

## The Mountaineers • Washington Trails Association

December 3, 2014

Mary Wagner  
Associate Chief, U.S. Forest Service  
Commercial Filming in Wilderness  
Attn: Wilderness & Wild and Scenic Rivers  
201 14<sup>th</sup> St. SW, Mailstop Code: 1124  
Washington, DC 20250-1124

*Via email: reply\_lands@fs.fed.us*

### **Re: Commercial Filming in Wilderness**

Dear Ms. Wagner:

The Mountaineers and Washington Trails Association respectfully submit these comments on proposed section 45.1c of the Forest Service Special Uses Handbook (2709.11), the directive governing the evaluation of proposals for special use permits for commercial filming and still photography on National Forest System lands, include NFS wilderness.

We appreciate the Forest Service's response to the strong public reaction to the agency's September announcement. A primary concern for both of our organizations as nonprofits is how nonprofits' using photography or filming for fundraising purposes will be interpreted as commercial filming. In a number of phone and in-person meetings, the agency's response was that interpretation would go back to intent: if such filming was not undertaken for commercial purposes, then it would not need to be permitted. We are concerned, however, about the gap between this stated intent and the actual language of the rule. We encourage the agency to clarify that they will not regard filmmaking by nonprofit organizations for fundraising purposes as commercial in nature.

Conservation and recreation-related nonprofit organizations sometimes shoot film or video of public lands as part of their programmatic activities. In some instances, this film or video is also used for fundraising purposes, *i.e.*, to raise money to support their programmatic work. There is some lingering uncertainty about whether filming by a nonprofit organization for fundraising purposes would be considered commercial filming under the Forest Service's definition.

On the one hand, section 45.5.(2) of FSH 2709.11 treats any filming "that involves the advertisement of a product or service, the creation of a product for sale, or the use of actors, models, sets, or props" as commercial filming. "For purposes of this definition, creation of a product for sale includes a film, videotape, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects or participants in a sporting or recreation event, and so forth, when created for the purpose of generating income." *Id.* Because fundraising generates income, it appears filming for this purpose would be commercial.

On the other hand, in subsequent communications about the proposed rule during agency-hosted listening sessions and conference calls, agency representatives articulated a slightly different standard. They indicated that the commercial or noncommercial status of a filming activity would turn on whether the filming was undertaken for commercial purposes. It would not turn solely on whether the filming was undertaken for purpose of generating income. Under this formulation, a nonprofit organization's filming for fundraising purposes would not be commercial in nature, and would not require a permit even when it generates income. This characterization suggests an intent to allow a broader range of filming activity without a permit.

We appreciate the agency's willingness to host listening sessions and conference calls about the proposed rule. However, we are concerned about the inconsistency between the intent stated during the listening sessions and conference calls and the language of the proposed rule. We think this inconsistency is significant. Our concerns are heightened when we consider that, in practice; this rule will be implemented by U.S. Forest Service field staff in ranger districts around the country. These individuals may have varying interpretations of the intent of the rule, and they may be completely unaware of the intent that was articulated during the agency's listening sessions. This outcome seems likely in light of the apparent inconsistency in enforcement of the proposed rule during the period in which it has been in place as an interim rule. We have heard anecdotal reports that some forests have not been enforcing the interim rule at all.

For these reasons, we urge the agency to carefully consider the scope of the commercial filming definition and ensure that it accurately reflects the intent of the agency. If the agency's intent is to allow filming that does not have a commercial purpose to occur without requiring a permit even if it generates income, it should revise the language of the definition in accordance with this intent.

We thank the Forest Service for the opportunity to share our views on the proposed directive 45.1c.

Best regards,

Andrea Imler, *Advocacy Director*  
Washington Trails Association, Seattle WA

Martinique Grigg, *Executive Director*  
The Mountaineers, Seattle WA