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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BARRY ADAMS, Plaintiff, v. UNITED STATES OF AMERICA et al., Defendants.	No. 4:01-cv-295 (BLW) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

10

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

REGULATORY MATERIALS

RULES

INTRODUCTION

In his pro se complaint filed June 25, 2001, Plaintiff Barry Adams asked this Court to order the United States Department of Agriculture, Forest Service, to grant his application for a noncommercial group use permit for the "'Annual Gathering of the Tribes 2001', 'Rainbow Family Gathering.'" Complaint ¶¶ 6-14, 56. On June 29, 2001, this Court denied plaintiff's motion for a temporary restraining order. Because the Rainbow Family gathering in the Boise National Forest has since concluded, any controversy over plaintiff's permit application is now moot. Plaintiff's complaint should therefore be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Even if the Court had jurisdiction over plaintiff's claim, his complaint would be subject to dismissal because the Forest Service complied with the governing regulation in denying his permit application. There is no dispute that plaintiff failed to provide the name, address, and telephone numbers of a person who would sign the permit on behalf of the group, as required by the Forest Service's regulation. Further, to the extent plaintiff seeks to challenge the validity of the noncommercial group use regulation, such a challenge is barred by the law of the Circuit and the principles of res judicata and collateral estoppel and is, in any event, meritless. Accordingly, in the event that the Court finds that an actual case or controversy exists, it should dismiss plaintiff's complaint for failure to state a claim pursuant to Rule 12(b)(6) or, in the alternative, enter summary judgment in defendants' favor pursuant to Rule 56.

BACKGROUND AND REGULATORY FRAMEWORK

This case is one of several disputes between the United States and members of the Rainbow Family including plaintiff. In disposing of a prior case brought by plaintiff and other

Rainbow Family members, the District Court for the District of Oregon explained:

> The Rainbow Family is an unincorporated, loosely-structured group of individuals that regularly gathers in undeveloped sites in National Forests to pray for peace, discuss environmental and other contemporary political and social issues, and exchange, develop, express and demonstrate their ideas and views. Annual gatherings have occurred in different National Forests on and around July 4 since 1972. These gatherings draw more than 20,000 participants and last for a month or more. Smaller regional gatherings take place throughout the year in National Forests across the country.

Black v. Arthur, 18 F. Supp. 2d 1127, 1130 (D. Or. 1998) (citations and internal quotation marks omitted), aff'd, 201 F.3d 1120 (9th Cir. 2000).

Although the Rainbow Family often displays an admirable concern for the preservation of the National Forest System, problems associated with loosely organized conglomerations of 20,000 or more persons in remote areas of the forests are inevitable. In the past, the Forest Service has encountered difficulties stemming from the increasing use of the National Forest System by large groups. See USDA, Final Rule, Land Uses & Prohibitions, 60 Fed. Reg. 45,258 (Aug. 30, 1995) [hereinafter "Final Rule"]).[1] As the district court found in Black, 18 F. Supp. 2d at 1130, "[i]mproperly closed latrines, eroded and compacted soil, destruction of vegetation, and litter have been problems at previous gatherings."

Problems associated with Rainbow Family Annual Gatherings have on occasion been more serious. For example, in the 1987 Annual Gathering in North Carolina, inadequate sanitation resulted in an outbreak of shigellosis, a form of bacterial dysentery transmitted by

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[1]The Final Rule preamble to the promulgation of the regulatory framework at issue in this case includes an exhaustive review of applicable First Amendment case law, demonstrating the Forest Service's awareness of its constitutional duties and its attempt to conform the regulatory scheme to First Amendment strictures.

contamination from human waste. The contamination resulted from the scattering of uncovered human waste. Flies, bare human feet, and other vectors spread the shigellosis bacteria. Two physicians from the Centers for Disease Control in Atlanta visited the 1987 Annual Gathering from July 4-11 and estimated that 65% of those remaining suffered from shigellosis. By the middle of August, twenty-five states reported outbreaks of the disease traced to persons attending the Gathering. Similarly, in the 1991 Gathering in Vermont, uncovered human waste was left scattered throughout the forest, and in the 1992 Gathering in Colorado, latrines were dug too close to open water. See Final Rule, 60 Fed. Reg. at 45,263-64.[2]

In addition, competing or inappropriate proposed uses of the National Forest System by groups other than the Rainbow Family have posed threats to physical safety. See, e.g., Final Rule, 60 Fed. Reg. at 45,281 (describing how a group called "We The People" sought to meet at sites where previous Mississippi National Guard military training had resulted in leftover unexploded ordnance and where the National Guard had scheduled ongoing tank maneuvers).

