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Access to national forests| The First Amendment rights of the public and press during controversial activities taking place on these public lands

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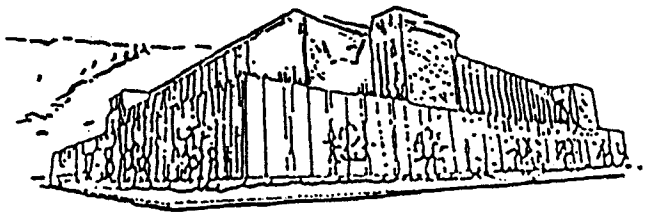

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Access to National Forests

The First Amendment rights of the public and press during controversial activities taking place on these public lands

By

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B.A., University of Georgia, 1983

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Access to National Forests:
The First Amendment Rights of the Public and Press During Controversial Activities Taking Place on These Public Lands (109 pp.)

Committee Chair: Clemens P. Work

As we approach the 21st century, the American public is more commonly questioning and criticizing resource extraction activities taking place on national forest lands throughout the country. Historically, Forest Service managers, contractors and permittees have been able to go about their work in the forests far from the public eye. The gap between people working in the forests and the public seeing what is going on in these forests is disappearing because of lifelike documentation provided by videotape and film. With the combination of readily available still and video cameras, a greater variety of media outlets, and public scrutiny of these activities, fewer operations on national forest lands will go without notice.

This thesis highlights situations that took place in the 1990s in which a reporter, photographer and one videographer were arrested for trying to document controversial activities on national forest lands. In a different incident, another videographer was denied the opportunity to document an activity on these public lands, even though hikers were allowed to access the same area. Rights of access and First Amendment freedoms are examined here, emphasizing the right of the public and press to access and be able to document all controversial activities taking place on this public forum public property.

PREFACE

Work on this thesis was accomplished in blocks of time, with most of the interviews and transcriptions taking place from late 1997 to early 1998. The paper was then shelved until the fall of 1998 when the author began the legal research and collected most of the documents. Writing took place from November 1998 until completion in January 1999.

All referenced documents were either provided to the author by the holder or were public information. The author interpreted these documents with as much accuracy as possible in order to present an unbiased, factual analysis. The interviews that were recorded were done so with permission, and statements from these interviews, as well as unrecorded telephone conversations that were quoted or referenced, were kept in context with the tone of the interview or discussion.

Due to the amount of time required to complete this thesis and the controversial nature of its subject matter, it should be noted that this work was executed when the author was not receiving a paycheck. Also, this thesis was not financially supported by anyone other than the author.

ACKNOWLEDGMENTS

Special thanks goes to Kathy Johnson for being by my side through the exciting, yet intensive research process required to reach the conclusions found in this thesis. She helped me brainstorm and recognize what questions remained unanswered and then critiqued my words on paper. Along with Kathy's support, I thoroughly enjoyed working with my committee chair, Clem Work, who kept me in an objective position whenever I strayed and was always helpful and available when I needed to meet with him. Finally, my deepest gratitude goes to all the people who provided me with answers to complicated questions and let me take up so much of their time for the interviews. Their valuable input along with guidance from my two other committee members, Deni Elliot and Tom Roy, is highly appreciated.

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INTRODUCTION

What rights do the press and public have to access controversial activities and exercise their First Amendment rights on public land administered by the USDA Forest Service? Forest Service and law enforcement response to this matter does not always reflect agency policy, guidelines and constitutional requirements. Because each public land management agency has unique policies, procedures and missions, the question of access will be considered only on national forests in this thesis.

The Forest Service manages 187 million acres in 155 national forests[1] and access to these public lands can be achieved by a number of means and entry points. Although someone can walk in at any point that is topographically possible, roads that enter and spread across national forest lands play a major role in providing access. Approximately "86,000 miles of arterial and collector roads are maintained by the Forest Service for passenger car access," according to the Washington Office of the Forest Service.[2] These roads are not all "public roads" by definition, but "they are typically open to the public for the use and enjoyment of National Forest System lands."[3]

Motorized access to national forest lands can be restricted on these roads. The reasons for the restrictions tend to be posted on gates that prevent motorized access and are listed on Forest maps. These maps denote seasonal and year-round closures to motorized use so that forest users know before going to an area if and what restrictions exist. Motorized restrictions, which are typically behind gates, are for such purposes as to "reduce wildlife disturbance, reduce

soil erosion, provide for non-motorized recreation, protect facilities, control concentrated public use, provide for grizzly bear protection, and protect water quality.[4] Other specific reasons for motorized restrictions also exist.

Non-motorized use throughout national forest lands is usually much less regulated than motorized use. Lolo National Forest Timber Sale Administrator Vic Ronck said in an interview, "I am not aware of any national forest lands closed to foot traffic." Forester John Stark from the same Lolo Forest office said, "Roads are closed just to motor vehicles." Rules sometimes exist to separate conflicting non-motorized use, but access to national forest lands is available everywhere for human foot traffic unless a legal special closure order has been issued.

The Chief of the Forest Service, each Regional Forester and each Forest Supervisor "may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction. An order may close an area to entry or may restrict the use of an area by applying any or all of the prohibitions authorized in this subpart or any portions thereof."[5] These same high level Forest Service officials may also "issue orders which close or restrict the use of any forest development road or trail within the area over which he has jurisdiction."[6]

Notice of the special closure and the reason(s) for it must be posted "in the offices of the Forest Supervisor and District Ranger."[7] Also, the regulations require "displaying each prohibition imposed by an order in such locations and manner as to reasonably bring the prohibition to the attention of the public."[8] Therefore, reasonable notice of a special closure is required.

The Special Closure Order[9] says, "When provided in an order, it is prohibited to go into or be upon any area which is closed for the protection of:

threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish; special biological communities; objects or areas of historical, archaeological, geological, or paleontological interest; scientific experiments or investigations; public health or safety; property." The special closure order must be issued for one of these reasons, and "if First Amendment rights are involved, the order must be narrowly drawn and not impinge upon those rights."[10]

Although a legal special closure order prohibits access to a specified area, given the required information is posted according to the regulations, "an order may exempt any of the following persons from any of the prohibitions contained in the order: persons with a permit specifically authorizing the otherwise prohibited act or omission; owner or lessees of land in the area; residents in the area; any federal, state, or local officer, or member of an organized rescue or fire fighting force in the performance of an official duty; persons engaged in business, trade, or occupation in the area; any other person meeting exemption requirements specified in the order."[11] Anyone not exempt from a closure order who enters the posted closed area or road is subject to trespass laws.

According to 18 United States Code 1863 titled "Trespass on National Forest Lands," "Whoever, without lawful authority or permission, goes upon any national forest land while it is closed to the public pursuant to lawful regulation of the Secretary of Agriculture, shall be fined not more than $500 or imprisoned not more than six months, or both."[12]

This criminal code is followed by "Notes of Decisions" with one Supreme Court case listed (U.S. v. Gemmill).[13]. This case, cited under "Closing Forest Areas," says, "By immediately closing entire area when logging operations were interfered with, forest supervisor went beyond limits of his authority and

exercised power that had not been granted to him, and, the closure order being invalid, trespass convictions could not stand."[14] At the time the parties in *U.S. v. Gemmill* were protesting a logging operation on national forest lands, Forest Service regulations did not allow Forest Supervisors to issue closure orders. Since this 1976 case, Forest Supervisors have been added to the list of authorized managers who can legally issue the order.

When a legal special order has been issued, trespass laws go into effect on national forest lands which are otherwise open to the public and press, at least by foot. The problem for the press and public is that the Forest Service sometimes issues a special closure order when the public and press want to access news events. According to one United States Supreme Court case, "Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the First Amendment in assuring that restrictions on newsgathering be no more arduous than necessary."[15] This ruling does not say people have a First Amendment right to gather news, but it does state the importance of allowing the public and press to watch and document news while it is happening. The U.S. Supreme Court has "not confronted directly the constitutional right of access to news events on public property,"[16] and the press and public do not at this time have a legal right of access to certain national forest lands if a legal special closure order has been issued for that area or road.

Having access to events while they are occurring on national forest lands is critical for people who want to shoot video, take photographs, or observe the events as they are happening. Without access to the events, people cannot fully exercise their First Amendment rights. "Access law is grounded in American political theory. Since government in the United States is based on the will of the public, citizens need to know what government is doing," according to the

authors of *The Law of Public Communication*.[17] Therefore, it is essential that the public and press have access to public property to witness and document activities occurring on national forest lands. Moreover, it is essential that the public and press have equal access to witness and document such activities and that the established press not be unduly favored over citizens.

The U.S. Supreme Court has not directly addressed access to federal lands; however, access to federal documents and meetings has been expanded by Congress in the past 30 years and endorsed by the U.S. Supreme Court. With the Freedom of Information Act (FOIA) adopted by Congress in 1966, the federal government has increased public access to federal documents. This access to documents demonstrates a willingness by Congress to have a more open government. President Lyndon Johnson, who signed the FOIA, said, "a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtain of secrecy around decisions which can be revealed without injury to the public interests."[18] The reasoning behind the FOIA and its exemptions would seemingly apply to the need for openness of government activities on public land. President Johnson said, "no one should be able to pull the curtain of secrecy around decisions."[19] It seems that today he might add the words "or actions" after "decisions" to his statement about the purpose of the FOIA.

"Congress included nine exemptions in the law to balance the public's right to be informed with the government's need to maintain some records in confidence."[20] These are as follows:

> 1. national security exemption; 2. agency management records, such as parking and sick leave regulations; 3. documents Congress has authorized to be confidential in other statutes; 4. trade secrets and confidential commercial and financial information; 5. information used in decision-making process of government as long as a document is not

> publicly revealed to be the basis for a decision; 6. information in personnel, medical, and similar files that 'would constitute a clearly unwarranted invasion of personal privacy'; 7. records compiled for law enforcement purposes which 'constitute an unwarranted invasion of privacy, disclose the identity of a confidential source or information provided by a confidential source, or endanger the safety of law enforcement personnel. The exemption also protects from required disclosure many investigative techniques and procedures used by law enforcement officers and information that would deprive a person of the right to a fair trial'; 8. banking reports; 9. maps of oil and gas wells.[21]

An agency must disclose any record not listed as one of these nine exemptions just as an agency must allow access to national forest lands unless a closure order is legally in effect.

While the First Amendment does not guarantee the right to collect all information about the government, it does protect the right to publish information about public issues. The First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the rights of the people peaceably to assemble, and to petition the Government for a redress of grievances."[22] The First Amendment is the basis for all U.S. Supreme Court decisions associated with access to information and the sharing of that information.

Although the press and public have the same First Amendment freedoms, do they have the same rights of access to federal property? The U.S. Supreme Court said in *Forsham v. Harris*[23] that the FOIA applies only to documents that have been created or obtained by a federal agency, and under the FOIA "any person" may submit a request for a federal record. Since the press and public are not differentiated in *Forsham*, it is critical that the established media not be given greater access to federal records than the public. Everyone ("any person") has the same rights of access to federal records.

The U.S. Supreme Court has stated that the First Amendment guarantees access by the press and public to courts, as found in *Richmond Newspapers v. Virginia* in 1980, *et seq*.[24] "Legislative bodies, many government records, and the public streets have long been open to the public, a justification in *Richmond(Newspapers)* for protecting access to courts . . . Arguably, the First Amendment rights relied upon in *Richmond Newspapers* to guarantee access to trials--the rights to report on government, assemble peaceably, and petition the government--apply to most legislative meetings, public records, and government property."[25] For now, though, the Supreme Court has not held that the First Amendment guarantees a right to gather news outside courtrooms.

Although the U.S. Supreme Court has looked at three cases concerning access to newsworthy information in prisons, the Court has found no First Amendment right of access for the press or public to prisons or prisoners.[26] In *Pell v. Procunier*, Justice Stewart speaking for the Court said, "It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public . . . It is quite another to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."[27] Justice Burger, writing the opinion for the Court in *Houchins v. KQED* in 1978, said the media have no right of access "different from or greater than"[28] that afforded the public in general. He added that the Constitution left the issue of public access to the "political process,"[29] citing *Branzburg v. Hayes*[30] in 1972. Also according to Burger, the reason access to prisons is viewed differently than access to courts is that prisons are not traditionally open to the public. Therefore, the greatest rights of access for the public and press

are to courts because courts have traditionally been open to the public.

In *Branzburg*,[31] the Supreme Court ruled that "the media has no constitutional right of access to places or events from which law enforcement lawfully excludes the general public. The First Amendment does not guarantee the press a constitutional right of special access to on-the-scene events not available to the public generally."[32] Although *Branzburg* was not an access case, the Court did address the question of special privileges for the press. *Branzburg* was three cases considered together in which "the press asked the Court to use the First Amendment to give them special privileges not granted to the public at large."[33] *Branzburg* questioned whether requiring journalists to appear before grand juries violated the First Amendment. "Justice White who wrote the Court opinion, argued the Constitution did not give immunity to journalists and they would, therefore, be held to the same standards regarding testimony as any individual. Not only must the media uphold laws applied to everyone, they also receive no special consideration not granted to all. The media, therefore, receive no special privileges, and they are held to the same standards of accountability as any individual or collective."[34]

In order to fully understand why the Supreme Court in *Branzburg* said the press should "receive no special consideration,"[35] one must look at the First Amendment of the Constitution and how it was applied in *Branzburg*. Justice White added in *Branzburg* that "the administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large

metropolitan publisher who utilizes the latest photo-composition methods. Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals'. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[36] Therefore, no federal law is in place that provides the press with more rights than the public.

At the end of the opinion for the Court, Justice White said, "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the condition and problems with respect to the relations between law enforcement officials and press in their own area. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitution so as to recognize a newsman's privilege, either qualified or absolute."[37] Therefore, state legislatures can create laws giving the media special privileges.

