

Testimony Before The
House Natural Resources Committee
“New Fees for Filming and Photography on Public Lands”
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Chairman Rahall, Ranking Member Young, and other members of the Committee, my name is Tony Overman, and I appreciate the opportunity to testify regarding the National Press Photography Association’s concerns about the Department of Interior’s proposal to change its rules to impose news restrictions on photography on public lands. In addition to my role as President of NPPA, I am an award-winning photojournalist with *The Olympian* newspaper in Olympia, Washington.

The National Press Photographers Association was founded in 1946 and is dedicated to the advancement of photojournalism, including still photography, videography, film and multi-media. Part of our mission is to “promote a better understanding of the photojournalists’ problems” and “support legislation favorable to, and oppose legislation unfavorable or prejudicial to photojournalists.” It is in that spirit that we wholeheartedly support the testimony presented today by our fellow photographers and their respective organizations.

NPPA’s membership includes nearly 10,000 journalists, who collectively work in every national park in the country. In my own work, I have extensively covered the Mount St. Helens National Volcanic Monument, which is being proposed for National Park status, and have photographed the substantial damage and ongoing reconstruction from last year’s destructive flooding in Mount Rainier National Park. Photojournalists routinely cover news stories like these that occur on public lands, including both breaking news events and other news items of important public interest.

Background

For many years, the Department of Interior did not restrict news photography on public land or require photojournalists to submit to a fee-and-permit process. Earlier this year, however, DOI proposed to amend its rules to establish fees for “commercial filming activities or similar projects, such as still photography.” Under the proposal, DOI would require many photographers to pay a fee, receive a permit, and submit to significant conditions before being allowed to photograph on public land. The proposed rules provide that “[n]ews coverage does not require a permit,” and it therefore appears clear that the Department intended to exclude journalists from these requirements.

While we acknowledge the importance of the Department’s efforts to protect our nation’s natural resources and appreciate its efforts to maintain this important distinction, we are concerned that the draft rules do not draw the bright line that is necessary to exclude all

journalistic activities from the photography restrictions. In comments filed in response to the proposal, we urged the Department to clearly and broadly define news coverage – avoiding artificial distinctions included in the draft over whether, for example, a photograph is “for a market audience” or will be used in a documentary, terms that can apply equally to journalistic and non-journalistic activities – and find a way to make clear that all news coverage and journalists will be exempt from restrictions on photography.

Even with such a broad exclusion, we urge the Department also to avoid burdensome obligations that could undermine the ability of photojournalists – in particular, freelancers and those associated with small news organizations – to carry out their duties. Finally, any rule adopted by DOI should maintain Congress’ presumption that still photography is always permitted on public land unless it falls into one of the narrow exceptions that Congress included in the Department’s authorizing statute.

Restrictions Must Clearly Exclude All News Photography

Consistent with the Department’s apparent goal to avoid restrictions on photojournalists, the proposed rules explain that “news coverage” does not require a permit. That term, however, is not defined in the draft, and the proposed regulation leaves open the distinct possibility that it will be misconstrued or that it will otherwise be interpreted to restrict working journalists. For example, the draft’s definition of “commercial filming” includes photographs created “for a market audience” or for use in a documentary, and thus could be thought to suggest that photographs so used do not constitute “news coverage.” Nearly all photography can be said to be “for a market audience.” Moreover, the line between documentary photography and journalism is effectively nonexistent; documentaries are widely understood to be a particular form of journalism.

The proposal, as drafted, thus would give DOI employees excessively broad discretion to define what is and is not news. That result, of course, would be entirely inconsistent with the government’s constitutional obligation to avoid defining or regulating the collection and reporting of news and with our government’s tradition of openness and fairness to the press.

Many of NPPA’s members work as freelance journalists. Although their work may ultimately be published or appear on the Internet, at the time they are taking pictures they may not be able to satisfy an official who questions them as to whether they are engaged in “news coverage” within the meaning of the rule or prove that they are employed by a news organization. Usually only staff photographers have those press credentials while freelancers, contract photographers and stringers may not, yet they are photojournalists just the same¹

The draft’s use of the term “news coverage” to delineate photography that is not subject to permitting requirements suggests a distinction that does not exist for freelancers and for many other photojournalists. A freelance photojournalist typically does not distinguish between being “on duty” and “off duty” and takes photographs of any newsworthy events he or she observes,

¹ Similarly, many stories involving public lands are important, but not “breaking,” news, a distinction drawn in the Department’s existing rules. 36 C.F.R. § 251.51. The Department’s proposed rules do not and should not distinguish between these types of coverage.

later selling those photographs to a news organization. For example, my wife (also a professional photographer) and I sometimes go to national parks on our days off. We always take photos during our trips. If we licensed one of these photographs to a newspaper, the photograph would constitute news, but we might not have been able to satisfy a Department or Agency employee that the photography was “news coverage” until after it was licensed to the newspaper.

Given the millions of photographers who visit public lands each year, it would simply be unworkable to charge DOI personnel with the responsibility of drawing complicated and ultimately arbitrary lines between whether photography is or is not commercial. To avoid creating this situation, any permit-and-fee regulation should explicitly exclude application in any circumstance to photojournalists or to the collection or reporting of news. The regulation should include an established definition of a “journalist” and of “news”² and should make clear that both the activities of freelance photojournalists and coverage of all news stories, not simply “breaking” news, are permitted without restriction.