To preserve National Forest System resources, to address concerns of health and safety, and to allocate space among competing users, the Forest Service promulgated the noncommercial group use regulation in 1995. See Final Rule, 60 Fed. Reg. at 45,258, 42,262-64, 45,278 (describing the public interests the noncommercial group use regulation was designed to protect).

In brief, the Forest Service regulation codified at 36 C.F.R. part 251, subparts B and C,

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[2]The 1987, 1991, and 1992 Annual Gatherings resulted in soil compaction, destruction of vegetation, and exposed tree roots. Gatherers left filled garbage bags, cigarette butts, and plastic twist ties throughout the sites. See Final Rule, 60 Fed. Reg. at 45,263-64. Eroded soil from paths leading down to sources of fresh water threatens the quality of stream banks and, thus, the long-term quality of the water.

and 36 C.F.R. part 261, subpart A, requires those wishing to use or occupy National Forest System land in noncommercial groups of 75 or more to obtain a special use authorization or permit to do so.[3] Persons wishing to obtain an authorization must provide minimal information in a short application form. See 36 C.F.R. § 251.54(d). One of the pieces of information the applicant must provide is "[t]he name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent." 36 C.F.R. § 251.54(d)(2)(i)(E). The regulation directs potential applicants "to contact the Forest Service . . . as early as possible in advance of the proposed use," 36 C.F.R. § 251.54(a), and requires applicants to apply at least 72 hours before the proposed event begins, see 36 C.F.R. § 251.54(g)(2)(iv). A permit issues automatically 48 hours after delivery unless the Forest Service denies it in writing, giving reasons for the denial. See 36 C.F.R. § 251.54(g)(3)(i). The Forest Service may reject an application only if it fails to meet one of eight narrow, content-neutral criteria. See 36 C.F.R. § 251.54(g)(3). If some alternative time, place, or manner of use would allow the applicant to meet all the criteria, the Forest Service must offer this alternative. See 36 C.F.R. § 251.54(g)(3)(iii).

Plaintiff filed the instant complaint in connection with the "'Annual Gathering of the Tribes 2001', 'Rainbow Family Gathering,'" which the Rainbow Family decided to hold in the Boise National Forest. See Complaint ¶ 6. On June 16, 2001, District Ranger Walter B. Rogers

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[3]The Forest Service regulations have recently been recodified, so that the subsections referred to by certain courts considering challenges to these regulations may be different than those referred to by the parties in this litigation. No relevant substantive changes were made to the regulations.

of the Loman Ranger District in the Boise National Forest received an application for a noncommercial group use permit from Rainbow Family member Electric Ed Tunis. See Complaint ¶ 30; Complaint, Attachment 4; see also Declaration of Walter B. Rogers, District Ranger for the Lowman Ranger District in the Boise National Forest, Clerk's Docket No. 8 (filed June 28, 2001) (copy attached as Exhibit 1) [hereinafter "Rogers Decl."] ¶ 5.[4] The Forest Service denied the application on the same day, on the grounds that 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 a person who would sign the permit on behalf of the group. See Complaint ¶ 37; Complaint, Attachment 5; see also Complaint, Attachment 4 (indicating "Number of participants: Unknown" in response to item 4 and "N/A" in response to item 6); Rogers Decl. ¶ 5. Mr. Rogers's letter also noted concerns about the proper disposal of waste and the extreme environmental sensitivity of the proposed site for the gathering. See Complaint, Attachment 5.

On June 16, 2001, the Forest Service also received a letter dated June 15, 2001 from plaintiff. See Complaint, Attachment 3; see also Rogers Decl. ¶ 6. In the letter, plaintiff indicated that he was joining in Mr. Tunis's application, but did not state or indicate that he himself was applying for a permit. See Complaint, Attachment 3. Mr. Rogers accordingly advised plaintiff by telephone on June 18, 2001 that the Forest Service did not view plaintiff's letter dated June 15, 2001 as an application. See Rogers Decl. ¶ 6.