The difficult part with this privilege provision is having to define "newsman," media or journalist without infringing on someone's First Amendment rights. One law giving the media special privileges is the shield law, which 29[38] states have adopted. As an example, Montana's media shield law, known as the Media Confidentiality Act, says that "without his or its consent, no person, including any newspaper, magazine, press association, news agency, news service, radio station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business."[39]

Although the Montana statute attempts to define the media, the definition is open to interpretation and could include individuals not considered to be media even 10 years ago. Today's news dissemination devices such as computers, video cameras and public access television have opened up the door to anyone wanting to provide news to the world. The statute protects those listed in the definition and any other individuals a court decides deserves the privilege of not having to reveal sources in legal situations. The Media Confidentiality Act does not, however, provide any other benefits to those listed or deemed to be the media. For now the statute, which is similar to ones in 28 other states, protects individuals considered to be the media and nobody else.

Oregon's attempt at defining the media in its shield law is even more broad than Montana's. The Oregon State Media Shield Law states that, "No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise: (a) the source of any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or (b) any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public."[40] By including a "person engaged in any medium of communication to the public" as the media, Oregon's statute leaves the definition open to an even wider interpretation.

The individual state shield laws are relevant to this thesis because this state law is often the only one which attempts to define who is the media and

who is not. This attempt to separate the press from the public is notable because as Justice White said in *Branzburg*, "To define those categories of newsmen is a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher."[41] Although the U.S. Supreme Court has not stated whether the press has greater rights of access to public land, the Court has stated the press and public have the same rights of access to courts, federal documents, and prisons.[42] It can be inferred that the media and the public have the same First Amendment freedoms and access rights on national forest lands, at least in 48 states.

Under statutes in California and Ohio, "authorized media representatives may enter areas otherwise closed to the public regardless of any safety concerns."[43] These statutes are currently deemed legal because under our federalist system, states are free to enact constitutional provisions and laws that do not conflict with the U.S. Constitution. Ohio and California are unique in that the media in these two states actually have greater access rights to news events than the public, at least in emergency situations to which the public does not have free access. But, the issue of defining "media" is a "questionable procedure" as Justice White warned in *Branzburg*.[44] The State Attorney General for California said, "The phrase 'duly authorized' (news media) refers to the news station, newspaper, or radio or television station or network having 'duly authorized' the individual to be its representative at the site."[45] He added that, "We reject the argument that the 'duly authorized' news media exception refers to someone authorized to be in the area by the law enforcement officer."[46] In other words, someone representing the media in California has to be sponsored by a "news station, newspaper, radio station, television station, or network" and

must be able to demonstrate this privilege by showing a press pass. This requirement for proof of sponsorship also means that law enforcement officers are not responsible for deciding who is 'duly authorized' to exercise this privilege of unrestricted press access.[47]

Ohio's statute provides special privileges to the media but with less clarity than California's as to who is the media and whether or not law enforcement determines the answer. The criminal code in Ohio states: "Nothing in this section shall be construed to limit access or deny information to any news media representative in the lawful exercise of his duties."[48] Ohio attempts to define media by referring only to the definition under "Newspapers, Magazines, and Periodical Publications" in criminal code section 2739.11. It says, "Any person, firm, partnership, voluntary association, joint-stock association, or corporation, wherever organized or incorporated, engaged in the business of printing or publishing a newspaper, magazine, or other periodical sold or offered for sale in this state, is a newspaper company."[49] The criminal code in Ohio does not attempt to define the radio and television media. As a result, this lack of explicitness leaves the question of who is the news media unanswered, and so far, this issue has not been legally challenged in Ohio.

It seems then that everyone with a press pass in Ohio and California could call themselves the media. Law enforcement is not 'duly authorized'[50] to determine who is the press in California, and Ohio laws are so vague and incomplete that anyone with a press pass could be the media. With or without the clarity of who is the media in these two states, California and Ohio's attempt to provide greater rights of access to the press than the public could backfire. Although injury and interference could occur if everyone has unrestrained access in dangerous emergency situations, the potential for discrimination against the

public who is to have the same rights of access as the press teeters on unfairness in California and Ohio.

In the other 48 states, the key for journalists and freelancers to get the story they are seeking on national forest lands is to first find out if the public has access. If access restrictions are established, the regulations should be applied equally to members of the public and the press. If Special Closure Order 36 CFR 261.53 is issued, the closure must be appropriate. Some people have legally challenged the special closure order when issued in protest situations and some have won their cases. Forest Service official Ed Bodenos said in a 1998 interview that, "There's going to be a justification statement prepared for the reason and purpose of the closure. They just can't, at a whim, close a piece of national forest land that's traditionally been open." Forest Service regulations do prevent forest supervisors from randomly closing areas of national forest lands[51], and the agency does have a commitment to provide the media and public with information about its activities.[52] It would seem then that the agency would favor complete openness, but that attitude is not always implemented.

Forest Service regulations address the topic of "Information Services" in Forest Service Manual 1600 saying,

> It is Forest Service policy to: 1. Make Forest Service information equally available to all news media. 2. Cooperate fully with the news media in responding to requests for information. 3. Provide the news media with factual and timely information on potential or current problems and issues related to management, protection, and use of forests and rangelands. 4. Generate news media interest in and coverage of Forest Service policies and activities. 5. Make Forest Service employees available for media interview, statements, panel discussions, and other news activities. 6. Coordinate contacts with representatives of national news media or motion picture producers with the National Media Offices of Information, Washington Office.[53]

These regulations encourage cooperation between the Forest Service and the

news media and imply receptivity and fairness by the Forest Service of the media's needs.

The Forest Service writes in its regulations that "the term 'news media' applies to all non-Government communications activities in the print and broadcast industries. 'Print media' includes newspapers, news and wire syndicates, newsletters, magazines and journals, book publishers, freelance writers, and association publications and newsletters. 'Broadcast media' includes all radio and television."[54] Because the Forest Service defines the 'news media' broadly in this regulation, it seems that anyone providing information via print, radio or television fits the agency's definition. Regardless of who fits the agency's description of the 'news media,' the public has the same constitutional rights implied and listed in the regulations as the media.

So, what rights do the press and public really have to access controversial activities on public land administered by the USDA Forest Service? In order to provide answers to this question, three separate incidents that took place on national forest lands will be dissected, the purpose being not to dwell on the past as much as to emphasize First Amendment freedoms and rights of access on these lands now and in the future. The first situation involves two Eugene, Oregon journalists who were arrested for criminal trespass on the Willamette National Forest while covering a story in 1996. The second situation involves a non-commercial, advocacy producer who was denied the right to shoot footage in 1997 of a mining exploration operation on the Lewis and Clark National Forest in Montana. The third situation involves an activist videographer who was prevented from shooting footage of bison being slaughtered inside a public facility. The people involved in these situations could have taken the Forest Service or their representative law enforcement to court, but because of the high

cost of litigation, the potential plaintiffs settled out of court or never contested a decision by the Forest Service.

Even though most conflicts over constitutional or access rights never go to any court, applicable U.S. Supreme Court rulings, lower court decisions and Forest Service policy provide the foundation for fair and legal resolutions. Court rulings and opinions about the rights of access for the public and the press on public property, more specifically on national forest lands, will therefore be used in the analysis of these situations. The key to impartiality, keeping the Constitution of the United States in mind, lies in looking toward these precedent-setting rulings, as well as the original intent of Forest Service policy.

Law and policy must be adhered to when determining the rights of access for the public and press if friction is to be kept to a minimum. Society holds Forest Service and law enforcement officials to a high standard of behavior; therefore, they must strive to follow the rules even if decisions conflict with their personal biases. By examining laws, policies and biases, the rights of access on national forest lands for the public and the press, as well as constitutional freedoms, will be made more clear.

SITUATION 1

When they left their office on August 11, 1996, reporter Jeff Wright and photographer Anthony LaPenna from the Eugene, Oregon newspaper *The Register-Guard* drove toward the Warner Creek salvage timber sale protest site to cover the story. Managing editor Jim Godbold said in a November 1997 interview that Forest Service "public information people and people who were familiar with the protesters" called the newspaper that morning to say, "The law enforcement people are here. They're going to try to remove the protesters." The Forest Service had allowed protesters to block access to the sale area outside of Eugene for 11 months until this day when the agency suddenly issued a special closure order. Warner Creek was already the "longest blockade of a forest road in history"[55] when the Forest Service decided it was time to end the blockade. The situation at Warner Creek had attracted national media attention from the *New York Times* and *60 Minutes* during these 11 months of protest because of the "conjunction of arson, old trees, salvage logging and civil disobedience."[56]

Environmentalists were protesting hundreds of timber sales under President Clinton's salvage logging rider throughout the Northwest in 1996. Signed a year earlier by Clinton, "the rider released thousands of timber sales on public lands from endless appeals and lawsuits."[57] Public outrage about the rider was so extensive that Agriculture Secretary Dan Glickman issued an order in July 1996 forcing the Forest Service to "immediately back off on more than 150

sales and send them through regular channels, where citizens could challenge them on their merits."[58] Jack Ward Thomas, Chief of the Forest Service at the time, said in a personal two-hour interview in 1998 that, "Protest would hit, phone call to the White House, some phone call would come down to us, and say 'back off.' Then, days later, 'buy it back.'" Warner Creek would be one of the 157 sales the Forest Service canceled,[59] at least for the time being. Protesters did not know this was the case when law enforcement officers moved in to arrest them.

"The agency's attitude toward the protesters changed abruptly after the Clinton Administration announced that logging would be at least delayed at Warner Creek."[60] Lacey Phillabaum, an activist who was at the protest site the day of the arrests, said in a 1998 interview that, "there were rumors that the sale was going to be bought back. The activists refused to unlock themselves because the Forest Service wouldn't show them the signed piece of paper preserving the area." During Thomas' interview, he talked about the arrests at Warner Creek, saying, "The way you do it is that you seal it off to the people that are already there. It keeps people from pouring in." Godbold of *The Register-Guard* said in his November 1997 interview that, "We had been monitoring it [the protest] for some time, knowing that at some point, they were probably going to try to go in and remove the protesters. When we heard that was happening, our reporter and our photographer just immediately got in their car and drove into the forest to cover that. They understood when they left that the [Warner Creek] road itself was closed" so the reporter and photographer drove up an adjacent, open Forest Service road. They parked and hiked in several miles "with four environmentalists also working their way to the protest site,"[61] called "Fort Warner." When they arrived "30 yards from the Warner

Creek protest site"[62] on national forest land where five protesters were in the process of being arrested, USDA law enforcement officers spotted the journalists "in the bushes."[63] The officers told the journalists to leave, but they did not so they were arrested and charged with criminal trespass.[64] Godbold said, "There were no barricades, there were no signs. There was nothing that would have told anyone, 'This is a closed area and you're now inside it.' However, the closure order specified that not only the road, but a quarter mile either side of the road was also closed. So, really, the length of the road, about 10 miles plus a half-mile strip that was encompassed in that 10 miles was also closed, and we didn't know that." Because the journalists were inside the closed half-mile strip and refused to leave, they were taken to jail for several hours and their notes and film were confiscated.[65] The *Register-Guard* sued the Forest Service, but Godbold said the case was settled out of court because of the high cost of litigation.

Is it legal to create a perimeter so great that the viewing of these events by the public and the press becomes impossible? At Warner Creek, Forest Supervisor Darrel Kenops issued special closure order 36 CFR 261.53 "for the protection of public safety and property"[66] 10 miles from "Fort Warner" plus a half-mile strip along the road. Viewing and photographing the arrests at "Fort Warner" from even half a mile away would have been impossible.

This day in August was no different than any other in the previous 11 months, except the Forest Service had decided it was time to end the blockade. Chris Holmes, Assistant Director of the Office of Communications for the Forest Service, said in a 1998 interview that, "The area was closed to all unauthorized personnel. Period. That was the decision of the Forest Service to allow the Forest Service law enforcement agents to do their job without interference from

spectators and/or the media. As soon as the area was secure, and the people were all safe, access would be allowed." He compared this to, "You say, 'I want to watch this.' The cops in downtown Missoula will tell you to get back. They're going to establish their reasonable perimeter. You won't be banished from the city of Missoula obviously. They'll set up some reasonable buffer to protect your safety, as well as to give the law enforcement officers the opportunity to conduct their business." Then, why was the Warner Creek road and a quarter-mile strip on each side of it closed 10 miles from the protest site? Unless the activity constitutes a true emergency or disaster, why would any perimeter be established? And, is 10 miles or even a quarter of a mile from the area a reasonable perimeter?

As of April 1999 no one has challenged the constitutionality of Closure Order Number 208 in court.[67] The constitutionality of other closure orders issued during protests has been challenged, however, by other people in similar situations. Within the same week as the Warner Creek closure, Forest Supervisor Darrel Kenops of the Willamette National Forest also issued Closure Order Number 202. This closure order was challenged in state court. "The area closed was many times the size of the area being logged and kept the public at least two miles by road from the logging area."[68] In this February 1997 case, James Hartnett defended himself against the State of Oregon, making a motion to dismiss for "lack of jurisdiction" because he had been charged by county law enforcement officers with criminal trespass on federal lands. District Court Judge Joseph Ochoa ruled that the District Court of the State of Oregon for the County of Marion "finds that the State has limited criminal jurisdiction over certain acts committed on national forest lands." He added that "the Court is not certain that the cooperative agreement, 'State's Memorandum of Law regarding

State Jurisdiction Over Forest Service Lands' . . . empowers the State to enforce a federal closure order in state court. However, this action is brought in state court under state law."[69]

Ochoa stated at the end of his decision that "it troubles the Court in its legal research of this issue, the only case in an Oregon state court involving the charge of Criminal Trespass on USFS lands is one where the issue of jurisdiction and constitutionality of the closure order was apparently never raised. *State v. Tauth*, 80 Or App 393- 1986. All other cases found by the Court in its research on these issues were cases adjudicated in federal court on federal charges of impeding traffic on a USFS road, or violating a USFS closure order."[70] Ochoa was obviously disappointed that the constitutionality of the Forest Service special closure order had not been challenged in an Oregon state or federal court. (Note: On May 1, 1996 a U.S. District Court in Washington ruled a Forest Service special closure order was unconstitutional.)[71]

In a separate motion the same day in February 1997 involving the State and Hartnett, Judge Ochoa issued an order allowing defendant's "motion to dismiss on grounds of unconstitutionality of Closure Order Number 202."[72] In the Court's "Findings of Fact," Closure Order No. 202 was issued

> 'for the reasons of safe access by permittee which included those involved in the logging operation, and firefighters, and any other persons with a permit specifically authorizing entry upon those lands affected by the order (giving examples of outfitters and guides). The area covered by the order was much larger than the three units involved in the timber sale itself, and included closure of access roads and surrounding lands to those access roads. The land affected by the closure in which the defendants were cited for trespass was between a mile and one-half to two miles of the timber sales . . . The order was issued in large part to prevent interference with the contractual obligations between the USFS and the private contractor involved in the logging operation on the Horse Byars timber sale. Another reason for issuing the order was to explicitly control those persons who wish to protest that timber sale. There is no evidence before the court that the protest was other than a peaceful protest.