No Burdensome Conditions Should Be Imposed on Photojournalists

There are two additional aspects in which the regulation should clarify the degree to which photojournalists will be protected and permitted to do their jobs. First, even as it claims to exclude news coverage from its permitting restrictions, the proposed rule subjects those engaged in what would clearly be defined under any standard as photojournalism to a staff judgment about whether “time, place, and manner restrictions” should be imposed on their work in a particular situation. Restrictions could be imposed on the number of photographers permitted, the type of equipment a photographer may use, or what areas are open to the public but off-limits to news photographers. These broad provisions are entirely inconsistent with our nation’s tradition of journalistic freedom, and they vest DOI staff with virtually unchecked discretion to limit or restrict journalistic activities.

Any new photography rule should recognize the important role that journalists play in our society and acknowledge journalists’ special needs as they perform their jobs. The Department must avoid imposing on journalists any blanket time, place, and manner restriction, and its rule must require that any restriction placed on photojournalists in a particular circumstance be considerably more narrowly tailored than restrictions that apply to the general public.

² See, e.g., *National Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (defining a representative of the news media as “a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”).

See also Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 4(2) (1st Sess. 1998) (with certain exceptions, defining a covered journalist as “a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain[, including] a supervisor, employer, parent, subsidiary, or affiliate of such covered person”); Office of Management & Budget, Uniform FOIA Fee Schedule and Guidelines § 6(j) (52 Fed. Reg. 10017 (Mar. 27, 1987) (“The term ‘news’ means information that is about current events or that would be of current interest to the public.”)).

Second, even though a photojournalist is not required to apply for a permit, DOI's proposal does not make clear that photojournalists would not be subject to burdensome and unreasonable conditions, including requiring the photographer to acquire an insurance policy, indemnify the United States, repair the area used for photography, or post a bond to guarantee any necessary repair. These requirements, like other obligations that might be characterized as relating to "time, place, and manner," could improperly prevent many photojournalists from reporting the news on public land.

Those requirements would place a disproportionate burden on freelance journalists, who often work on a last-minute basis, paying their own costs with the intention to subsequently sell photos to a news outlet, and on photojournalists affiliated with smaller news organizations without the means to comply with any restrictions the staff might impose.

In sum, despite the Department's apparent intent, NPPA is concerned that the proposed conditions could create unacceptable restrictions on photojournalists' ability to collect and report the news, and that they would have a particularly harmful effect on smaller news organizations and freelance photojournalists. The Department must clarify that these requirements should apply to large commercial operations, such as those of Hollywood-style entertainment productions, and not to photojournalists.

Still Photography Must Presumptively Be Permitted

In Congress's authorizing statute, it directed DOI that, subject to limited exceptions, the Department "shall not require a permit nor assess a fee for still photography on [DOI] lands . . . if such photography takes place where members of the public are generally allowed."³ The proposed rules ignore the language of the statute and provide that "[s]till photography requires a permit if" it falls into a number of broad categories, several of which go beyond those authorized by statute.

While the proposal is clear that news coverage is not subject to permitting – and, as I have explained, news coverage must be read broadly – the Department's shift in language marks a significant change in approach. The statute presumes that photography will be permitted unless the government can show that one of the limited exceptions applies. In contrast, the proposed rules suggest that a photographer would be responsible for showing that he or she is engaged in "news coverage," and, failing that, showing that his or her activities do not fall into any of the broadly-worded situations under which the rule would require a permit.

This is not simply a semantic issue. Time is of the essence when it comes to covering news, and it is frequently impracticable to apply in advance to cover a news story, even if it is not "breaking" or "spot" news. Any failure to unambiguously exclude photojournalists from a permitting process could introduce delays as officials consider whether a newsgathering activity is permissible. An untimely decision would have the same effect as an outright prohibition against photography. To avoid this outcome, any rule should therefore include a presumption that journalists and news photography are not subject to permitting and that, in any case, still

³ 16 U.S.C. § 4601-6d(c)(1).

photography is permitted without prior permission. A permit or fee should be required only if the government can meet the burden of showing that a photographer falls into one of the limited categories set forth in the statute.

Conclusion

The photography of Ansel Adams and his contemporaries in the early part of the twentieth century allowed citizens and lawmakers, many of whom could not travel to visit our nation's expansive open lands, to understand the importance of protecting and preserving areas that later became national parks. Today, freelance photojournalists like Jim Brandenburg carry on that documentary tradition in the parks as well as on other natural treasures that might one day become publicly-owned or national parks. Photography, in other words, is central to our longstanding traditions of openness on public lands and of using photographs to share those lands with others.

The Department of Interior's well-intentioned efforts to protect public lands from damage will unwittingly undercut both of these core principles by preventing photojournalists, and, through them, the public at large from having full and unrestricted access to gather news on public lands. While the government may believe that the press has no more right of access than that of the public we have no less right either. We therefore respectfully urge that any restrictions on photography in these important areas be carefully drafted, as described in this testimony, to avoid interfering with photojournalists' ability to report the news.

Mr. Chairman, I appreciate the opportunity to appear before you today, and I would be pleased to answer any questions that you or other members of the Committee might have.