By letter dated June 17, 2001, plaintiff submitted his own application for a

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[4]Despite plaintiff's suggestion to the contrary, Mr. Tunis did not apply, orally or in writing, for a noncommercial group use permit on June 12, 2001. See Rogers Decl. ¶ 4.

noncommercial group use permit. See Complaint, Attachment 6; see also Rogers Decl. ¶ 8. With respect to item 6 of form FS-2700-3b, which requests the name, address, and day and evening telephone numbers of the person who will sign a special use permit on behalf of the group, plaintiff stated "n/a not applicable or NEED ALTERNATIVE - Equal Right to access to Federal lands for all Viewpoints!" Complaint, Attachment 6, at 3; see also Complaint ¶ 39. Although plaintiff also provided information in his letter under the heading "FS-2700-3c," he did not include the name of an individual who would sign on behalf of the group there either. See Complaint, Attachment 6, at 4-5; see also Rogers Decl. ¶ 9.

On June 18, 2001, the Forest Service denied plaintiff's June 17, 2001 application, on the ground that it did not specify the name, address, and day and evening telephone numbers of the person who would sign a special use permit on behalf of the group. See Complaint ¶¶ 10-12; Complaint, Attachment 1; see also Rogers Decl. ¶ 9. Mr. Rogers's letter also noted concerns about the proper disposal of waste and the extreme environmental sensitivity of the proposed site for the gathering. See Complaint, Attachment 1.

On June 18, 2001, the Forest Service received from Jeff Kline a complete application for a noncommercial group use permit for the Rainbow Family gathering in Bear Valley in the Lowman Ranger District. See Complaint, Attachment 9. This application included a signature on behalf of the group, but failed to meet another regulatory requirement. See id.; Complaint ¶¶ 46, 48; see also Rogers Decl. ¶¶ 10-11. Specifically, the Forest Service determined that conducting the gathering in Bear Valley would implicate threatened and endangered species or their critical habitat including the imperiled Chinook salmon, steelhead, and bull trout – as well as religious or cultural sites of the Shoshone Bannock and Shoshone Paiute Tribes. See Rogers

Decl. ¶ 11 & Attachment A. Because of the legal requirements associated with implicating these environmentally sensitive resources or lands, the Forest Service could not make a determination that they would not be materially impacted by the proposed activity and denied the permit application on that basis. See Rogers Decl. ¶ 11 & Attachment A. A second application from Mr. Kline for a noncommercial group use permit was denied on June 25, 2001 on the same grounds. See Rogers Decl. ¶¶ 12-13 & Attachments B-C.

ARGUMENT

I. STANDARD OF REVIEW

While pro se complaints are to be construed liberally, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972), "a plaintiff, suing in a federal court, must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment," Smith v. McCullough, 270 U.S. 456, 459 (1926), quoted in Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001). In reviewing defendants' motion to dismiss pursuant to Rule 12(b)(1), the Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); see also St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989).

Should the Court determine that it has jurisdiction to hear this action, it must take all allegations of material fact as true and construe them in the light most favorable to plaintiff in ruling on defendants' Rule 12(b)(6) motion. See AlliedSignal, Inc. v. City of Phoenix, 182 F.3d

692, 695 (9th Cir. 1999). A complaint may be dismissed under Rule 12(b)(6) only where "it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief." Id.

> As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." . . . . There are, however, two exceptions to the requirement that consideration of extrinsic evidence converts a 12(b)(6) motion to a summary judgment motion. First, a court may consider "material which is properly submitted as part of the complaint" on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment. If the documents are not physically attached to the complaint, they may be considered if the documents' "authenticity . . . is not contested" and "the plaintiff's complaint necessarily relies" on them. Second, under Fed.R.Evid. 201, a court may take judicial notice of "matters of public record."

Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001) (citations omitted); see also Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000) (noting that the Court "may consider facts contained in documents attached to the complaint" in ruling on a Rule 12(b)(6) motion), cert. denied, 121 S. Ct. 1602 (2001). Thus, in ruling on defendants' motion to dismiss for failure to state a claim, the Court may consider the attachments to plaintiff's complaint. The Court may also take judicial notice of the preamble to the Final Rule "because it is the record of an administrative body that contains relevant information on the background and purpose of the challenged regulation." Black, 18 F. Supp. 2d at 1132 (citing Federal Rule of Evidence 201).

If the Court determines that jurisdiction exists and feels it necessary to consider the declaration of District Ranger Walter B. Rogers in resolving the case, summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, "there is no genuine issue as to any material fact," and "the moving party is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(c).

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE ANY CONTROVERSY REGARDING PLAINTIFF'S PERMIT APPLICATION IS NOW MOOT.

The Court no longer has jurisdiction to hear this case. Mootness is a jurisdictional issue deriving from the requirement of a case or controversy under Article III. See Cole v. Oroville High Sch. Dist., 228 F.3d 1092, 1098 (9th Cir. 2000), cert. denied, 121 S. Ct. 1228 (2001). As the Ninth Circuit has explained:

> The case-or-controversy requirement demands that, through all stages of federal judicial proceedings, the parties continue to have a personal stake in the outcome of the lawsuit. This means that . . . the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.

United States v. Verdin, 243 F.3d 1174, 1177 (9th Cir. 2001) (citation and internal quotation marks omitted), petition for cert. filed (June 19, 2001) (No. 00-50131). "A case is moot where the issues before the court no longer present a live controversy or the parties lack a cognizable interest in the outcome of the suit." H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 612 (9th Cir. 2000).

Although a "party asserting mootness bears a heavy burden of establishing that there is no effective relief remaining for a court to provide," see GATX/Airlog Co. v. United States Dist. Ct. for the N. Dist. of Cal., 192 F.3d 1304, 1306 (9th Cir. 1999), that burden is easily met here. The instant complaint relates to the denial of plaintiff's application for a noncommercial group use permit for the "'Annual Gathering of the Tribes 2001', 'Rainbow Family Gathering,'" which has now concluded. See Complaint ¶¶ 6-14 ("Nature of Complaint"); Complaint, Attachment 4 (listing the starting and ending dates for the gathering as June 15, 2001 and July 31, 2001

respectively); Complaint, Attachment 6 (designating the ending date for the gathering as "July 7, 2001 plus clean-up/restoration"). Because the gathering for which plaintiff sought a permit is over, the controversy over plaintiff's permit application is moot. Thus, this court has no jurisdiction to entertain plaintiff's claim for injunctive relief unless an exception to mootness applies.

No such exception is applicable here. "The Supreme Court has instructed that [the 'capable of repetition yet evading review'] exception to mootness applies only in 'exceptional situations . . . .'" Unabom Trial Media Coalition v. United States Dist. Ct. for E. Dist. of Cal., 183 F.3d 949, 950 (9th Cir. 1999).

> To qualify for this exception, there must be a reasonable expectation that the complaining party will be subject to the same injury in the future. In addition, the injury suffered must be so inherently limited in duration that the action will become moot before the completion of appellate review.

In re Di Giorgio, 134 F.3d 971, 975 (9th Cir. 1998). In the instant case, the allegations of plaintiff's complaint do not give rise to a reasonable expectation that he will be subject to the same alleged "injury" in the future. Inasmuch as another Rainbow family member (Jeff Kline) has demonstrated a willingness to sign permit applications on behalf of the group, it is possible that future Rainbow gatherings will proceed with valid permits or, at a minimum, that the signature requirement will not be placed in issue. See Complaint, Attachments 9 & 11; see also Complaint ¶ 46. Further, there is nothing to stop plaintiff from applying for a permit for a future gathering well in advance of the proposed date so as to ensure the availability of appellate review before the controversy becomes moot. In fact, the Forest Service's regulation directs potential applicants "to contact the Forest Service . . . as early as possible in advance of the proposed use."

36 C.F.R. § 251.54(a). Because the controversy is moot and no exception to mootness applies, plaintiff's complaint should be dismissed for lack of jurisdiction.