Kenops testified that areas were available for peaceful protest, but defendants did not request a permit to exercise their rights of free speech in those areas. The areas set aside were not specifically identified, nor was the process of seeking a permit outlined by the testimony of Mr. Kenops.[173]

The Court's "Conclusions of Law" were:

'If defendants had come to this court, before any criminal charges had been lodged against them, to challenge the lawfulness and constitutionality of Order No 202, the state would not have jurisdiction to hear the case. The proper forum for such a challenge would be in the United States District Court of Oregon. However, the defendants are before this court charged with Criminal Trespass in the Second Degree, as a violation. The state must prove every element of this charge.' *State v. Dameron*, 316 Or 448 (1993). In this case, the state must prove that defendants remained unlawfully upon the premises open to the public. Once the lawfulness of the order is challenged on any ground by the defendants, it is the plaintiff's burden to prove that the order was lawful.

There is no question that national forest service lands are premises open to the public. To 'remain unlawfully' means to fail to leave premises that are open to the public after being lawfully directed to do so by the person in charge. *Id.* at 457; ORS 164.205(3)(b).

Defendants claim Closure Order No. 202 was an unconstitutionally overbroad prior restraint of defendants' rights of free speech under the First Amendment, and should be found invalid. In order for a closure order to be valid, as to free speech rights it must be valid as to regulating First Amendment free speech rights, and it must constitute a valid time, place, and manner of expression regulation. Curtailment of First Amendment rights also must be made in the least restrictive manner.

The restriction on defendant's ability to access a public forum, i.e., National Forest lands, is 'prior restraint' on the exercise of First Amendment rights. Here, access to the forum was regulated by a permit system, if the permit scheme controlling the time, place and manner of speech is content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. There was no testimony whatsoever as to what the permit scheme involved, and how any of these factors were addressed by the permit scheme.

Furthermore, the primary focus of the closure order was apparently to prevent interference with contractual relations between the USFS and the company involved in the timber sale. This does not appear to be one of the reasons stated by the authority of the forest supervisor to issue a closure order.

> The area established by the closure order apparently permitting an alternative demonstration site over two miles from the logging sites, appears to the court to be unduly overbroad.
>
> For all above reasons, the court finds that Closure Order No. 202 was unconstitutional, and therefore, defendants did not remain upon Forest Service lands unlawfully.
>
> The Motion to Dismiss on Grounds of Unconstitutionality of the closure order is therefore allowed.
>
> The charges of Criminal Trespass in the Second Degree shall be dismissed based on the holdings of this court in this order.
>
> It is so ordered.'
>
> (Feb. 26, 1997 by District Court Judge Joseph V. Ochoa)[74]

In Washington, another special closure was issued by the Olympic Forest Supervisor in 1996 during a controversial salvage timber sale. The closure was extended approximately six miles[75] to the boundary of the Olympic National Forest so that protesters who had locked themselves down to concrete reinforced with rebar would be inside the closure area.[76] Once it was issued, Forest Service law enforcement officers "stripped" self-restrained protesters of "boots, winter clothing, shelter, food and warmth" so "activists unlocked and were handcuffed and cited for violation of a closure order."[77] This closure order was also challenged in court and on May 1, 1996, Judge Kelley Arnold of the U.S. District Court in Tacoma found in *U.S. v. Benjamin White* that the special closure order "violates the First Amendment to the U.S. Constitution in that it is unconstitutionally overbroad, covered an excessive area, and burdened more speech than is necessary to serve government interest."[78]

In *White*, Judge Arnold cited *Madsen v. Women's Health Center, Inc.*[79] in which the U.S. Supreme Court held that the state (of Florida) could not restrict demonstrators to a distance of over 300 feet from a clinic where abortions were

performed. The Court in *Madsen* also ruled that even restricting demonstrators to a distance of more than 36 feet from the clinic was not fully justifiable. The test developed by the *Madsen* court is ". . . when evaluating a content-neutral injunction, we think that our standard time, place and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provision of the injunctions burden no more speech than necessary to serve a significant government interest." *Madsen*, 114 S.Ct. 2516, 2525- 1994.[80]

As stressed here by Judge Arnold, it is not only important to be allowed to exercise one's First Amendment freedoms, but to also be allowed reasonable access to the activity. When the Forest Service issues a special closure order, a boundary of varied magnitude is established. The actual distance people are kept from one of these designated areas varies greatly depending on the situation. Most people are prevented from legally entering the closed area, but exemptions are in place which allow some people to lawfully access the restricted area. One such exemption is given to those with a permit specifically authorizing the otherwise prohibited act or omission."[81] This exemption is vague and allows for arbitrary decisions by Forest Service officials as to who qualifies for a permit.

In 1996, 12 Earth First! activists in Idaho were convicted for violating a forest closure when they attempted to access a timber sale in the Cove-Mallard area.[82] They had applied for and were denied a permit that would have allowed them access. In this special closure order case, at least 10 miles of road had been closed from the sale area.[83] U.S. District Judge Edward Lodge overturned these convictions "on the grounds the Forest Service did not cite any specific standards that justified denying the activists a permit allowing entry into the timber sale area."[84] This article about Lodge's ruling in the *Lewiston Morning Tribune* headlined, "Forest Officials Aren't Ruling Out More Closings; Court

Action in Favor of Earth First! Will Mean Adjustments in Future Closures" quoted Forest Service official Ihor Mereszcak of the Nez Perce National Forest who said, "We didn't institute that closure until we had experiences of some interference. Usually something happens and then we have to react. We don't do it just as a matter of practice."[85]

In another article in the *Cascadia Times*, reporter Natalie Shapiro wrote that "permits were arbitrarily denied based on the viewpoint and affiliation of the applicant. Closing contentious logging areas to the public has been a common practice by the Forest Service. Every year, activists have been shut out of logging areas by a federal closure order once they begin protesting. The Forest Service says that closures protect public safety; activists say closures keep out witnesses."[86]

According to Jonathan Proctor, a graduate student at the University of Montana who wrote a paper on the special closure order in 1995, "The closure orders for the Nez Perce list several exemptions from the closure restrictions, including: persons with a permit; people on official duty; loggers and drivers while working; hunters, and private landowners and guests in the area. This proves that the issue is not so much public safety as it is an attempt to keep a specific group out."[87] Proctor said the purpose identified for the Cove-Mallard area closure was "public safety" (261.53e) and "to prevent interference with Government contractors in the performance of authorized activities." This purpose is not listed in the special closure order.

Office of General Council (OGC) attorney Alan Campbell said in a February 1998 interview, "If it's a situation where there is active logging, I think with the emotions involved, both on the industry side and on the environmentalists' side, that there's a reasonable possibility that a closure would

fit within one of those two" [purposes for a closure order: protection of public health and safety].[88] In response to the judge's ruling about who was and was not permitted inside the closure at Cove-Mallard, Jack Ward Thomas, Chief of the Forest Service at the time, said in a personal interview, "I think the judge was dead wrong. The other people who were in there had no intention of violating somebody else's rights. But, I'm not the judge. The judge is the judge. The people who the closure was for were people who were dead intent on violating somebody else's rights."

The reality of the situation is that the Forest Service cannot determine if every single activist or spectator is going to violate somebody else's rights before a violation occurs. The Supreme Court ruled in 1980 that "mere speculation of harm does not constitute a compelling state interest."[89] When talking about protesters in general, Thomas said in the interview that, "They've got a perfect right to protest. If they're in violation of the law, they've got a perfect right to get arrested. If they're out there picketing, or doing any of those things that are considered to be acceptable protest--they're not violent, they're not getting in the way of anybody else's right, of course, they have every right to do that."

Closures established during environmental protests tend to be at least one mile from the timber sale area or in the Warner Creek situation, 10 miles from the self-restrained activists. This distance prevents interested members of the public and the media from witnessing the activity. Environmental activist Jake Kreilick of Missoula said in a personal interview in 1988 that, "They [government officials] don't want to let people see what's going on back there."

Proctor, the University of Montana graduate student, also wrote in his paper for the Ecology Center in Missoula that "the Forest Service routinely uses

the special closure regulation to prevent environmental activists from protesting at the site of timber sales, as well as to keep the media from calling attention to such activities."[90] When the Forest Service issues a special closure order to keep people out of an area that has been traditionally open to the public, the Forest Service needs to be prepared to explain exactly why access for the public and press is forbidden. If there is a sudden closure for the protection of public safety, why not apply the closure adjacent to the activity or scene so people can see what is happening? OGC attorney Campbell, who represents the Forest Service, said in his interview that, "There's really nothing to hide. There's no reason to keep the media from covering these things as stories, consistent with the legitimate concerns of health and safety and property. That doesn't mean that you have to be ten miles back where you can't see anything, and say, 'cover your story from here'."

The protesters at Warner Creek had been non-violent for 11 months[91] so issuing a closure order 10 miles from the protest site for the "protection of public safety" is a questionable concern. In fact, logging was not even taking place at Warner Creek during the 11-month blockade so there was no immediate conflict between loggers and protesters.[92] Also, no threats were ever documented in the 11 months of protest.[93]

Howard "Twilly" Cannon, who helped create the Ruckus Society, an organization which provides "safe, non-violent and effective civil rights-style training" to people throughout the country said in a personal interview that, "What we've been trying to do in Ruckus is to bring non-violence back into protest. We've put at least 450 people through these non-violent training programs [which can last up to a week]. It's very traditional, American-style stuff. Martin Luther King would feel pretty at home in our camp." In Jack

Ward Thomas' interview, he commented on the behavior of protesters in general, saying, "They're not violent, but they're sitting there, locking ups going on, absorbing thousands of dollars of personnel time, both for the private sector and for the Sheriff's department, and this, that, and the other. They're not just benignly sitting there. It's got consequences to it. Big consequences."

Although environmental protesters typically use non-violent tactics to draw attention to timber sales they oppose, recent history demonstrates that law enforcement officers often resort to the use of pepper spray and other pain compliance techniques to end protests.[94] Pepper spray was not used at Warner Creek, but it has been used in many other protest situations in the 1990s. Mark Harris, an attorney for spray victims in Oregon, said to Alan Pittman of the *Eugene Weekly*[95] that, "We're talking about the use of chemical pain to punish someone for political thought." Pittman said that another attorney, Lynne Wilson, who has written legal articles on the chemical, believes "the use of pepper spray is chilling the constitutional rights of citizens to protest. The message that police are sending with the burning spray is, 'You better think twice before you come out and speak out against the government, because you're going to be punished before you're even convicted'."[96] Jack Ward Thomas said in his interview that, "You do not have First Amendment rights to break the law under any circumstances, without paying the consequences." This use of force against people who are often causing civil disobedience by locking themselves to a permanent object, like a gate, is prevalent, as shown in the mass media. Courts throughout the United States are responding differently to police use of pepper spray against non-violent protesters.

The use of force by police against non-violent protesters who have chained or locked themselves to an immovable object is controversial. Alice

Tallmadge wrote in the *Eugene Weekly* that, "Despite the trauma endured by four protesters, (at an anti-logging protest in Eureka, California) veteran Earth First! organizer Darryl Cherney says a different pepper spray incident in (Congressman) Rigg's office--and the resulting media coverage--has turned into a 'bonanza' for the contested trees. He says, 'You couldn't buy this kind of exposure.' Making the public aware of the effect of logging on the environment has always been the group's biggest challenge, he says. And this incident has made public education a lot easier."[97] Tallmadge also wrote in her article that "reactions to a videotape showing law enforcement officers dabbing pepper spray onto the eyes of non-resisting activists during an anti-logging protest in Eureka continue to pour in from across the country and around the globe. Outrage has been broadcast from Canada, Mexico, France and England. The Eureka Police Department and Humboldt County Sheriff's Department have been deluged with calls from irate citizens. Amnesty International and newspaper editorial writers across the West have blasted the action. The usually temperate *New York Times*, writing of the clearly audible 'screams of agony' on the video soundtrack, suggest the pepper spray assault 'had clear elements of physical torture'."[98] Jack Ward Thomas said in an interview while discussing the topic of how law enforcement officers should deal with protesters that "capitulation only assures that you will see it again, and again, and again, until there is no control." He added that, "You say, 'Look, if you don't turn yourself loose, I'm gonna dab pepper spray in your eye.' Pepper spray's a lot better than a whap in the face." Thomas stressed that law enforcement officers need to maintain control in protest situations.

These scenes of police using pain compliance techniques to end protests would not be so widely exposed if video cameras were not so readily available.

