

**PHOTOCOPY
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**The Standardization of Permitting Policies Among Federal
Agencies for Outfitters, Guides and Similar Recreation Service
Providers**

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Overview

The pace of change and reform in permitting and concessions management is creating confusion and disarray among the federal resource managers and recreation service providers. Concessions reform is moving through Congress.^{1,2} Commercial Use Licenses (CUL's), issued routinely in units of the National Park Service for some outfitting and guiding and other recreation related services, have been criticized by the General Accounting Office.³ As a result, some Parks are eliminating CUL's and attempting to replace them with more burdensome concessions contracts that require high levels of bureaucratic overhead. In some areas recreation opportunities are being eliminated.^{4,5} An increasingly frequent justification is the absence in resource management plans of a demonstrated public "need" for such services.

The Forest Service and Bureau of Land Management are operating under long established policies that provide a fair rate of return to the government, although some improvements in administration of the policy are desirable. Both agencies have historically used special use permits to manage services provided by outfitters and guides on public lands. The core language in these permits is also issued for gas lines and other special uses across National Forests⁶. The strict

¹ S. 208, National Park Service Concessions Policy Reform Act, ordered reported February 2, 1994, by Senate Committee on Energy and Natural Resources.

² H.R. 1493, National Park Service Concessions Policy Reform Act of 1993 (see also H.R. 473 and H.R. 2146).

³ United States General Accounting Office, Report to the Chairman, Committee on Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations. *Federal Lands: Improvements Needed in Managing Short-Term Concessioners*, U.S. House of Representatives, Washington, D.C.: 1993. p.p. 12.

⁴ Lancaster, John O. (Superintendent, Glen Canyon National Recreation Area), letter to Wilderness Inquiry. Page, Arizona: November 1993, p. 3.

⁵ America Outdoors Action Alert on Canyonlands National Recreation Area Resource Management Plan. Knoxville, TN.: February, 1994.

⁶ Conversation with John Shilling, USDA Forest Service, Washington, D.C., October 20, 1993.

liability terms included in these permits are not appropriate for outdoor recreation⁷. Therefore, the Forest Service is considering a separate permit for outfitters and guides.

We believe these issues reflect the need for a specific policy for recreation service providers on federal lands that takes into account the need for resource protection, business viability, and public health and safety.

Need for a Standardized Permitting Policy for Outfitting and Guiding on Public Lands

Outfitters, guides, and similar companies provide access to the backcountry for relatively inexperienced recreationists for whitewater rafting trips, cross country skiing, canoeing, kayaking, hiking, horseback riding, mountain biking, fishing, hunting and other types of recreation services. Without outfitters and guides, or an expensive federal replacement, many of these experiences and much federal land would be inaccessible to the average taxpayer.

We believe the need for outfitters and guides to aid the taxpayers' enjoyment of public lands is well established. The majority of families and individuals seeking backcountry recreation opportunities on federal lands do not possess the first aid training, equipment, or knowledge of low impact techniques important to many recreation activities in backcountry settings. Recreationists may simply not have the time to develop the logistical expertise necessary to operate in the areas. Individuals with special needs also deserve recreation opportunities that are available through outfitters. Additionally, the public may prefer the interpretive or educational component of a trip led by an outfitter or guide.

The competitive operating environment, the origination of services from facilities outside federal boundaries, the relatively short term of permits, and the significant levels of investment

⁷ Catherine Hansen, Holland and Hart, Legal analysis of liability issues in Forest Service special use permit for America Outdoors. Cheyenne, Wyoming: January 1994.

required for many of these operations, are among the factors that call for a separate, distinct policy for outfitters and guides. We believe this policy is an important component of a rural economic development strategy, especially where federal lands are predominant.

A significant distinction between outfitter and guide services and hospitality concessions exists. This distinction was recently made in S. 208, approved by the Senate Energy and Natural Resources Committee by a vote of 16 to 4.⁸ For hospitality concessions, an exclusive, long term contract for twenty years or more is awarded to one company. Hospitality concessions generally are awarded to a company for services to the public from facilities inside federally managed lands.

On the other hand, services provided to customers by outfitters and guides generally originate from bases or facilities outside federal and public lands and the activities are low impact. Multiple competitors compete for the same market. There is a misconception among some in the federal government that the investment requirements for recreation service providers are quite low. The General Accounting Office has mistakenly informed Congress, "Short term agreements (5 years or less) are for services requiring little or no investment in facilities."⁹

To the contrary, over time, the investment and financing requirements for many outfitters and guides operating under five year permits have increased significantly. The Nantahala Outdoor Center, for example, has retail facilities, two restaurants, and lodging established to service their customers, who utilize National Forests for recreation. Many outfitters operating on the Colorado River through the Grand Canyon have warehouses, kitchens, and office facilities, financed with loans whose terms are for fifteen years. Financial institutions often examine

⁸ See exemption language and permitting terms for outfitters in S. 208, *op. cit.*

⁹ Keith O. Fultz, *Recreation Concessioners Operating On Federal Lands*, published testimony United States General Accounting Office, Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations, United State House of Representatives, Washington, D.C.: March 21, 1991, p.p. 5.

permits to determine their term and whether the business has renewal rights. Eliminating stability by reducing renewal options for permittees who have met the terms of their permit will reduce investment in facilities, diminish service, and damage rural economies.