III. IN THE EVENT THE COURT FINDS THAT JURISDICTION EXISTS, PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM OR SUMMARY JUDGMENT SHOULD BE ENTERED IN DEFENDANTS' FAVOR.

A. THE FOREST SERVICE FOLLOWED ITS REGULATION IN DENYING PLAINTIFF'S PERMIT APPLICATION.

There is no question that the Forest Service properly applied its regulation in denying plaintiff's permit application. As noted above, the Forest Service regulation requires those wishing to obtain a noncommercial group use permit to provide "[t]he name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent." 36 C.F.R. § 251.54(d)(2)(i)(E). Plaintiff does not dispute that he failed to provide this piece of information and instead indicated that it was not applicable to the Rainbow Family. See Complaint ¶ 39; Complaint, Attachment 6. Accordingly, the Forest Service properly rejected his permit application. See Complaint, Attachment 1.[5]

Contrary to plaintiff's assertion, the Forest Service was not required to offer plaintiff an alternative time, place, or manner. Pursuant to 36 C.F.R. § 251.54(g)(3)(iii), the Forest Service must provide an alternative only if the "alternative time, place, or manner will allow the applicant to meet the eight evaluation criteria." See also United States v. Linick, 195 F.3d 538,

[5]As noted above, the permit application submitted by Electric Ed Tunis suffered from the same defect, while Jeff Kline's applications failed to meet the requirement set forth in 36 U.S.C. § 251.54(g)(3)(ii)(C) because the Forest Service could not make a determination that the proposed activity would not materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Service Handbook 1909.15, chapter 30. See Complaint, Attachments 4, 5; Rogers Decl. ¶¶ 5, 11, 13; Rogers Decl. Attachments A, C; see also supra pages 5-7.

543 (9th Cir. 1999) ("If a permit is not granted, the Forest Service is required to offer an alternative time, place, or manner if one is available.") (emphasis added). An alternative would not allow the applicant to meet the eight criteria since plaintiff himself failed to provide "[t]he name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent," as required under 36 C.F.R. § 251.54(d)(2)(i)(E).[6] The Forest Service was therefore not required to provide an alternative.

B. ANY CHALLENGE TO THE CONSTITUTIONALITY OF THE NONCOMMERCIAL GROUP USE REGULATION MUST BE REJECTED.

To the extent plaintiff seeks to challenge the constitutionality of the signature requirement or any other aspect of the Forest Service's noncommercial group use regulation, such a claim is foreclosed by settled law in the Circuit and the principles of res judicata and collateral estoppel. Moreover, even if the Court could consider plaintiff's challenge, it is clearly without merit.

1. THE LAW OF THE CIRCUIT, RES JUDICATA, AND COLLATERAL ESTOPPEL BAR ANY CHALLENGE TO THE REGULATION'S CONSTITUTIONALITY.

In United States v. Linick, 195 F.3d 538, 543 (9th Cir. 1999), the Ninth Circuit found that in light of an Interpretive Rule promulgated by the Forest Service — a rule in effect at the time plaintiff submitted his application — the regulatory scheme governing the "special use" of National Forest System land is a valid time, place, and manner restriction. More recently, in Black v. Arthur, 201 F.3d 1120 (9th Cir. 2000), the Ninth Circuit reiterated its holding that the

[6]Moreover, as of June 20, 2001 and June 25, 2001, the Forest Service had not been able to identify any sites within the Boise National Forest that would meet the requirement of 36 C.F.R. § 251.54(g)(3)(ii)(C). See Rogers Decl. Attachments A & B.

noncommercial group use regulatory scheme "constitutes neither a facially invalid prior restraint nor a facially invalid time, place, or manner restriction." Id. at 1123. In Black, the Court of Appeals rejected the contention advanced by Mr. Adams and others "that the challenged Forest Service regulation does not apply to them because a Rainbow Family gathering does not have an internal governing structure that would make it a 'group.'" Id. at 1122. The Court of Appeals specifically held that "Rainbow Family gatherings constitute . . . a group use [within the meaning of the regulation] because they involve gatherings of 75 or more people." Id. Although the Ninth Circuit did not have a particular application of the regulation before it, it also rejected plaintiffs' "central argument . . . that the Forest Service cannot constitutionally require the signature of a Rainbow Family member as a condition of granting a permit." Id. at 1122, 1123.[7]

In addition to being controlling law in this jurisdiction, the Ninth Circuit's decision in Black is binding upon plaintiff pursuant to the principles of res judicata and collateral estoppel. As the Ninth Circuit has explained:

> Res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties from relitigating all issues connected with the action that were or could have been raised in that action. Claim preclusion is appropriate where: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded to a final judgment on the merits; and (4) the same claim or cause of action was involved in both suits.