Personal video camcorders, as demonstrated here, can clearly record scenes and associated sounds at protest sites. Environmental activist Storm Waters said in an interview that, "Video documentation provides an invaluable archival tool in bringing to light the truth revolving around the issues and the people involved with those issues from all perspectives." He added that "video documentation of public direct actions helps to ensure safety and integrity of all those present at each event."[99] Tim Lewis, an independent videographer for "CopWatch" in Eugene, chronicles police-protester confrontations. He said to a reporter at the *Register-Guard* in 1997 that, "One of the best things CopWatch has done is to force the officer to think that they aren't just out there doing their own thing. They better be aware that they're being watched and that they should be responsible in how they conduct themselves."[100] Lewis and other CopWatch volunteers broadcast their videotapes of police arrests on public access television. Citizens like Waters and Lewis also supply the traditional media with images of newsworthy events.

Keeping the press and public away from tense situations on national forest lands by issuing a closure order "to protect public safety"[101] combined with the use of force by officials against non-violent protesters, is a bewildering image. Typically, someone has a video camera in these situations and documents the interactions taking place even if a closure order is in effect. Jack Ward Thomas said in his interview that, "They're destroying property and they're doing all this other stuff. They just want attention and I'm not gonna give it to them." Thomas said later in the interview that, "There's the cameraman, there's the protesters. They're getting arrested, as a set-up, potentially, for the cameraman to take pictures. This is a symbiotic relationship. 'I do wild and crazy things. And I violate the law, so you can come out and cover it, which is what I want,

and you get a story.' What about the poor cops? The newspapers are groovin' on it, the protesters are groovin' on it." Thomas added that, "I talked to an organizer who said, 'Our biggest thing is when something like that happens. That's the moment you wait for, when somebody gets hit with a club, or pepper spray.' I remember at Cove-Mallard where guys were wired on drugs. They kept jerking the local cops around. And they got pinned down, and this guy--a cop--had finally had enough of him, and he went into the standard police hold that they use on people when nobody's looking. And, this was on full camera. And the fellow over there said, 'Boy, that was worth the wait!' That's the gamble you take, when you do that sort of stuff."

The relationship between protesters and camera people can be mutually beneficial, but is it right to keep photographers, videographers and spectators from accessing these places on national forest lands and documenting the events? Attorney Bruce Barrett of Missoula said in a personal interview, "It's our land, our property. Public streets, public properties and public lands are public--that's why they call it public. So, there has to be a reasonable basis for the restriction [special closure order]. It may be reasonable to say, 'We have to have a safe area around the equipment and we have to make sure that there isn't danger to the public, both from the activities that are going on and from the potential explosiveness of demonstrations.' You can simply go there anyway, risk the arrest, and then defend yourself, based on First Amendment rights and the general right of public access." The public has disregarded the special closure order on national forests in many protest situations and have been arrested. Some people have won their defense and some have not. Barrett also said, "If they give you a thousand dollar fine and six months in jail, this is no minor thing; this is no slap on the wrist. And that's a real risk."

In the 1995 "National Media Guide for Emergency and Disaster Incidents" published by the National Press Photographers Association, the Reporter's Committee for Freedom of the Press referred to the Court's opinion in *Richmond Newspapers*. The Supreme Court has recognized that the press has an affirmative "right of access or right to gather information for we (the Court) have recognized that without some protection for seeking out the news, freedom of the press could be eviscerated."[102] The media guide also quotes the Court in another case, writing that, "Peace officers may only impose reasonable time, place, and manner restrictions on press access to public scenes; but may not bar such access altogether."[103] These restrictions "directly limit oral or written expression,"[104] but are "constitutional if they are aimed at furthering non-speech interests such as health, safety, and a pleasing environment. To be constitutional, these time, place, and manner restrictions must also be narrowly tailored and leave ample alternative channels for communication of information."[105] Forest Service regulations say, "It is well established that the government may enforce reasonable time, place, and manner restrictions on First Amendment activities."[106] (Note: Newsgathering does not necessarily fall under First Amendment protections.) These time, place, and manner restrictions are unconstitutional if they are "designed to suppress expression";[107] therefore, the Forest Service can apply these regulations as long as the purpose is not to overpower the constitutional rights of the public and press.

The way the Forest Service typically attempts to apply the time, place, and manner restrictions is to require non-commercial groups of 75 people or more to apply for a special-use permit.[108] "Permits have been recognized as constitutional restrictions of time, place, and manner when specific and objective

standards guide the licensing authority."[109] The Forest Service response to this issue is, "The final rule establishes a permit system with specific and objective standards that further the significant governmental interests of resource protection, allocation of space in the face of greater restrictions on the use of public land, and promotion of public health and safety."[110]

A permit system may work for an orderly, planned gathering but loose-knit gatherings and protest situations tend to draw an unknown number of people acting as individuals. These individuals do not necessarily call themselves a group as everyone has his or her own purposes for gathering. As stated in the 1995 Forest Service Federal Register, "The rule is not intended to apply to 75 or more individuals who do not arrive as part of a particular group or in connection with an organized activity . . . ."[111] It goes on to say that it also "is not reasonable for groups to predict how many unrelated and uninvited outsiders may be attracted to an activity."[112] Nobody can predict how many people will appear at a protest site nor can anyone anticipate the purposes of each individual. People at protest sites include legal protesters, protesters whose aim is to hinder authorized operations, spectators, self-proclaimed media representatives and corporate journalists. It is unnecessary to apply for a non-commercial group use permit when one is acting as an individual rather than representing a group. Therefore, applying time, place, and manner restrictions by requiring a non-commercial permit is inappropriate in protest situations because one person is not responsible for anyone besides him or herself.

The public and press interested in protest situations on national forest lands, be it to express themselves, gather news or simply observe, do not want their access to areas severed. According to the National Media Guide, "The first hurdle to overcome is access to the scene of the event."[113]

Does the media have rights of access to all areas of national forest lands, at least by foot? Attorney Barrett said in his interview that, "We know that people must have a right to go there because if they didn't have a right to go there, you wouldn't need a closure. To keep the people out, the Forest Service issues special closure orders, which have become very controversial over the years, because in a sense, it's stopping the public from going on public lands." Chris Holmes of the Forest Service talked about future protests in an interview, saying if a special closure order is established, "the media will be provided access to photo points or observation areas. Our objective is to make sure that our people can do their job, in protecting resources, public safety, etc. and enforce the law, but also to help members of the media get a story and do their job too." He added that, "If it's not dangerous, you can go anywhere you want to essentially." Therefore, if a closure order has not been issued in an area of national forest lands, the press has access.

Does the media have any greater rights of access than the public to public property? The U.S. Supreme Court has thus far ruled in every access case that the press has no greater rights of access than the public.[114] Also, "several courts have recognized a common law right for everyone to observe, photograph, and record what can easily be seen or overheard in a public place."[115] Therefore, everyone would seemingly have a right of access to controversial areas of national forest lands to observe or record what can easily be seen or heard as long as safety is not a real concern. Everyone should be able to get close enough to the specific event or area on this public property to exercise any and all of their First Amendment rights.

Public places that have long been open to the public and the press include

public streets, sidewalks, parks, public records and government property.[116] National forest lands fit this category of public places that have traditionally been public forums because these lands have long been open to the public and the press, like sidewalks and parks. In *United States v. Rainbow Family*, the United States District Court in Texas ruled that "Forest Service lands are the type of forum in which expressive activity has historically occurred, and in which public expression must be tolerated to a maximal extent."[117] If this is the case, then clearly Forest Service lands are also the type of forum in which freedom of the press must be tolerated and access be available to a maximal extent.

"The fact that property is owned by the government does not necessarily make it a public forum. Federal courthouses, jails, government offices and city halls are not usually open for general public use. This type of property is often referred to as non-public forum public property."[118] Courts have typically rejected the media's attempts to gain access to these publicly-owned structures when authorities can demonstrate that media access would interfere with the normal operations of the facility. In the Warner Creek situation, the subject property is generally open to the public and press and the media was not interfering with the normal operations of the national forest. The reporter and photographer were on an assignment to get a story about the protest situation, not interfere with the arrests or any other national forest activity. Based on the definition of non-public forum public property, the greatest rights of access and First Amendment freedoms exist on public forum public property.

The public and media's right of access to quasi-public facilities, such as army bases and nuclear power plants, is even less assured than their right of access to public property. In *Stahl v. State*,[119] journalists crossed a fence with protesters into a nuclear generator site owned by an Oklahoma corporation even

though there were posted warnings that trespassers would be arrested. All the trespassers were arrested, including the journalists. Although the facility was dedicated to a public use and regulated and financed by a public agency, the Court of Criminal Appeals of Oklahoma ruled "the subject property was not a public forum and newspersons had no constitutional guarantee of access thereto."[120] Also, the First Amendment does not "shield newspapers from state criminal prosecution in their news gathering function," according to the Court of Criminal Appeals.[121] It added that the "First Amendment does not guarantee the press a constitutional right of special access not available to the public generally."[122] According to *The Law of Public Communication*, nuclear power plants and army bases belong to the public, but unlike public parks, they are not open for regular public use.[123] The protest situation in *Stahl* was very different from the one at Warner Creek because the protest site in *Stahl* was quasi-public property not regularly available to the public and the protest site at Warner Creek was public property that has long been open to the public and the press.

In another case where a news photographer and other journalists ran through a police roadblock to reach a plane crash site,[124] the Wisconsin Supreme Court found in *Oak Tree v. Ah King* that "the refusal to obey a police command does not normally constitute disorderly conduct."[125] But, the Court said in 1989, Ah King's "continued penetration into a nonpublic restricted area"[126] where the general public has been excluded must be regarded as disorderly conduct. The difference between this case and Warner Creek is that the plane crash was an obvious emergency and the arrests at Warner Creek were clearly not an emergency since protesters had been there for 11 months. Also, the area of the plane crash was generally not open to the public and the area at Warner Creek is regularly open to the public. One similarity between this case and Warner Creek

is that a restricted area was in effect, making it illegal for the public and press to be inside the area. Both the plane crash site in *Ah King* and the protest site at Warner Creek were closed for the "protection of public safety"; however, newspaper editor Godbold said in an interview that the purpose of the closure at Warner Creek was "solely to prevent news media access." He added that "we never got to argue that" since the *Register-Guard* and the Forest Service settled out of court.

The journalists at Warner Creek were arrested for violating the closure order, yet many other people who were inside the closure were not arrested. "(Reporter) Wright said he noticed several people on higher ground looking down on the protest site,"[127] but it is unclear if law enforcement agents knew more people were hiding in the forest. In this situation, the press was punished while others avoided arrest. Obviously, Forest Service representatives at the site did not want photographs being taken because they confiscated (photographer) LaPenna's camera as he took pictures while being arrested. The decision to focus on arresting those who could easily publish photographs and a story, and not pursuing other potential trespassers demonstrates the agents' desire to keep their actions out of the public eye via newspapers.

By seizing LaPenna's camera and Wright's notes, law enforcement officers were also possibly violating the Fourth Amendment of the U.S. Constitution. The Fourth Amendment says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Attorney Bruce Smith represented the *Register-Guard* in a 1996 case against the

USDA Forest Service, and went as far as writing his argument, but the case never went to court. In his argument,[128] he cited several U.S. Supreme Court cases that addressed the Fourth Amendment. Quoting *Maryland v. Macon*, the First Amendment "imposes special constraints on searches for and seizures of presumptively protected material, and requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances."[129] This court also said, "The risk of prior restraint . . . is the underlying basis for the special Fourth Amendment protections accorded searches for and seizures of First Amendment materials . . . ."[130]

Seizure of material from news gatherers is almost always a violation of the Fourth Amendment right and could even be considered a breach of the Federal Privacy Protection Act. This Act states that, "It shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product or materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, . . ."[131] An exception in the Act which allows the media's materials to be searched and seized applies when the government has "probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate . . ."[132] Attorney Smith wrote in his argument that the newsgathering material seized from Wright and LaPenna was not related to the alleged crime of trespass. Also according to this argument, James Keefer, the Supervisory Law Enforcement Officer of the USFS, said that nobody looked at the prints after developing them which is "in effect an admission they were not related to the crime."[133] By searching and seizing Wright's notes and LaPenna's film and

then admitting these materials were not related to the alleged crime of trespass, it is apparent that law enforcement officers seized them as a prior restraint to the journalists' First Amendment freedoms.

In this situation, it seems First Amendment freedoms were not taken into consideration when the journalists' materials were seized. It also seems likely that these freedoms were not taken into account when the Forest Supervisor issued the closure order in the first place. The press and public should be able to see their government at work without having to fear their civil rights will be violated. Short of not issuing it at all, it seems the closure could have benefited everyone best by having it abut "Fort Warner" since the situation was not an emergency.

Although the media representatives were targeted by law enforcement officers, Forest Service policy requires the agency to accommodate the media.[134] How does the Forest Service define media and why does the agency make a distinction between the media and the public? Forest Service regulations say that "the term 'news media' applies to all non-Government communications activities in the print and broadcast industries. 'Print media' includes newspapers, news and wire syndicates, newsletters, magazines and journals, book publishers, freelance writers, and association publications and newsletters. 'Broadcast media' includes all radio and television."[135]

Chris Holmes from the Washington, DC office of the Forest Service said in an interview that, "Journalists are card-carrying members--members of the news media. The key word is news. An independent producer just won't be treated the same as members of the accredited media. If you're just doing it for local access, claiming to be a member of the press, it doesn't work. The guidelines [Media Guidelines for Law Enforcement Situations on National Forest

Lands to be out in late 1999] provide more liberal access for members of the press than for the general public, and the way we determine that is by the credentialing process." Holmes added that, "If you're a freelancer, you probably will not be given the same access as somebody from CNN or the *Missoulian*" if there is a closure order in effect. Because of U.S. Supreme Court rulings and the fact that national forest lands are a public forum, Holmes' determination of who should be given special privileges in terms of access to controversial activities on these lands is unfair.

