the holder's activities.
8. The holder has the responsibility of inspecting the use area and adjoining areas for dangerous trees, hanging limbs, and other evidence of hazardous conditions which would pose a risk of injury to individuals. After securing permission from the authorized officer, the holder shall remove such hazards.
9. The holder shall be liable for any injury, loss, or damage, including fire suppression costs and environmental harm or injury to natural resources, that arises in connection with the use and occupancy authorized by this permit.
10. The holder shall indemnify and hold harmless the United States for any injury, loss, or damage, including third-party claims, damage to federal property, fire suppression costs, and environmental harm or injury to natural resources, that arises in connection with the use and occupancy authorized by this permit.
11. The person who signs this permit is not subject to any individual liability under this permit as a result of that signature. The person who signs this permit signs as an agent of the holder and provides his or her name solely to allow notice of actions pertaining to the permit to be communicated to the holder and to give the permit legal effect.
12. The holder agrees to permit free and unrestricted access to and upon the premises at all times for all lawful and proper purposes not inconsistent with the intent of the permit or with the reasonable exercise and enjoyment by the holder of the privileges thereof.
13. This permit is subject to all valid existing rights and claims outstanding in third parties.
14. This authorization may be revoked or suspended only in accordance with 36 CFR 251.60(a)(1)(i). Upon expiration or revocation of this permit, the holder shall immediately remove all improvements except those owned by the United States, and shall restore the site within 30 (number) days, unless otherwise agreed upon in writing. If the holder fails to remove the improvements, they shall become the property of the United States, but that will not relieve the holder of liability for the cost of their removal and the restoration of the site.
15. This permit is a license for the use of federally owned land. It does not grant any interest in real property. This permit is not transferable. The holder shall not enter into any agreements with third parties for occupancy of the authorized premises and improvements.

16. Any decision concerning this permit, including but not limited to suspension or revocation and modification of permit terms and conditions, is not subject to administrative appeal and is immediately subject to judicial review.
17. This permit is accepted subject to the conditions set forth herein, including any conditions in any exhibits attached to and made a part of this permit.
18. The above clauses shall control if they conflict with additional clauses or provisions.

<Add clauses here to address local conditions. Delete instructions prior to printing.>

I have read and understand the terms and conditions and agree to abide by them.

U.S. DEPARTMENT OF AGRICULTURE
Forest Service

HOLDER:

Authorization is granted:

By: JEFF KLINE
 By: SUITE 740 NATIONAL PRESS BUILDING
 Date: WASHINGTON, DC 20045
6/23/01

By: _____
 Name: _____
 Title: _____
 Date: _____

HOLDER MUST HAVE THIS PERMIT (OR A LEGIBLE COPY) IN POSSESSION DURING THE AUTHORIZED ACTIVITY

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0326-0082.

This information is needed by the Forest Service to evaluate requests to use National Forest System lands and manage those lands to protect natural resources, administer the use, and ensure public health and safety. This information is required to obtain or retain a benefit. The authority for these requirements is provided by the Organic Act of 1897 and the Federal Land Policy and Management Act of 1976, which authorizes the Secretary of Agriculture to promulgate rules and regulations for authorizing and managing National Forest System lands. These statutes, along with the Term Permit Act, National Forest Site Area Permit Act, Granger-Thyng Act, Mineral Leasing Act, Alaska Term Permit Act, Act of September 3, 1954, Wilderness Act, National Forest Roads and Trails Act, Act of November 1, 1972, Archaeological Resources Protection Act, and the Alaska National Interest Lands Conservation Act, authorize the Secretary of Agriculture to issue authorizations for the use and occupancy of National Forest System lands. The Secretary of Agriculture's regulations at 38 CFR Part 251, Subpart B, establish procedures for these authorizations.

The Privacy Act of 1974 (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552) govern the confidentiality to be provided for information received by the Forest Service. Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

RESOURCE RESTRICTIONS FOR CACHE CREEK, SACK CREEK AND BEAR VALLEY CREEK AREAS

Listed below are the resource restrictions necessary to protect and minimize impacts to critical Threatened and endangered species in these areas;

