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CAMERON S. BURKE
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BARRY ADAMS, Plaintiff,	No. 4:01-cv-295 (BLW)
v.	DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER
UNITED STATES OF AMERICA et al., Defendants.	

INTRODUCTION

In order to win a temporary restraining order, plaintiff Barry Adams must demonstrate " (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in [his] favor, and at least a fair chance of success on the merits." Miller v. California Pacific Medical Ctr., 19 F.3d 449, 456 (9th Cir.1994). Because there is no question as to the legality of defendants' actions and because, moreover, the balance of equities tilts sharply in favor of defendants, this Court should deny plaintiff any relief.

36 C.F.R. § 261.10(k) and accompanying regulations prohibit occupation of National Forest System land in noncommercial groups of 75 or more without a Forest Service permit. Plaintiff submitted a deficient permit application that was denied by the Forest Service in accordance with its regulations. See Section IA infra. The permit requirement has been repeatedly upheld by courts around the country, including the Ninth Circuit, as a valid time, place and manner restriction. See Section IB infra. Without a permit, plaintiff and over 3000 other members of the Rainbow Family are currently participating in an illegal gathering on the Boise National Forest, one of the most ecologically sensitive forests in the United States. The protection of precious Forest System resources was one of the Forest Service's central motivations for enacting the permit requirement. United States Department of Agriculture (USDA), Final Rule, Land Uses & Prohibitions, 60 Fed. Reg. 45,258, 42,262-64, 45,278 (explaining that purpose of permit requirement is to preserve National Forest System resources, address concerns of health and safety, and allocate space among competing users). The Boise is a unique spawning site for the imperiled Chinook Salmon, and is

also home to several other threatened species, including bulltrout, steelhead, bald eagles, Canada Lynx, and Ute Ladies Tresses. The ongoing illegal activity also threatens the traditional cultural fishing rights of the Shoshone Bannock and Shoshone Paiute Tribes. In light of these facts, as well as the circumstances surrounding plaintiff's belated and ineffectual attempt to get a permit, the balance of hardships tilts definitively in favor of defendants. See Part II infra.

I. Plaintiff has no likelihood of success on the merits.

A. The Forest Service complied with its own regulations in denying plaintiff's permit application.

Plaintiff appears to complain about two aspects of the Forest Service's handling of his application[1] – the Forest Service's denial of his application and its failure to offer an alternative gathering site. Because the Forest Service carefully followed its regulations, plaintiff's arguments are without merit. Persons wishing to obtain an authorization must provide minimal information in a short application form. 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 signature requirement").[2] Plaintiff admittedly failed to provide this piece of information and instead indicated

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[1]Although it is not entirely clear from Plaintiff's Complaint, Plaintiff submitted only one application. The Forest Service did not treat his letter of June 15, 2001, as an application since it did not state or indicate that Mr. Adams was applying for a permit. Declaration of Walter B. Rogers, District Ranger for the Lowman Ranger District in the Boise National Forest ("Rogers Decl.") ¶6. Instead Mr. Adams discussed the application of Electric Ed Tunis and stated that he was joining it. Id. The Forest Service denied that application as well. Id. ¶7.

[2]The signature requirement,"is necessary to ensure that the group will be responsible for the actions of its members as a whole, to give the authorization legal effect and to subject the

that it was not applicable to the Rainbow Family. Complaint ¶39. Accordingly, the Forest Service rejected his permit application. Letter of District Ranger Rogers to Plaintiff dated June 18, 2001 and attached at Tab 1 to Plaintiff's Complaint.

Contrary to plaintiff's assertion, the Forest Service was not required to offer plaintiff an alternative. 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**." (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." Accordingly, the Forest Service was not required to provide an alternative.

B. The noncommercial group use regulation, including the signature requirement, is a constitutional time, place and manner restriction on its face and as applied to the Rainbow Family.

To the extent plaintiff challenges the constitutionality of the signature requirement or any other aspect of the Forest Service's noncommercial group use regulation, his claim is foreclosed by settled law in this Circuit. See, e.g., United States v. Linick, 195 F.3d 538, (9th Cir. 1999) (regulation constitutes a valid time, place and manner restriction); Black v. Arthur, 201 F.3d 1120 (9th Cir. 2000) (upholding signature requirement). Indeed, courts around the country have unanimously upheld the constitutionality of the signature requirement (and the permit requirement

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group to the authorization's terms and conditions. Without the ability to impose terms and conditions on all members of a group, the government would clearly be extremely hampered in its ability to achieve any of its interests." United States. v. Kalb 234 F.3d 827, 833 (3d Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3620 (U.S. Mar. 12 2001).

as a whole).[3] Plaintiff himself is intimately familiar with this controlling legal authority because of his involvement in civil and criminal litigation with the Forest Service, including Black. Courts have not hesitated to find that the Rainbow Family, like every other applicant, must abide by the signature requirement. See, e.g., Kalb, 234 F.3d at 833.

II. The balance of hardships tips definitively in defendants' favor.

Members of the Rainbow Family, including plaintiff, are well aware of the permit requirement generally and the signature requirement in particular, and of the series of court cases upholding these requirements. The Rainbow Family was equally cognizant that its National Gathering would be held in the period around July 4th, which is when the group always holds its national gatherings, and that the gathering would likely involve more than 20,000 people. Although the regulation directs potential applicants "to contact the Forest Service ... as early as possible so that potential constraints may be identified," (36 C.F.R. 251.54(a)) and requires applicants to apply at least 72 hours before the gathering begins (36 C.F.R. 251.54(g)(2)(iv)), Mr. Adams waited until a large group had already descended upon the Boise National Forest to submit his application, -- an application he knew to be facially deficient. On top of all that, the Rainbow Family chose one of the most ecologically sensitive forests in the country.

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[3] See, e.g., United States v. Johnson, 159 F.3d 892 (4th Cir. 1998) (upholding signature requirement); United States v. Kalb, 234 F.3d 827, 832 (3d Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3620 (U.S. Mar. 12, 2001) ("[b]y 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."); 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).

To this day, plaintiff and other Rainbow Family members continue their illegal gathering in the Boise National Forest, an act which poses a risk to the Boise's threatened species and encroaches on the cultural rights of the Shoshone Bannock and Shoshone Paiute Tribes. The only hardship plaintiff can advance is the possibility that he will be cited or arrested for participating in a gathering he knows is illegal. He and other participants in the gathering could avoid this possibility by taking the Forest Service up on its offer to work together to find a more feasible alternative site.

CONCLUSION

Because there is no basis in law or equity for plaintiff's claim, this Court should deny his requested relief.

Respectfully submitted,

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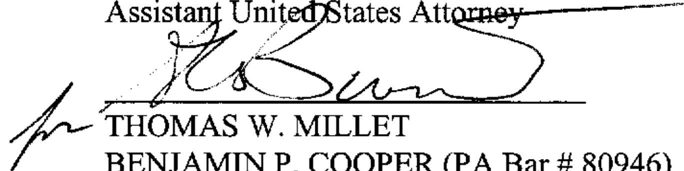

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June 28, 2001

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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 28th day of June, 2001, she mailed a true and correct copies of DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER and DECLARATION OF WALTER B. ROGERS by U.S. Mail, postage prepaid, and by facsimile transmission to the following:

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