Forest Service attorney Alan Campbell said in his interview that, "I don't know what a formal definition of a journalist is. Do you have to be getting paid by somebody else, or are you simply trying to disseminate information? I don't know." In contrast to Holmes' response, at least Campbell recognizes a dilemma.

Andrew Daunif from Eugene, Oregon, who is involved in environmental activism but would not label himself other than saying, "I'm just a human being," asked, "What makes someone qualified, as a journalist, when it comes to reporting news? For instance, why shouldn't I be considered able to record the information that's happening and put it out to the public?" Attorney and video producer Barrett said in an interview that, "It's a little dangerous to limit the definition of the press to somebody getting a paycheck from a newspaper." He added that "the guy who shot Rodney King and then proceeded to provide the tape to the newspapers" is a good example of a citizen who has provided the media with rare footage. Barrett went on to say, "Should he be called the press? I don't know; it sure sounds and looks like press and acts like press and he got paid like press, so maybe it's press." Whether this man who happened to have a camera and captured footage of police officers assaulting another man in Los

Angeles, California could be called press is worthy of speculation.

University of Georgia broadcasting professor David Hazinski said in a 1998 lecture at Emory Law School and again in the *Atlanta Journal* that "in the case of journalists, they insist that no one should regulate them, including themselves . . . Just about anyone who wants to can come under the tent. The public has no yardstick to measure the quality of the information it gets or the people who deliver it, short of the reputation of the news organization."[136] As a result of the general confusion of how to define "journalist," the "media" or the "press," it is essential to treat everyone the same on public forum public property.

Although "media, journalist and press" are difficult to define, California and Ohio have created laws providing the media with special privileges, in spite of the fact that the U.S. Supreme Court has ruled that equal freedoms exist everywhere in the United States for the press and public. States can write constitutional provisions and laws that do not conflict with the U.S. Constitution. But, in the situation of California and Ohio providing more liberal access to journalists, these states seem to discriminate against the public that wants equal access. "Under these statutes in California and Ohio, authorized media representatives (by the legislature in California) may enter areas otherwise closed to the public regardless of any safety concerns," according to the 1995 National Media Guide for Emergency and Disaster Incidents.[137] This guide does not define "journalist" clearly, but a Los Angeles Municipal Code says, "past experience and demonstrated need of the applicant to cover on a regular basis news events at which police and/or fire lines are established"[138] is the city's attempt to define who is a "credentialed" journalist. Therefore, if members of the media want special access rights, they need to look to California and Ohio

for guidance when addressing legislators. Also, if the public in Ohio and California want equal access all the time to scenes where the established media is allowed, the public can challenge the state statutes in court. In the meantime, everyone still has equal rights of access in the other 48 states.

Obviously everyone in the Warner Creek situation had the same rights of access, which was no right of access. Because of the commitment of the Forest Service to provide the media and public with information about Forest Service issues, the agency designed a settlement agreement in March 1997 with the *Register-Guard* that acknowledged each other's needs.[139] The settlement agreement between the *Register-Guard* and the Forest Service focuses on the *Register-Guard*, but if studied closely, does not provide the *Register-Guard* with any special access rights. The agreement is vague, not specific to the *Register-Guard* and contains no definitions to key words, like "news media." The Forest Service regulations define "news media" broadly enough that the phrase could easily be applied, for example, to any person writing a one-page newsletter or producing a television program for public access television. It does not matter who is the "news media" when the pubic has the same First Amendment rights and rights of access as the media on public forum public property.

The settlement agreement between the *Register-Guard* and the Forest Service says,

> The USDA Forest Service recognizes the *Register-Guard*'s professional interest in and need to cover newsworthy events involving environmental conflicts in the national forests. The *Register-Guard* recognizes USDA Forest Service's need to ensure the safety of people and property in conflict situations. The *Register-Guard* assumes responsibility for its employees and acknowledges the risk inherent in coverage of conflict situations. In the event of a USDA Forest Service closure of national forest system lands in Region 6 to carry out a law enforcement operation

> where the media seeks access to the site, USDA Forest Service Public Affairs and Law Enforcement personnel will use their best efforts in consultation with the *Register-Guard* and other news media to ensure timely information to news media and to provide timely news media access to the news events. Such access, to the extent consistent with law enforcement and safety interests, will not be unreasonably restricted. The USDA Forest Service is committed to engaging in this process. This agreement does not create any new rights nor does it limit any existing rights under the law. This guideline shall remain in effect until the USDA Forest Service develops media guidelines for law enforcement operations.

Jack Ward Thomas' comment during his interview about the settlement agreement was, "You realize it says nothing at all." Although the settlement agreement represents mutual understanding of the other's needs, it does not say the press will have access to similar events in the future.

When the Forest Service issues a special closure order, does the corporate media have greater access to national forest lands than freelancers? In 48 states, the legal answer is "no." However, in some situations, government representatives allow one media person inside a closure but not another, regardless in which state the controversy is occurring. Chris Holmes from the Forest Service again said freelancers will not be treated the same as representatives from CNN or the *Missoulian* when a closure order is in effect.

In 1985, the U.S. District Court in Iowa found, in regard to access rights to information, that "city officials discriminated by according access to 'legitimate' or 'established' media and denying access to an 'underground newspaper' called 'Challenge'."[140] The court restated two U.S. Supreme Court rulings that "public officials cannot impede the free exercise of speech or press simply because the content is insulting, disturbing or critical."[141] The U.S. District Court added that "officials could show no compelling governmental interest to justify refusal of access to one newspaper while allowing access to another newspaper."[142] This decision was based on two U.S. Supreme Court

cases that ruled, "Any classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."[143] One other U.S. Supreme Court case ruled "that individual newsmen not be arbitrarily excluded from sources of information."[144] The Forest Service cannot legally provide the corporate media access and then deny access to a photographer representing an environmental newsletter.

Even though the Supreme Court has ruled that everyone has the same rights of access and freedom of the press and expression, the First Amendment does not guarantee "effective and accurate reporting," according to the U.S. Supreme Court case *Saxbe v. Washington Post*.[145] These freedoms provided by the Constitution apply to reporters and photographers, novice and professionals even if the end result of their efforts is biased or offensive. The *National Media Guide* writes that "photojournalists, amateur photographers and just plain citizens all enjoy equal protection under the First Amendment. What this means in practical terms is that the most under-equipped video newshound to the most highly paid prizewinning photojournalist enjoy an equivalent First Amendment right to photograph newsworthy events. Under the law, everyone's photographic newsgathering efforts are equally protected by the First Amendment."[146] Thus, everyone has the same First Amendment rights, regardless of the quality or impartiality of their expression as long as they are not breaking the law.

Applying equal rights of access to everyone in the Warner Creek protest situation by denying everyone access, however, was not necessarily the best solution to resolving the problem of the long-term roadblock. OGC attorney Campbell said in his interview that the Forest Service "probably didn't give it

[the closure order] any thought as to the breadth of it." Closing off an area to arrest people and to keep spectators, legal protesters and the media away are not listed reasons for issuing the special closure order.[147] Also, law enforcement must distinguish between spectators and law-abiding participants and those hindering an operation, the definition of civil disobedience. Campbell said, "If you're physically blocking a road, that's illegal regardless of whether there's a closure order in effect. They [Forest Service and its representatives] felt the only way they could deal with it was if they made it illegal for everybody to be in the area."

Law enforcement gave everybody at the protest site five minutes to clear the road and anyone still blocking it would be arrested.[148] Three women protesters would not unlock themselves from a gate so they were arrested. When another woman tried to lock herself down, she was arrested before succeeding. When a man heard screams from one of the women, he either jumped or fell onto the road so he was arrested.[149] All five were arrested for criminal trespass, the same charge as the two journalists who would not leave the area when told to leave.[150]

Jack Ward Thomas said during his interview that, "We offered access to the press. They chose to do it their way, which was to violate the closure with full intention, probably, of being arrested. Makes a great story. But, they weren't excluded from the area. They could have come in under straight observational capability." He added later in the interview that, "These reporters came in--had to sneak in two miles, when they could have walked right down the road." Actually, while the two "trespassing" reporters were hiking to the protest site, another journalist from the *Register-Guard* did go to the briefing point at the closure boundary on the main road.[151] According to Godbold, this reporter

asked for and was denied access. Even if a reporter was allowed to walk 10 miles to the protest site, he or she would have missed seeing the activity associated with the arrests.

In dealing with future protests, Forest Service attorney Campbell said, "You may be able to escort the media to a place that is closer, yet still safe, that doesn't interfere." He added, "Decisions about who goes in and who doesn't should be made at a different level than law enforcement." Chris Holmes of the Forest Service said in his interview that "Media Guidelines for Law Enforcement Situations" (to be created in 1999) will "establish two perimeters. One is the public perimeter" and the other is "the media perimeter." Although the guidelines are not yet available, this plan contradicts repeated U.S. Supreme Court rulings that the press is to have no greater rights of access than the public.

Finding solutions to these recurring problems is possible, providing authorities handle these situations differently. As long as the Forest Service, including law enforcement, acts appropriately, why does it matter if someone is watching or holding a camera, or if that person is a freelancer or a traditional journalist? If the Forest Service wants the press to get the agency's perspective, perhaps the Forest Service could provide an information representative to the site. If a closure is created, it seems that the best place to have it would be immediately adjacent to the activity so everyone interested could watch what is happening.

Eliminating the use of temporary closures in environmental protest situations seems to be the ideal solution. This way everyone can see what is taking place and nothing is hidden. If people are hindering an operation, they should be arrested. If they are only expressing their opposition to an activity, the law says they are allowed to do so. If anyone with a camera wants to shoot

video or take photographs of these activities, the First Amendment protects them on public forum public property.

SITUATION 2

When Gene Bernofsky of the non-profit organization *World Wide Film Expedition* decided in 1997 to produce a documentary on a proposed mine in a Wilderness Study Area in Montana, he wrote a letter to the Musselshell Ranger District asking permission for access to the area.[152] This area in the Big Snowy Mountains was under special-use permit by Cominco American, Incorporated at the time.[153] Musselshell District Ranger William Fortune responded "no" to the access request in a letter to Bernofsky.[154]

What rights of access did Gene Bernofsky have to witness and document exploratory mining work on these national forest lands? Bernofsky actually had full rights of access to this area of national forest lands, yet Ranger Fortune wrote in a letter that he did not and gave reasons for denial.[155]

In the letter to Bernofsky, Fortune wrote:

> We are in receipt of your 5/19/97 letter requesting permission to video film Cominco's geophysical mineral exploration in Swimming Woman canyon, and I have given this some thought.
>
> As a matter of direction, policy and courtesy, the granting of authorization for filming of another authorized use (Cominco's authorized exploration), can only occur with the written consent of the other authorized user. We also have to assure that the requested filming would not interfere with National Forest management.
>
> We have discussed your request with Cominco, and they do not wish to have such filming occur. I also have concern about the potential for a media presence that might interfere with this authorized activity. Therefore I am denying your request for filming. Feel free to contact me or David Wanderaas about this matter 406-632-4391.

In this first letter from the Musselshell District Ranger, no distinction between commercial and non-commercial videography was made. The letter did not mention the fact that this direction and policy applies only to commercial works. Gene Bernofsky is a non-commercial producer,[156] and therefore, the regulations Fortune refers to are not applicable to Bernofsky. All Fortune had to ask was if Bernofsky was commercial or non-commercial.

The Forest Service manual Fortune refers to is titled "2725.5-Arts" under the broader category of "2725-Industry."[157] The policy direction says:

> Special-use authorizations are required on National Forest System land when these activities represent significant occupancy, or the use is commercial in nature. Significant occupancy is defined as occupying an area of National Forest for a few hours to several days utilizing some of the following: models, actors, crews, props, equipment, structural improvements, and so forth. Commercial activity means that the authorization holder, crew, or actors are on salary or under contract. These projects usually have a definite product as their objective, such as movie or television production, commercial advertisement, picture for a catalog, filming of people and events for direct resale, and so forth.
>
> Authorizations are not required to merely photograph forest scenes, particularly from locations off National Forest System lands; nor are authorizations appropriate when the activity is not commercial. This includes freelance work by individuals who are not under contract or salary at the time and significant occupancy will not occur.
>
> Authorize the use of National Forest System lands for commercial still photography and motion picture and television locations only where such uses will not seriously impact forest lands and resources or other uses, or will not unreasonably interfere with National Forest management.
>
> Grant authorizations for filming in areas currently under other special-use authorizations only with written consent of the holder.

In simpler terms, no authorization is required if the "filming" is not commercial. Bernofsky most closely fits the description of a freelancer whose work is not under contract or salary at the time and he does not use models, actors, crews, props, equipment (other than a video camera and tripod), or structural improvements. Therefore, permission is not needed from Cominco,

the holder of the special-use authorization.[158] Perhaps Fortune did not realize Bernofsky is a non-commercial producer, but it is odd that he did not use the word "commercial" in this first letter when applying policy to deny Bernofsky's request.

In the Summer 1997 *Montana Journalism Review*, author Bill Platt wrote an article about Gene Bernofsky fighting "a guerrilla documentary war against Montana mining companies."[159] Bernofsky is quoted as saying, "I don't want to have anything to do with the establishment media . . . I've always had this insane idea that I wanted to keep what I cared about separate from making a living."[160] Bernofsky is a non-commercial video producer because he gives away his videotapes. Occasionally, however, he will charge ten dollars per tape in order to cover the cost of the actual tape, postage and handling. He also produces them for free at Missoula Community Access Television, and airs them on access television stations across the country. Because Bernofsky is a non-commercial producer, the Forest Service did not need to ask Cominco for permission because neither has the right to say "no" to his access request. Thus, Bernofsky never needed to ask permission from the Forest Service or Cominco.