1. Bear Valley Creek: There will be no human entry in an area along Bear Valley Creek beginning at the Bearskin bridge on Bearskin road No. 563, downstream along road No. 582 to the confluence with Elk Creek, from the edge of the road edge to stream side to 100 feet back to the northwest (opposite) side of Bear Valley Creek. (See attached Special Order with map). This area is very critical for spawning chinook salmon and they are currently in the creek. There will be **ABSOLUTE ZERO TOLERANCE FOR ANYONE ENTERING OR DRIVING IN THIS CLOSURE AREA.**
2. There will be no camping within 50 feet of running water.
3. There will be no firewood gathering or cutting within 100 feet of running water.
4. Latrines: Latrines and waste pits will not be constructed within 300 feet from running water. Latrines and waste pits will not be located in areas that contain riparian vegetation. Latrines and waste pits will be designated by the District Ranger. (See attached special order)
5. Kitchens: Locations for kitchens and ovens will be designated by the District Ranger. Gray water disposal will be at least 300 feet from running water and will not be located within areas that contain riparian vegetation.
6. Nursery location will be designated by the District Ranger.
7. No washing with soap or detergents in Cache and Sack Creeks.
8. No cutting of green trees in the area.
9. Keep dogs out of Bear Valley Creek. Dogs in Bear Valley Creek will cause serious harassment to spawning and migrating Chinook salmon. Dogs should be on a leash to prevent harassment to fish. Dog waste should be disposed of to prevent it from being an attractant to wildlife.
10. Do not leave fires unattended as it is very dry in the lodgepole pine stands.
11. Do not disturb old cabin on the north side of Sack Creek in the timber.
12. Clean up: Dumpsters will provide somewhere in Cache Creek Meadows for you to deposit your trash/garbage. Pick up all litter, dismantle and scatter all structures. Fire circles and rings will need to be dismantled and filled in.
13. Parking: Cache Creek Meadows parking area has been flagged. Do not park beyond those areas as you will be in the riparian area.
14. Stream Crossing: Construct native pole bridges to protect stream banks and reduce sediment input to creeks.
15. Rainbow Family Gathering will provide commercial porta-potties in the parking lot near where the trail head to Sack Creek and towards bus village.
16. Do not drink water from streams without treating it first or by purifying. Portable water should be provided to bus village, A Camp and other campers accessed by road vehicles.

As a minimum, these are the kinds of things we would need in a permit application before we could go forward with consultation with the Regulatory Agencies.



File Code: 2300

Date: June 25, 2001

Mr. Jeff Kline
Chairman and Chief Executive Officer
Hispanic Radio Network, LLC
740 National Press Building, Suite 74
Washington, D.C. 20045

Dear Mr. Kline:

This is to acknowledge receipt of your second application for a noncommercial group use permit and receipt of your letter dated June 25, 2001. You have applied for a permit for the annual gathering of the Rainbow Family of Living Light (Rainbow Family) in Bear Valley on the Lowman Ranger District of the Boise National Forest. The second application was received in my office at approximately 3:25 p.m. on June 23, 2001.

First, I would again like to express my appreciation for your efforts in completing this application, and commend your good faith in trying to meet the requirements of the noncommercial group use regulation. We also appreciate the Rainbow Family's acceptance of the 16 resource restrictions imposed by the Forest Service for the gathering site and the two Forest orders issued by the Forest Service in connection with the gathering. We are especially encouraged by the Rainbow Family's agreement per your June 25 letter to engage in advance consultation with the Forest Service to cooperatively select the site for next year's annual Rainbow Family gathering. These are significant steps, and we look forward to working with you on issues of mutual concern to the Rainbow Family and the Forest Service.

However, I am again compelled to deny the application for this Rainbow Family gathering. The regulatory requirements for a special use permit have not been met. In your June 25 letter, you ask the Forest Service to waive the regulatory requirement to grant or deny a noncommercial group use application within 48 hours. There is no provision for waiver of this requirement in the noncommercial group use regulation. This requirement was included in the rule for the benefit of applicants and to meet constitutional requirements for a short, specific time frame for evaluating applications for permits governing expressive activities. Without such a requirement, applicants could argue that mere delay on the part of the Forest Service could constitute denial of a permit. Even if you, as agent for the Rainbow Family, were willing to waive the Rainbow Family's right to a 48-hour determination and the group's right to sue the Forest Service for failing to meet that requirement, other noncommercial group use applicants and permit holders could challenge the Forest Service's inconsistent application of the regulations in enforcing that requirement for them and foregoing it for the Rainbow Family to facilitate issuance of a permit.

Even if the Forest Service were able to waive the 48-hour requirement, the Forest Service still could not authorize the annual Rainbow Family gathering in Bear Valley. By asking the Forest Service to treat the annual Rainbow Family gathering as being subject to a "valid permit



application that is under review" and decline to enforce noncompliance with the permit requirement, you are seeking to have the agency deem the gathering authorized. In effect, you are asking the agency to waive not only the 48-hour requirement, but the entire regulatory scheme, which addresses significant concerns of resource protection, allocation of space, and public health and safety.

The noncommercial group use rule requires that a permit application satisfy eight evaluation criteria. As stated in my June 21 letter, your application does not meet a critical evaluation criterion in the regulation that allows the Forest Service to meet its obligations under the National Environmental Policy Act. Under this criterion, the authorized officer must make a determination that: The proposed activity does not materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Service Handbook 1909.15, Chapter 30.