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[7]Like the Ninth Circuit, courts around the country have upheld the constitutionality of the permit requirement as a whole and the signature requirement in particular. See United States v. Kalb, 234 F.3d 827, 832 (3d Cir. 2000) ("By now there is a body of caselaw addressing the constitutionality of the signature requirement; this requirement has been upheld uniformly and we will uphold it here."), petition for cert. filed, 69 U.S.L.W. 3620 (U.S. Mar. 12, 2001); United States v. Johnson, 159 F.3d 892 (4th Cir. 1998); United States v. McFadden, 71 F. Supp. 2d 962 (W.D. Mo. 1999); United States v. Masel, 54 F. Supp. 2d 903 (W.D. Wisc. 1999), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000).

> Collateral estoppel is appropriate when the following elements are met: (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.

Rein v. Providian Fin. Corp., 252 F.3d 1095, 1098, 1099 (9th Cir. 2001) (citations omitted). To the extent he seeks to raise the same issues or claims[8] as in Black, Mr. Adams is precluded from doing so because he was a named plaintiff in that action, he had a full and fair opportunity to litigate issues there, and a final judgment on the merits was ultimately entered in favor of the Forest Service.[9]

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[8]To determine whether two claims are the same for purposes of res judicata, the Ninth Circuit considers:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Nordhorn v. Ladish Co., 9 F.3d 1402, 1405 (9th Cir.1993); cf. Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 289 (9th Cir.) (noting that "[p]laintiffs' assertion of new incidents arising from the application of the challenged [municipal] policy is . . . insufficient to bar application of res judicata"), cert. denied, 121 S. Ct. 623 (2000). But cf. Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000) ("A claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim."), cert. denied, 121 S. Ct. 1247 (2001).

[9]Any constitutional challenge may be further precluded by the amended judgment of conviction that was entered on February 9, 2001 by the United States District Court, District of Montana (Richard F. Cebull, U.S. Magistrate Judge). See United States v. Adams, No. CR-00-5037-GF-RFC (D. Mon. Feb. 9, 2001). In that case, Mr. Adams was found guilty of using or occupying National Forest System lands during the 2000 Rainbow Family Gathering in Montana without authorization when such authorization was required. Although that judgment is on appeal, the pendency of the appeal does not affect the judgment's preclusive effect. See Hawkins

2. ANY CHALLENGE TO THE CONSTITUTIONALITY OF THE REGULATION IS, IN ANY EVENT, CLEARLY MERITLESS.

Moreover, even if a challenge to the validity of the signature requirement was not barred by prior decisions, the Court would have to reject plaintiff's challenge as utterly meritless. To the extent plaintiff is suggesting an alternative regulatory scheme that does not contain a signature requirement, his contention flies in the face of Supreme Court precedent. In Ward v. Rock Against Racism, 491 U.S. 781, 789-90 (1989), the Supreme Court ruled that time, place, and manner restrictions need not be the "least restrictive means" of achieving the government's interests to survive constitutional attack. Rather, the test for narrow tailoring in this context is whether the government "could reasonably have determined that its interests would be served less effectively without [the regulation] than with it." Id. at 801.