In another letter written to an "Interested Forest Participant" which was mailed to everyone on the district's list of people concerned about potential mining activity, Fortune wrote:[161]

> You have expressed concern about my denial of authorization to Gene Bernofsky or World Wide Film Expedition to video film Cominco American, Incorporated's geophysical mineral exploration in Swimming Woman canyon, within the Big Snowy Wilderness Study Area.
>
> World Wide Film Expedition is a commercial video film business. Forest Service Manual 2725.5, Regional Supplement 2700-93-6 states that special-use authorizations are required on National Forest System land when the arts (filming) activity is commercial in nature and that these projects usually have a definite product as their objective, such as a movie

> or television production, commercial advertisement, pictures for a catalog, filming or people and events for direct resale, and so forth.
>
> This Manual direction goes on to state:
>
> 'Grant authorizations for filming in areas currently under other special-use authorizations only with written consent of the holder.' Cominco's exploration is an authorized use of this area, and is of course the object of the World Wide Film Expedition's request for the filming authorization.
>
> We contacted Cominco to discuss World Wide Film Expedition's request. Cominco expressed significant concern about the filming request and did not consent to authorization of any filming of their exploration. Cominco noted concerns about possible use, intent, and content of commercialization of such filming. Cominco may also have been concerned about filming of "trade secrets" of their geophysical exploration.
>
> This manual direction also states that commercial photography may only be authorized where such uses will not unreasonably interfere with National Forest management. I had a concern that additional commercial activity might interfere with the authorized geophysical exploration.

This second letter from Ranger Fortune emphasizes "commercial filming." Bernofsky said in an October 1998 interview that, "We, World Wide Film Expeditions, have been registered with the Internal Revenue Service as a non-profit, 501(c)3, since 1983." Platt wrote in the Summer 1997 *Montana Journalism Review* that, "he has been fighting a guerrilla documentary war against mining companies in Montana for more than a decade, all on his own time and mostly with his own resources. He runs his own production company, World Wide Film Expedition, out of his Mount Avenue house (in Missoula, Montana). His brand of video activism would not be possible without the equipment available from Missoula Community Access Television (MCAT), which he calls the only truly democratic medium in Missoula."[162]

During a phone conversation in November 1997 with David Wanderaas, spokesman for the Musselshell Ranger District, he said that the Forest Service,

Cominco, and anyone else interested in accessing the mining exploration area had to get permission from the adjacent private landowners. He said this section of national forest land is surrounded by private land and that it is the private landowner's discretion as to who has access. This is referred to as "good will access." Since that is the case, why did Ranger Fortune not tell Bernofsky to ask the private landowners' permission for access? It seems clear that he did not want to provide Bernofsky with any helpful information even though Bernofsky asked.

In an Internet interview with David Wanderaas, he wrote, "Hikers drove into the NFS lands and started their several day hike onto and across the crest of the Big Snowies during the geophysical exploration activity; they most certainly were not denied access."[163] Because hikers were allowed in the area and Cominco's "permit" said that "there would be no effect to public health and safety,"[164] Bernofsky had as much right to be in the area as the hikers. In a personal interview with Terry S. Maley, mining law expert and author of the *Handbook of Mineral Law*, he referred to Bernofsky's situation, saying, "It's certainly no different from a hiker going in and photographing as far as I can see. The only thing I can offer is that there would be nothing in the Mining Law that would be a constraint on photographing."

Analysis of this situation consistently supports a position that the Forest Service feared certain media attention that could cause controversy about the mining exploration activities on this national forest, the Lewis and Clark National Forest. The agency denied access to Bernofsky in an attempt to dodge public attention and possible grievances. The First Amendment provides for everyone's freedom of speech as well as for freedom of the press. It also provides the right peaceably to assemble and the right to petition the Government

for a redress of grievances. Access to this area of the Lewis and Clark National Forest was available for Bernofsky to exercise his First Amendment rights since no special closure order could be applied.

The Mining Law of 1872 does provide for some degree of exclusion on national forest lands, but not in Swimming Woman Canyon. Maley said in his interview that, "If the claimant [mining company] has surface rights, they can exclude everybody except the federal government. Most claims, of course, do not have surface rights. To have surface rights, the claims were located before July 23, 1955 and on the plat it will be shown to carry surface rights. Some [mining claims] do and some don't before 1955, but none do afterwards." According to David Wanderaas, Cominco does not have surface rights in Swimming Woman Canyon.[165] Therefore, Cominco could not exclude the public from the exploratory area in Swimming Woman Canyon unless a special closure order was issued. A special closure order was not issued because public safety nor any of the other legitimate purposes for a closure order were a concern.[166] Maley added that, "The only way they can keep you out is if it's not safe. As a general rule, they cannot exclude or keep somebody off while they're doing exploratory drilling as long as you don't physically interfere."

Maley referred to a case called *U.S. v. Curtis Nevada Mines, Inc.*[167] which dealt with a mining company wanting only people with permits to be able "to gain access to unpatented mining claims (on national forest lands) for recreational purposes or for entrance to adjacent national forest lands."[168] The Ninth Circuit Court of Appeals ruled that under Section 4(b) of the Multiple Use Act, 30 USC 612(b), "Any use of the surface . . . shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto."[169] The Court said, "The mining

claimant can protest to the managing federal agency about public use which results in material interference and, if unsatisfied, can bring suit to enjoin the activity. . . In the present case (*Curtis Nevada Mines*), appellees have not presented any evidence that the public use of land included within their unpatented mining claim has 'materially interfered' with any mining activity. Absent such evidence, Section 612(b) applies in this case to afford the general public a right of free access to the land on which the mining claims have been located for recreational use of the surface resources and for access to adjoining property. Therefore, we reverse the portion of the judgment (from the lower court) that requires specific written permits or licenses for entry onto the mining claims."[170]

Commenting on the *Curtis Nevada Mines, Inc.* case, Maley said, "A case [like Bernofsky's] has not come up on that with mining. I wouldn't be surprised if it did." Maley went on to say in his interview that Ranger Fortune "was using some means other than the mining law [in denying Bernofsky's request]. I'm personally skeptical that he could prevent them [Bernofsky] from going in. About the only basis you can keep somebody out of the forest, at least from walking in, is for something like fire danger." Bernofsky, who thought he needed permission to videotape the exploratory mining activities, said in a November 1998 interview, "Why would I write a letter asking permission to go there if I were going to break the law by interfering?" This would be the only rationale available for legally keeping Bernofsky out of the area.

Both of Fortune's letters make reference to his concern about possible interference with Cominco's exploration activities. In the first letter, he wrote, "I also have concern about the potential for a media presence that might interfere with this authorized activity."[171] In the second letter, he wrote, "I had a concern

that additional commercial activity might interfere with the authorized geophysical exploration."[172] Later in the second letter, Fortune wrote, "Cominco may also have been concerned about filming of 'trade secrets' of their geophysical exploration."[173] It seems strange that the Forest Service would be speaking for the company as to what Cominco's concerns may have been. Since the Forest Service was communicating with Cominco, it seems that the response would come more from a position of knowledge rather than speculation.

As a matter of fact, Bernofsky originally wrote a letter to Jerry Zieg at Cominco, asking when the company planned to do their exploratory work. Zieg replied to Bernofsky via e-mail, writing, "I have no idea when they (the crew) will fit the work into their schedule, nor will they until shortly before they carry it out . . . There is always the chance we will not have time to do this particular survey at all. I would add that a geophysical survey is pretty boring viewing; there is hardly anything to film in the survey area except a man walking in a relatively straight line. I appreciate your courtesy in asking permission to video our activities, and am sorry I can be of so little help. Sincerely, Jerry Zieg"[174] Obviously, Zieg was not concerned about Bernofsky videotaping Cominco's trade secrets as Ranger Fortune suggests.

Another major issue is that nothing in the Mining Law or Special-Use authorization prevents a non-commercial videographer or other member of the public from being on national forest lands unless there is a special closure order in effect. Even if Fortune did have the authority to address the access question for Bernofsky, he obviously wanted to prevent media coverage of Cominco's activities. In 1985, the United States District Court in Iowa[175] cited two U.S. Supreme Court cases, writing that, "Public officials cannot impede the free exercise of speech or press simply because the content is insulting, disturbing or

critical."[176] During a conversation with Wandaraas, he said, "We make a decision based on the first authorized user's response and what our concerns are." He went on to say that coverage by the *Missoulian*, *60 Minutes*, the *Great Falls Tribune*, or the *Billings Gazette*, "would be okay."

Once again, the Supreme Court in *Branzburg v. Hayes*[177] ruled that, "The First Amendment does not guarantee the press a constitutional right of special access not available to the public generally." Whether Bernofsky represented the traditional press or not, the Musselshell District Ranger had no right to attempt to control his right of free expression and free speech about the mining exploration activities. The district ranger apparently thought that by forbidding access to Bernofsky, the agency could control speech and expression. Wandaraas added, "that when you put that out as public information [Bernofsky's videos], it's nice to have both sides of the story, which they do not. That was the issue there."

Two Supreme Court cases held that "any classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional."[178] Once again, the U.S. Supreme Court ruled in 1985 that, "Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the First Amendment in assuring that restrictions on news gathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information."[179] In the Bernofsky situation, it does not matter if the Forest Service considered him to be a "newsman" or not because the press and public have the same First Amendment freedoms and rights of access in Montana. The result was that the Forest Service did not treat Bernofsky fairly because the agency withheld access information, did not

question Bernofsky as to his commercial or non-commercial status, and basically did not provide the public service it boasts.

Contrary to the Musselshell District Ranger's response, Northern Region Lands Specialist Ron Erickson said in a March 1998 personal interview, "To me, we should treat everybody the same, in regards to the news media. And, it shouldn't be because the guy might twist it [the story] around." But, he added, "within our special uses authority, basically, that's been delegated down to the district ranger." This situation of handing down such authority needs to be accompanied by solid constitutional law training. The First Amendment and supporting court rulings are critical reference items when making decisions about someone else's rights on public land. As a result of this knowledge and understanding, a similar situation to Bernofsky's would have a different result. Erickson said, "If it's truly a non-commercial activity, he's not required to have a permit. That's a true statement." Therefore, the non-commercial producer, writer, photographer or any other member of the public has access to all areas of national forest lands, at least by foot, whether or not someone else has a special-use permit for the area.

SITUATION 3

When environmental activist Mike Mease attempted to shoot video on January 29, 1998 on the Gallatin National Forest of state officials slaughtering six bison, he was arrested. Since 1991, the Montana Department of Livestock (DOL) has had the legislative responsibility of managing the wild buffalo that wander out of Yellowstone National Park.[180] The management plan includes the killing of these bison outside the Park boundary by the DOL.[181] As this herd represents the last wild bison in the United States, this issue is highly controversial. The reasoning behind the statutes giving the DOL this authority is that some lawmakers fear that bison with brucellosis will infect Montana cattle, causing their fetuses to abort.[182] Although no cases exist of the infectious disease being spread by the bison, the state agency killed 1,084 wild bison between November 1996 and April 1997.[183]

These killings were the result of the implementation of the interim bison management plan combined with severe winter conditions that caused the bison to leave the Park in search of places to graze.[184] "In 1996-97, a particularly harsh winter with deep snow and ice conditions sent hundreds of bison toward park boundaries, seeking accessible forage at lower elevations."[185] According to an aerial survey conducted by the Park Service in July 1997, the population of wild bison was estimated at 2,200 in Yellowstone National Park.[186] This estimate represents the total number of wild bison in the area since the bison have plenty of forage available during the summer months and tend to stay within the Park boundaries.[187] Problems with the bison leaving the Park almost

always occur in the winter months as they search for food.[188]

In an effort to halt the killing of buffalo by the DOL, Mike Mease in 1997 co-founded Buffalo Nations, a non-profit environmental organization.[189] Volunteers recruit other volunteers from all over the United States to try and directly stop the killings and haze the bison back into the Park or into other areas where the DOL will not shoot the bison. This controversy of killing bison before testing to find out if they have brucellosis has become a highly emotional issue throughout the country during the late 1990s.

On that day in January, officials shot and killed six bison as part of the interim bison management plan.[190] Mease and other activists from Buffalo Nations were on the scene early that morning to document and protest the activity. One boy was arrested for driving his snowmobile between armed DOL officials and the targeted bison.[191] Mease, who did not interfere, followed the DOL officials and Gallatin County Sheriff's deputies on his snowmobile as they brought the carcasses into the garbage transfer station to be slaughtered.[192] This station on the Gallatin National Forest was open at the time by appointment since this slaughtering occurred outside the standard operating hours.[193] The DOL had previously acquired a key to the gate so an official opened it.[194] Access to the facility, however, was available to the public as well because the Forest Service had not issued a special closure order. Although Mease did not necessarily realize public access was available, the permittee of the public property had also given Mease permission to be there anytime.[195]

Mease said in a personal interview that he followed the officials inside the fenced area for the sole purpose of documenting the butchering. Soon after Mease's arrest, he said to reporter Andrea Barnett of the *Missoula Independent* that, "There were probably ten snowmobiles in all, four of which were cops. I

waved at the deputy and he waved back. They just thought I was another bubble-head until I took my helmet off."[196] When officials recognized Mease as not being an official after he removed his snowmobile helmet, Gallatin County law enforcement officers arrested him for obstruction of justice.[197] Mease was issued a citation which read, "Said defendant did knowingly or purposely or negligently obstruct a peace officer to evict: failed to comply with order given by Deputy Sheriff Troutwine by entering and remaining during DOL bison operations."[198] These charges were eventually dropped, but very little documentation exists explaining why.

Deputy Gallatin County attorney Todd Whipple said in his motion to dismiss, "Probable cause existed to issue the citation, however, it is in the best interest of justice to dismiss the citation."[199] Justice of the Peace G.L. Smith ruled in response that, "Upon reading the Motion of Todd S. Whipple, a deputy county attorney, and good cause appearing therefrom, it is hereby ordered that the above-entitled action be dismissed."[200] Even though the charges against Mease were dropped for being inside the fenced facility, the arrest prevented him from shooting video of a controversial activity on public land to which he had a right of access.