36 C.F.R. 251.54(g)(3)(ii)(C). Your proposed activity implicates two of the environmentally sensitive resources or lands identified in Forest Service Handbook 1909.15, Chapter 30: threatened and endangered species or their critical habitat, and Native American religious or cultural sites, archaeological sites, or historic properties or areas. FSH 1909.15, sec. 30.3, paragraphs 2(b) and (g).

1. The noncommercial group use rule is consistent with the obligations imposed on the Forest Service and all federal agencies under the Endangered Species Act (ESA). Section 7 of the ESA instructs each federal agency to act in consultation with the appropriate agency, the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) regarding potential effects of a proposed action on threatened and endangered species (50 C.F.R. 402.01(b)). Once an agency discovers that a proposed action "may affect" listed species, it must consult with the consulting agency. All Forest Service planned, funded, executed, or permitted programs and activities are to be reviewed for possible effects on endangered, threatened, proposed, or sensitive species per Forest Service Manual direction (FSM 2672.4).

There are six threatened species in Bear Valley: Chinook salmon, steelhead, bull trout, bald eagle, Canada Lynx, and Ute Ladies Tresses, as well as an experimental/non-essential population of gray wolves. We are completing a biological assessment under the ESA for your application. We have made a "may affect but not likely to adversely affect" determination for the Ute Ladies Tresses. We are still conducting an assessment for the bald eagle, Canada Lynx, and the gray wolves. We have made a "may affect but likely to adversely affect" determination for the Chinook salmon, steelhead, and bull trout. Consequently, we have had to consult with and seek a biological opinion from the FWS and NMFS. Therefore, under the noncommercial group use regulation, the authorized officer cannot make a determination that the proposed activity does not materially impact the characteristics or functions of these environmentally sensitive resources and lands and is denying the permit on that basis.

2. In addition, the proposed activity would take place on lands subject to off-reservation Tribal treaty rights of the Shoshone Bannock and Shoshone Paiute Tribes. These lands are considered sacred to the Tribes and essential to their lifeways. The proposed activity implicates traditional cultural resources on National Forest System lands. The Boise National Forest is required to

consult with federally recognized Tribes on any action that may affect off-reservation Tribal treaty rights, cultural resources, or the ability of the agency to meet trust responsibilities established under public laws and implementing regulations. The Forest must honor its responsibility and legal obligations for consultation with the Tribes. The Forest Service has not completed consultation with the Tribes regarding the proposed gathering. Therefore, under the noncommercial group use regulation, the authorized officer cannot make a determination that the proposed activity does not materially impact the characteristics or functions of these environmentally sensitive resources and lands and is denying the permit on that basis.

Thus, if the Forest Service treats the annual Rainbow Family gathering as being subject to a "valid permit application under review," the agency is deeming the activity to be authorized, even though a critical regulatory requirement has not been met. Without the required permit, noncommercial group uses are unauthorized, and those engaging in these activities as participants or spectators are subject to being cited under Forest Service regulations. The Forest Service is consistently enforcing the noncommercial group use permit requirement. Otherwise, the agency could be accused of inconsistent application of the rule.

Nevertheless, while not required to do so once an application has been denied, the Forest Service will continue the consultation process with FWS, NMFS, and the Tribes in the hope of issuing a permit for your event. At this point, we have not been able to identify any alternative sites in the Boise National Forest that would not pose the same obstacles in terms of 36 C.F.R.

251.54(g)(3)(ii)(C). Although we cannot completely foreclose the possibility that there is an alternative site in the Boise, we believe that threatened species are present throughout the Forest. If you have an alternative site in the Boise or in a different national forest, please let us know so we can work with you. The Forest Service is unaware of any agreement on the part of the Rainbow Family to move to a different site, or any recommendation on the part of any agency officials that the gathering continue at its present site. However, it is questionable whether it would be feasible to move a gathering of over 2100 people that will soon climb to as many as 20,000 from one primitive national forest site to another.

Per 36 C.F.R. 251.54(a), we encourage you to apply as soon as possible in advance of the gatherings, and in a timely manner, per 36 C.F.R. 251.54(g)(2)(iv), at least 72 hours before the gathering begins. There are already more than 75 people at your gathering (over 2100), and you have not obtained the required permit. Therefore, your gathering is unauthorized. If you consult with the agency sooner for future gatherings, we are confident that we will be able to locate an appropriate site and meet the regulatory requirements for issuing a permit.

If you have any questions, please contact me at the Lowman Ranger District at (208) 259-3361.

Sincerely,



WALTER B. ROGERS
District Ranger