Clearly, that test is met here. The signature requirement serves an important role in the overall framework of the noncommercial group use regulation by serving at least two interests. First, "[b]y signing a special use authorization on behalf of the group, the agent or representative gives the authorization legal effect and subjects the group to the authorization's terms and conditions." Final Rule, 60 Fed. Reg. at 45,286. The Forest Service's attempts to protect the governmental interests articulated above have been frustrated in the past in part by the Rainbow Family's diffuse organizational structure. "[I]nformal agreements made with one individual or subgroup have not been respected by other group members. It has thus been difficult for the agency to obtain commitments from the Rainbow Family on issues pertaining to the Gatherings." Id. at 45,267. The signature requirement resolves this difficulty. By signing the permit, the

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v. Risley, 984 F.2d 321, 324 (9th Cir. 1993).

agent or representative, as a matter of federal law and regardless of the law of any particular state, binds the group and its individual members as a whole to the terms and conditions of the permit and gives the permit legal effect. See id. ("The special use authorization process will enhance the agency's ability to achieve its objectives by allowing the agency to obtain commitments from the Rainbow Family that apply to the group as a whole."); United States v. Kalb, 234 F.3d 827, 833 (3d Cir. 2000) (endorsing this rationale), petition for cert. filed, 69 U.S.L.W. 3620 (U.S. Mar. 12, 2001).

Second, the signature requirement deters intentional false statements to the Forest Service which might cause an erroneous denial or grant of an authorization application. An applicant for a noncommercial group use authorization must submit basic information sufficient to allow the Forest Service to make an informed time, place, and manner decision. See 36 C.F.R. § 251.54. 18 U.S.C. § 1001(a) criminalizes the making of any "materially false, fictitious, or fraudulent statement or representation" as to "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." The signature requirement thus helps assure that the Forest Service's permitting decision is made with accurate information. Thus, even if a challenge to the signature requirement were not barred by the law of the Circuit and the principles of res judicata and collateral estoppel, it would of necessity fail.

C. THERE ARE NO ALLEGATIONS IN PLAINTIFF'S COMPLAINT TO SUPPORT AN ARGUMENT THAT THE REGULATION HAS BEEN UNCONSTITUTIONALLY APPLIED TO HIM.

Although the Ninth Circuit in Black left open the possibility that the Rainbow Family could raise a claim that the noncommercial group use regulation had been unconstitutionally applied to it in a particular case, see 201 F.3d at 1124, plaintiff's complaint does not include a

single allegation that would support such a claim, nor could it, since the Forest Service carefully followed its regulation in denying his application, see supra pages 11-12. Instead, plaintiff's complaint merely rehashes the arguments that the Ninth Circuit considered and explicitly rejected in Linick and Black.

The Ninth Circuit has made it clear that the Forest Service's noncommercial group use regulation constitutes neither a facially invalid prior restraint nor a facially invalid time, place, or manner restriction. See Black, 201 F.3d at 1123; Linick, 195 F.3d at 543. The thrust of plaintiff's complaint, however, is that the Forest Service may not apply its content-neutral permit system to him. He thus seeks to render this established government power, necessary here to the protection of natural resources and other vital national interests, a nullity. No personal belief system, no matter how deeply and sincerely held, whether religious or political or otherwise, can justify his refusal to comply with an otherwise valid, generally applicable law such as the noncommercial group use regulation, including its signature requirement. See Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions."); Employment Division, Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-80 (1990). Plaintiff's suggestion that persons need comply only with laws they find consistent with the fundamental tenets of their political or religious creed would turn each person into a "'law unto himself.'" Employment Div., 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)). This is not the law. See United States v. Masel, 54 F. Supp. 2d 903, 920 (W.D. Wis. 1999) ("[T]o credit defendant's argument would allow the Rainbow Family or any other

group to avoid the permit requirement simply by maintaining that it had no leaders or agents that could sign the permit, thereby gutting the entire special use authorization scheme."), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000).

CONCLUSION

For the foregoing reasons, plaintiff's complaint should be dismissed as moot pursuant to Rule 12(b)(1). In the alternative, plaintiff's complaint should be dismissed for failure to state a claim pursuant to Rule 12(b)(6), or summary judgment should be entered in defendants' favor pursuant to Rule 56.

Respectfully submitted,

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August 21, 2001

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CERTIFICATE OF SERVICE

THE UNDERSIGNED, an employee of the United States Attorney's Office for the District of Idaho, hereby certifies that on the 21st day of August, 2001, she mailed true and correct copies of MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT by U.S. Mail, postage prepaid to the following:

Barry E. Adams
P.O. Box 8574
Missoula, MT 59807

- and -

Barry E. Adams
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