That day the DOL official opened the gate with the key he had previously acquired from EcoWest[201] and immediately closed the gate after all officials and Mease were inside. No EcoWest employees were present,[202] although the holder, the Solid Waste District, and the agent, EcoWest, "assumes all risk of loss of the property."[203] The permit goes on to say, "The holder (and agent) shall compensate in full the United States for damages occurring under the terms of this permit or under any law or regulation applicable to the National Forests. The holder (and agent) shall be liable for all injury, loss, or damage . . . ."[204]

Therefore, it seems it would be in EcoWest's best interest to have an employee present whenever the facility is in use and not to provide the DOL or anyone else with a key. EcoWest is responsible for the area under permit at all times and does not relinquish this privilege of operating the facility even when the DOL occasionally wants to occupy the site and control access to it.

Prior to this day, Mease thought that at some point DOL officials would be taking dead bison to the transfer station.[205] To prepare for this unscheduled event, he asked Tom Dolezal who owned EcoWest Corporation at the time for permission to be there.[206] Dolezal gave Mease that permission to be at the facility, saying to reporter Bennett, "I have to treat him the same as I do anyone else. It's a public facility."[207]

So, what rights of access did Mike Mease, a member of the public and to some people a member of the press, have to document this controversial activity on national forest lands? The subject property is public property and is leased to a public entity but run by a private company. The Forest Service leases the land to West Yellowstone/Hebgen Basin Solid Waste District, a public entity, which in turn hired EcoWest Corporation to run the facility.[208] Although Tom Dolezal sold EcoWest to Harry Ellis in February 1998, the permit itself has not changed and does not expire until December 31, 2004.[209] According to the Solid Waste District's permit, the facility is available to the public every day of the year.[210] Even though there were no Forest Service officials present at the transfer station that day, the Forest Service is the authorizing agency of this parcel of land. The special-use permit says, "The District Ranger, Hebgen Lake Ranger District, telephone no. 406-646-7369, is responsible for administering this special-use authorization. The holder should contact the District Ranger regarding any questions concerning the occupancy and use authorized and the

provisions to this authorization."[211] Only the Forest Service has the authority to limit access and this restriction would have to be in the form of a special closure order.

This garbage transfer station is indeed a public facility; however, it is enclosed within a ten-foot bear-proof fence with a lockable gate. John Tebby, who works there, said in a personal interview that the purpose of the fence is "to keep bears out and enclose the capped landfill. You can only walk on it. It's sensitive ground." Tebby added that the locks on the gate are "to secure equipment and keep people from dumping without paying." Therefore, the garbage transfer station is closed off to keep bears out, to prevent customers from dumping garbage without paying, to deter vandalism, and to keep people from driving over the sensitive ground. It is not fenced and gated to keep the public from accessing national forest lands to exercise their First Amendment rights.

The transfer station's hours of operation are posted near the gate. Although the dilemma transpired outside these posted hours, the sign also says, "Dumping by Appointment." The special-use permit says, "Use or occupancy of the permit area shall be exercised 365 days each year, unless otherwise authorized in writing under additional terms of this permit."[212] EcoWest employee Greg Glen Johnson said in an interview that, "If your hours don't jive up with our hours, give us a call and we'll make arrangements to have somebody come out here and open up the transfer station . . . what they tried to accomplish with that particular situation was just accommodate the community." This event occurred at a time outside the normal operating hours, yet the agent for the permittee had given permission to Mease to be there anytime he wanted. Dolezal said in an affidavit, "I expressly gave Mike Mease permission to enter

the Hebgen/Solid Waste District Transfer Station at anytime to monitor any activity thereon involving the buffalo." Dolezal added in the affidavit, "that permission would have lasted (through) January 29, 1998."

Dolezal gave permission to Mease to be at the facility anytime, but Dolezal did not have full control of the property. He worked for the West Yellowstone/Hebgen Basin Solid Waste District, the permittee of the facility on national forest lands. Neither the Solid Waste District nor Dolezal had the authority to limit anyone's access because the permit says, "The holder agrees to allow the public free and unrestricted access to and use of the permit area at all times for all lawful purposes."[213] Only if Dolezal had private property rights could he have provided or denied access to anyone wanting to use the facility. The property in this case is public and is thus available to everyone.

The irony here is that the permittee of this portion of public land had an open door policy in accordance with the language in the special-use permit, but the Department of Livestock (DOL) did not and chose to control access to the facility. According to Gallatin County Deputy Jason Jarrett's report on the events of the day, he wrote, "Admittance to the inner compound was restricted to officials and was being monitored by Deputy Houghton of the Sheriff's Office at the front gate."[214] Todd Whipple, the Gallatin County Attorney, said in a personal interview that, "Officers were engaged in keeping the area clear on behalf of the DOL. When Mease disobeyed the officer, he was arrested." When discussing this incident with Whipple, he thought the transfer station was on private property and also felt that Mease thought it was on private property.

No signs are displayed on the property indicating this area is part of the Gallatin National Forest even though the permit requires a specific Forest Service sign to be clearly displayed at the front gate. The special-use permit

says, "Signs setting forth this policy of nondiscrimination to be furnished by the Forest Service will be conspicuously displayed at the public entrance(s) to the premises, and at other exterior or interior locations as directed by the Forest Service."[215] If the required anti-discrimination statement was placed at the entrance, all those wanting access would have known this property is an area of national forest lands because these standard anti-discrimination signs always display the Forest Service logo.[216] The DOL knew this property was on the Gallatin National Forest even if others involved did not know the land designation. DOL spokesman, Rob Tierney, said in a personal interview that, "The Forest Service was involved all the way through that operation." The jurisdictional ambiguity could have been avoided had signs been posted and a Forest Service representative been assigned to the site to clarify the agency's authority in this situation. As a result of no Forest Service representation at the transfer station that day, the DOL exercised more power than that agency possesses. The DOL has no closure authority on federal lands and thus had no right to control access to the garbage transfer station.

Access to the facility can be controlled by the Forest Supervisor if a legal special closure order is issued. Special closure order 36 CFR 261.53 says, "When provided in an order, it is prohibited to go into or be upon any area which is closed for the protection of: threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish; special biological communities; objects or areas of historical, archeological, geological, or paleontological interest; scientific experiments or investigations; public health or safety; property."[217] If the Gallatin Forest Supervisor were to issue this special closure order, it would have to be for one of the listed purposes. If someone violates that order, the charge would be criminal trespass, which is a

misdemeanor. Lands Specialist Cole said in an interview that, "I see if the Gallatin Forest is in tune to this [bison situation] and there is a safety issue, they'll put a special order together that precludes public use during the round-up and processing time and no one will even get close to where that gate is." Claude Coffin of the Hebgen Lake Ranger District who is responsible for overseeing the garbage transfer station permit said in an interview that, "We never have closed it to human entry in an order. I don't know if we would do that unless there was a safety issue."

If safety is not an issue and a person is not breaking a law, state and county officials do not have the authority to prevent someone from accessing an area on national forest lands not under the regulation of a special closure order. According to Office of General Counsel attorney Alan Campbell who represents the Forest Service, "The Forest Service normally has reciprocal arrangements with local and state law enforcement that allow them to enforce our laws and us to enforce theirs." Attorney Campbell added that, "I don't think the state could have a law that says thou shalt not go on the national forest." He added, "But a state law may for example be aimed at public safety and have incidental effect of restricting access." In this case, the county sheriff's department had the authority to arrest anyone breaking the law, but the Forest Service did not have a regulation in place to deny public access. Unless someone is breaking the law or safety is an issue, the DOL and the public have a right to be on those national forest lands at the same time while the facility is in use.

According to the permit which provided Dolezal with the privilege of using 12.64 acres of national forest lands, "the Forest Service reserves the right to use or allow others to use any part of the permit area for any purpose."[218] This clause in the Forest Service permit provided the Department of Livestock

with the right to use the facility for slaughtering dead bison where entrails could be left and trucked away. Claude Coffin, the Forest Service issuing officer of the special-use permit, said, "State law mandates the DOL to handle the bison situation and do whatever they need to do to deal with it." Coffin suggests that the DOL had the approval of the Forest Service to access the transfer station anytime for any purpose associated with the disposal of bison parts. In order for this 24-hour access to be expeditious, EcoWest owner Dolezal gave a key to the bison operations manager for the Department of Livestock. According to DOL spokesperson Tierney, the DOL could access the transfer station anytime the agency needed. This privilege, however, did not provide the state with the authority to deny public access. Possession of a key to the front gate was simply a matter of convenience for the DOL and EcoWest employees.

The permit that Dolezal had to honor provides for unrestricted use of this facility by the public. Once again, it says, "Unless specifically limited under additional terms to this permit, the holder agrees to allow the public free and unrestricted access to and use of the permit area at all times for all lawful purposes. To facilitate public use of the permit area, all existing roads or roads as may be constructed by the holder shall remain open to the public, except for roads as may be closed by joint agreement of the holder and the authorized officer."[219] It also says, "In exercising the privileges provided by this authorization, the holder shall not interfere with or obstruct the public's right to use and enjoy National Forest System lands and facilities."[220] These clauses in the Solid Waste District's permit required Dolezal to provide nondiscriminatory use of this public facility on public property.

The permit goes on to say that not only must the holder of the permit not interfere with or obstruct the public's right to use the garbage transfer station,

but that interference is cause for terminating the authorized privileges of the holder. The permit says, "Verified conduct constituting interference with the public's use of National Forest System lands and/or facilities by the holder, its agents or employees, or the area authorized or in relation to the privileges authorized herein, shall be cause for termination of this authorization."[221] Therefore, Dolezal had to provide access to the facility anytime someone wanted to use it.

The government also cannot discriminate against users unless a special closure order is in effect. Lands Specialist Cole of the Helena Ranger District said in his interview that "in most cases, the special use of national forests doesn't preclude others to use those same lands as long as that secondary use by the public doesn't materially interfere with the permitted use." Gordon Schofield, Group Leader of Special Uses for the Forest Service in the Northern Region, said in an interview that the fact it's national forest system lands "retains a lot of rights to the public because it is National Forest System land owned by the public." He also responded to the statement that 'if the DOL was inside that facility slaughtering bison, then the public had a right to be there to watch them, maybe even protest it as long as they did not interfere, and basically be allowed to exercise their First Amendment rights.' Schofield said, "On the surface, that makes sense to me." Therefore, without a Forest Service special closure order in place, the Solid Waste District, Dolezal, the Department of Livestock, the Gallatin County Sheriff's Department nor the Forest Service could deny the public its right to access the facility.

So, why did the government officials order Mease to leave the garbage transfer station? DOL spokesperson Tierney said in an interview that the facility was restricted "strictly for security purposes." He added that, "We have various

people, from Native Americans to people who came to retrieve those carcasses--basically, those folks don't need people harassing them and in their face where they're trying to do their business." According to the Gallatin County Sheriff's Department Complaint, "Michael Mease (was) arrested for obstructing during DOL bison operation."[222] Mease's citation says, "The above named defendant is charged with violating Montana Code 45-7-302."[223] This statute titled "Obstructing Peace Officer or Other Public Servant" says, "A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function, including service of process."[224]

Mease was not accused of obstructing, impairing or hindering the preservation of peace or the performance of a governmental function. His citation says only that he failed to comply with a deputy sheriff's order "by entering and remaining"[225] in the facility. The sheriff's supplement report also says, "Deputy Troutwine advised him that he must leave the area. Mr. Mease refused. Troutwine told him that he must leave or be arrested. Mease stated that he chose to be arrested. He was taken into custody by Troutwine and I (Jason Jarrett) at that time."[226] Mease then was charged only with being on public property and refusing to leave. No official statements were ever made that he was obstructing, impairing or hindering peace or a governmental function. According to Mease, "My main objective being in there was to document the event," which is a First Amendment right.

Authorities are provided with some means of maintaining order in First Amendment situations through time, place and manner restrictions under guidelines established by the U.S. Supreme Court. These restrictions are

constitutional when they are applied equally to the public and press. In the case of public and press access to the scene of the bison slaughtering, authorities could have provided a place close to the operation for Mease and others to watch, document or legally protest the activity. Judge Brett referenced several U.S. Supreme Court cases in his dissenting opinion in *Stahl v. State* stating that "if, in a particular case, it is found that the purpose behind the State action is not legitimate, and is designed solely to penalize, control or limit speech or press rights, the State must show substantial justification for their actions before the restriction will be upheld."[227] This law expresses the constitutional requirement that people must be allowed to exercise their free speech and free press rights regardless of what is expressed. They must also be able to see their government at work in order to most effectively exercise their First Amendment rights.

Mease was exercising several if his First Amendment rights that day and had a right to do so inside the public facility. No special closure order was in place; he was not materially interfering with the slaughtering, and being a member of the public, he had "free and unrestricted access to and use of the permit area at all times for all lawful purposes."[228]

Mease has also been previously identified as a member of the press, however, the public and press have the same rights of access according to many U.S. Supreme Court rulings. Whether or not Mease was press should not have been relevant, but it was in this situation because reporter/photographer Scott McMillion from the *Bozeman Chronicle* was required to identify himself as media in order to enter and stay inside the facility to document the slaughtering. McMillion said in a personal interview that, "I had talked to Mark Bridges, the chief of the enforcement division for Livestock"[229] and asked for permission, so the officer at the gate let McMillion enter. Mease said in a press release that,

"The police cannot allow one journalist access and deny another."[230] Mease added in a personal interview, "I've been hired by CNN as a stringer and in December of 1997, the Department of Livestock gave a tour to journalists and I was invited and went on the tour. So, even the DOL has recognized me as a journalist."

If Mease actually was a member of the news media wanting permission to be in this area that is under special-use authorization, he would not need approval from anyone because the area is typically available to the public. Attorney Campbell from OGC gave his interpretation of the difference between news coverage and a commercial project. He said in his interview that, "There's a distinction to be made between the coverage of an event versus undertaking a commercial venture. When the *Missoulian* covers something, it's a part of news coverage. I think that's different than somebody saying, 'We want to use your smokejumper plane in this movie we expect to make money from.' Or, 'We want to use this picture of a fire tower in our advertising.' I think there's a difference there." This example clarifies the difference between filmmaking for a profit and filmmaking for the purpose of providing news and information.

Former University of Montana Journalism Dean Joe Durso said in an interview, "I would say Mike [Mease] is not a journalist. He's an advocate. I think because he doesn't pursue the story with some sense of impartiality and balance, and because he does not seek the other side, then he's not doing journalism--he's doing something else." Durso added that, "I think 'journalist' is a term that's used too loosely. I think one of the criteria for being a journalist is that you don't have an axe to grind, that you are functioning with an unbiased perspective that will lead you to pursue stories in a traditional fashion. Of course, I'm an old-fashioned journalist. You may talk to other people who say

'nope, he is a journalist'. And, they're allowed to have their opinion too."

Attorney Bruce Barrett said in an interview, "An awful lot of the news of the world is driven by small, independent people who may not get a regular W-2 form from a news organization, but provide us some of the most up-to-date and hot news we get." Barrett added that "courts have to draw lines. They have to make judgments, because otherwise, what would stop anybody from saying, 'press, press, press'. I don't know. I think it's one of those frontiers." Although most people have a difficult time defining "journalist," the U.S. Supreme Court has said that the press has no greater rights of access than the public.

In the Mease case, it is unclear if he wanted to gather footage to be used in a news story or if he was working on a documentary or both. Even if Mease ended up making a profit from a news organization, he would not fit the definition of commercial filmmaker because Forest Service policy direction says, "Commercial activity means that the authorization holder, crew, or actors are on salary or under contract."[231] Mease has occasionally been paid by networks after shooting the footage, but he is not under contract or employed by any network. According to Mease's "jail booking sheet," he is employed by Buffalo Nations and is a human rights documentary producer.[232] Mease also does not seem to fit the commercial definition because he does not use "props, crews, or equipment" besides a camera to accomplish his goals.[233] These regulations also do not list news coverage as one of the examples of commercial filming that would require authorization from the agency and permittee to film. Therefore, this regulation does not apply to members of the news media or non-commercial filmmakers.

As a result of this analysis, Mike Mease and any other member of the

public or press had a right to be inside the garbage transfer station exercising their First Amendment rights. If an individual interferes with another's use, that person is breaking the law and can be arrested. Otherwise, all members of the public and press have a right to be inside an area of national forest lands under special-use permit if the facility is open to another individual. Therefore, no special permission is necessary. Based on Forest Service regulations associated with areas under special-use permit, the only people who would need special authorization to videotape or photograph inside this facility would be commercial filmmakers.

CONCLUSION

There will always be people who will want to gain access to politically sensitive areas of national forest lands and exercise their First Amendment rights, without having to fear they are going to be arrested. In the 1980s and 1990s, the Forest Service has been confronted with lawsuits that have challenged the agency's policies in regards to First Amendment issues. Since then, some changes have been implemented in the agency's rules and regulations. One of the primary corrections made in 1995 was that the Forest Service no longer requires a permit to distribute non-commercial printed material. Another shift in the rules is that "in regulating noncommercial group uses the agency cannot single out expressive conduct and treat it differently from other activities."[234]

Although these new rules apply to specific First Amendment freedoms, this thesis has demonstrated that the Forest Service needs to address its handling of other First Amendment situations as well. Freedom of the press, freedom of speech, freedom to petition the government for a redress of grievances and the right of people peaceably to assemble apply to the situations analyzed here. Whether or not specific Forest Service rules and procedures are in place, managers and law enforcement officers need only to reflect on the First Amendment and people's rights to exercise those freedoms in public places when making decisions. When confronted with non-commercial photographers, videographers and established members of the press wanting to access sensitive areas and situations on national forest lands, the Constitution of the United States needs to be the guide.

Due to the fact that video and still cameras are readily available and some people want to expose government activities in remote areas by documenting them, the Forest Service needs to be better prepared for these situations in the future. The agency's own regulations say, "The Department's intent is to ensure that no undue burdens are imposed on the exercise of First Amendment rights."[235] The United States Supreme Court in *Madsen v. Women's Health Center* allowed vocal anti-abortion demonstrators to approach within 35 feet of a women's health clinic to exercise their First Amendment rights. Certainly, the public and press should be able to access public property to watch and document a controversial timber sale and associated non-violent protesters, a mining exploration activity that is considered safe for hikers to bypass, and the slaughtering of bison carcasses. Even though officials may not like a video camera documenting them or others at work in the national forests, they must allow this observation to take place just as the women walking into a health clinic must tolerate it. If someone is directly interfering with an operation, laws are in place to arrest that person. Otherwise, national forest lands are public forum public property where people should be able to exercise their First Amendment freedoms.

In future similar situations, the agency could respond in more creative ways. First of all, if a closure order is in effect because the operation is inherently dangerous, the public and press should be able to be in a position to at least watch and document the activity from a viewing distance. Closures that are up to ten miles away from a particular Forest Service activity are unreasonable if the activity poses no immediate threat to the public. Second of all, the Forest Service must allow for greater public knowledge of activities on public land. In controversial situations, the Forest Service could immediately dispatch a

mediator or information officer to the site, who would then act as a liaison between law enforcement officers and the public and press. This person should be someone who has a good rapport with a wide variety of people, including environmental groups and the media, and has earned the trust of others outside the agency.

The three situations analyzed in this paper in which people attempted to exercise their First Amendment rights on national forest lands and were denied could all have been dealt with differently. The Forest Service has a responsibility to recognize these Constitutional rights on public forum public property even if these freedoms burden some people while benefiting others. Public scrutiny of activities on national forest lands will, in all likelihood, continue in the future. Agency managers and their law enforcement representatives, therefore, need to respond to First Amendment situations by looking toward the Constitution, and recognize that people will want to witness, document or perhaps even protest some activities on national forest lands. As Chief Justice Burger wrote in *Richmond Newspapers*, "People assemble in public places not only to listen, observe, and learn; indeed they may 'assemble for any lawful purpose'."[236] National forest lands encompass some of the largest public forum public property available in the country, setting the stage for a variety of First Amendment opportunities. It is critical, therefore, that knowledge of and respect for these freedoms are upheld in order for us all to be able to freely exercise our First Amendment rights as guaranteed by our Constitution.

FOOTNOTES

[1]John Harmon, "The Forest Keeper," *Atlanta Journal-Constitution*, 16 August 1998, C1.

[2]*USDA Forest Service Transportation Policy Development*, http://www.fs.fed.us/news/roads/welcome.html, 2 April 1998.

[3]*Forest Service Manual, Title 7700-Transportation System*, effective July 27, 1994.

[4]USDA Forest Service, Northern Region, *Lewis and Clark National Forest Visitors Map*, Revised 1997.

[5]USDA Forest Service, *Code of Federal Regulations*, July 1, 1997 Edition, 36 CFR 261.50 at 348.

[6]*Id.*

[7]USDA Forest Service, *Code of Federal Regulations*, July 1, 1997 Edition, 36 CFR 261.51(a) at 349.

[8]*Id.* at 36 CFR 261.51(b).

[9]USDA Forest Service, *Code of Federal Regulations*, July 1, 1997 Edition, 36 CFR 261.53 at 350.

[10]Plaintiff's Brief in Support of Motion for Preliminary Injunction, *Guard Publishing v. USDA*, 96-CV6228-1996, at 11.

[11]USDA Forest Service, *Code of Federal Regulations*, July 1, 1997 Edition, 36 CFR 261.53 at 350.

[12]18 USC § 1863 "Trespass on National Forest Lands" (1988) Chapter 91 at 616.

[13]U.S. v. Gemmill, C.A. Cal. 1976, 535 F.2d 1145, certiorari denied, 97 S.Ct. 496, 429 U.S. 982, 50 L.Ed.2d 591.

[14]18 USC § 1863 "Trespass on National Forest Lands" (1988) Chapter 91 at 616, citing U.S. v. Gemmill, C.A. Cal. 1976, 535 F.2d 1145, certiorari denied, 97 S.Ct. 496, 429 U.S. 982, 50 L.Ed.2d 591.

[15]Cox Broadcasting Corp. v. Cohn, 95 S.Ct. 1029 (1975).

[16]Kent R. Middleton and Bill F. Chamberlain, *The Law of Public Communication*, 3rd Edition, (White Plains, NY: Longman Publishing, 1994), 448.

[17]*Id.* at 444.

[18]*Id.* at 456, citing Availability of Government Records and Information: President's Statement upon Signing Bill, 2 Weekly Com. Pres. Doc. 895 (July 4, 1966).

[19]*Id.*

[20]Kent R. Middleton and Bill F. Chamberlain, *The Law of Public Communication*, 3rd Edition, (White Plains, NY: Longman Publishing, 1994), 11.

[21]*Id.* at 484.

[22]Commission on the Bicentennial of the U.S. Constitution, *The Constitution of the United States*.

[23]Forsham v. Harris, 445 U.S. 169 (1980).

[24]Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Press-Enterprise Co. v. Riverside Superior Court II, 478 U.S. 1 (1986); Globe Newspapers v. Superior Court, 457 U.S. 596 (1982).

[25]Kent R. Middleton and Bill F. Chamberlain, *The Law of Public Communication*, 3rd Edition, (White Plains, NY: Longman Publishing, 1994), 448.

[26]Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post, 417 U.S. 843 (1974); Houchins v. KQED, 438 U.S. 1 (1978).

[27]Pell v. Procunier, 417 U.S. 817 (1974) at 834.

[28]Houchins v. KQED, 438 U.S. 1 (1978) at 2597.

[29]*Id.* at 2595.

[30]Branzburg v. Hayes, 408 U.S. 665 (1972).

[31]*Id.*

[32]*Id.* at 684-685.

[33]Elizabeth Blanks Hindman, *Rights vs. Responsibilities, The Supreme Court and the Media*, (Westport, CT and London: Greenwood Press, 1997), 108.

[34]*Id.*

[35]*Id.* at 108, citing Branzburg v. Hayes.

[36]408 U.S. 665 (1972), citing Lovell v. Griffin, 58 S.Ct. 666 (1938).

[37]*Id.* at 707

[38]*Id.* at 644 and Reporters Committee for Freedom of the Press: Ala., Alaska, Ariz., Ark., Cal., Co., Del., Ga., Ill., Ind., Ky., La., Md., Mich., MN, Mont., Neb., Nev., N.J., N.M., N.Y., N.D., Ohio, Okl., Ore., Pa., R.I., SC and Tenn.

[39]*Statutory Provisions on Evidence, Part 9 - Montana Media Confidentiality Act*, 26-1-902 - Extent of Privilege at 1264 (1979), still applicable in 1999).

[40]*Oregon Media Shield Law*, ORS 44.520.

[41]Branzburg v. Hayes, 408 U.S. 665 (1972).

[42]Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Forsham v. Harris, 445 U.S. 169 (1980); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post, 417 U.S. 843 (1974); Houchins v. KQED, 438 U.S. 1 (1978); Globe Newspapers v. Superior Ct., 457 U.S. 596 (1982); Press-Enterprise v. Riverside Sup. Ct., (II) 478 U.S. 1 (1986); Press-Enterprise v. Riverside Sup. Ct., (I) 464 U.S. 501 (1984).

[43]*National Media Guide for Emergency and Disaster Incidents* (June, 1995), 16.

[44]Branzburg v. Hayes, 408 U.S. 665 (1972).

[45]*National Media Guide for Emergency and Disaster Incidents* (June, 1995), 17 (CA Attorney General Opinion 84-804, Dec. 26, 1984).

[46]*Id.*

[47]*Id.* at 17 citing *NPPA Police-Press Guidelines* by Mark Hertzberg (1990); Leiserson v. City of San Diego, 184 Cal. App. 3d 41, 50 (1986).

[48]*Id.* at 18 citing *Ohio Penal Code Section 2917.13-Misconduct at an Emergency* - (effective 1/2/74).

[49]*Ohio Penal Code § 2739.11, Newspapers, Magazines and Periodical Publications - Definitions.*

[50]Lieserson v. City of San Diego, 184 Cal. App. 3d at 41, 229 Cal. Rptr. 22 (Aug. 1986).

[51]USDA Forest Service, *Code of Federal Regulations*, July 1, 1997 Edition, 36 CFR 261.53 at 350.

[52]*Forest Service Manual 1600* - Information Services, Washington Office Amendment 1600-90-1, Effective 6-1-90, Chapter 1650, Press, Radio and Television.

[53]*Id.*

[54]*Id.* at 1650.

[55]Tony Davis, "Last line of defense: Civil disobedience and protest slow down 'lawless logging'," *High Country News*, 2 September 1996.

[56]*Id.*

[57]*Id.*

[58]*Id.*

[59]*Id.*

[60]Tony Davis, "When the crackdown came," *High Country News*, 2 September 1996.

[61]Joe Hardwood, "Register-Guard team arrested at protest site," *Register-Guard*, 17 August 1996, 1A.

[62]*Id.*

[63]*Id.*

[64]Interview with Jim Godbold, Managing Editor for Eugene, Oregon's *Register-Guard* (1997).

[65]Elizabeth Manning, "Newspaper sues Forest Service," *High Country News*, 11 November 1996, 5.

[66]USDA Forest Service, *Code of Federal Regulations*, July 1, 1997 Edition, 36 CFR 261.53 at 350 (Special Closure Order No. 208 issued August 11, 1996).

[67]Interview with Jim Godbold, Managing Editor for Eugene, Oregon's *Register-Guard* (1998); Interview with Lacey Phillabaum, Activist/Reporter for *Earth First! Journal* (1998); Letter to author from Lauren C. Regan, Attorney at Law, Bahr and Stotter Law Offices, Eugene, Oregon, December 8, 1998.

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