A permitting policy for outfitters and guides should be more streamlined and less costly to issue and manage than the concessions contracts of the National Park Service, for example. There are an estimated 9,000 permits or concessions agreements¹⁰. To provide an NPS style concessions contract to all these concessions would be too costly. Clearly, some other form of permitting other than NPS type concessions contracts should be implemented for short term concessions and it should be standardized among all agencies.

Goals of a Standardized Permitting Policy for Recreation Service Providers

The goals of a permitting policy for outfitters and guides should be to provide

1. the incentive for investment in the resources necessary to create and sustain successful small businesses capable of meeting the goals set by resource management;
2. a cost-effective method of selecting those individuals and companies with a business ethic that reflects resource stewardship and a commitment to quality service;
3. a fair return to the government for the privilege of operating on public lands;
4. annual performance evaluation criteria, which reasonably assures public health, safety, quality services and environmentally sensitive use of natural resources, and which serves as the basis for permit "renewal";

¹⁰ United States General Accounting Office, Report to the Chairman, Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations, United States House of Representatives, *Federal Lands: Improvements Needed in Managing Concessioners*, Washington, D.C.: 1991, p.p. 2.

5. the potential for growth of small businesses who contribute to economic development in rural America.

Essential Elements of a Standardized Permitting Policy for Recreation Service Providers

To achieve the goals listed above, several key elements of a permitting policy are required.

1. **Award new permits based on experience, qualifications, and stewardship not fee bidding.** Agencies should base the award of new permits on proposals for operations that reflect the experience of the permittee, their qualifications, demonstrated business skills, quality service, and commitment to resource protection. Fee bidding for permits subverts stewardship and potentially undermines the quality of service. Regardless of mandates to consider other qualifications, in the era of deficit reduction and high levels of scrutiny, agency personnel will tend to select the highest fee bid at the expense of other qualifications, such as service or stewardship. Variable fee burdens will result among competitors that undermine the ability of some companies to compete on quality and resource stewardship.

For these reasons, fees should be standardized for each type of service within a resource area or unit and should be based on fair market value. These terms are reflected in S. 208.¹¹ Some credit should be given to non-compensated services provided to the government by recreation service providers either as part of the evaluation or in lieu of fees.

2. **Provide renewal rights upon expiration.** If the terms of the permit have been met, the resource protected, and quality service provided to the customer then permittees should be granted rights to renew their permit. Adequate investment in services, the procurement

¹¹ See section on standardization of fees for outfitting and guiding in S. 208, *op. cit.*

and maintenance of equipment, the training of quality guides and staff, and the marketing of recreation services, requires a planning horizon that extends beyond the expiration of a five year permit. Companies who are in the third or fourth year of a five year permit may need to acquire equipment, improve facilities, and enter into marketing arrangements, whose life naturally extends beyond the expiration of the permit. If however, upon the expiration of the permit renewal is not an option for a satisfactory permittee or if the award of that permit is subject to a bid, those investments will not be made. It is unlikely that any significant investments in quality services or facilities will ever be made for permits with terms of five years that are subject to a bid from competitors regardless of performance by the existing permit holder.

The goal of the policy should be to select individuals or companies with a commitment to quality, stewardship and with the business skills to succeed and to retain those operators as long as they meet the terms of the permit. Turnover for the sake of turnover or a policy intent on providing business opportunities to an unlimited number of entrants will not serve the resource or the public well. A high level of turnover will also result in higher operating overhead for the agencies and a "cash cow" mentality for permittees. The net effect for a permittee operating in this environment will be to transfer cash from their permitted operation to more secure investments. With the decline of investment in resources, training, and facilities, service to the public and resource stewardship will decline.

3. **Adequate evaluation of permittees ensures quality service and resource stewardship.**

Adequate annual evaluation of the permittees' operations will ensure the delivery

of quality service. Rights to renew should be based on the permittees' ability to provide satisfactory service and compliance with other terms of the permit. The policy of retaining renewal rights for permittees who are not probationary for two consecutive evaluation periods or who are not probationary or unsatisfactory in the final year of their permit is an appropriate policy. S. 208 reflects the intent to retain "satisfactory" outfitters.¹²

Improvements should also be made in the administration of this policy by developing a standardized format for permittees' operation plans and well defined evaluations. Operation plans then become part of the permit and compliance with the operation plan is one measure of the permittees' performance in annual evaluations. Practices to minimize impacts and meet other resource management objectives can be specified in the operating plan. Other elements of the evaluation should measure quality service and the ability to meet the financial obligations to the government. Training permit holders and administrators in requirements and responsibilities of the permit are important components of an adequately implemented policy.

The evaluation should not focus on compliance with administrative procedures or deadlines that do not comply with standard business practices. Evaluations should be developed in cooperation with service providers who are experts in their disciplines. The evaluators should be adequately trained in the administration of the policy and the evaluation.

An appeals process should be established that allows for impartial review of appeals of a probationary or unsatisfactory rating. That process should be fair and easily understood by both parties.

¹² See exemption language and permitting terms for outfitters in S. 208, *op. cit.*

4. Transferability of the permit with the sale of the business. As with any business, the incentive to risk and invest is based partially on the potential to establish and build equity value in the business and property. Many outfitters, for example, work many years at low salaries to establish their businesses. Most do not have retirement plans. Their retirement is based on the ability to sell a successful business. The greater the success the greater is the reward.

A permitting policy should allow the transfer of a permit with the sale of the business to a buyer judged to be qualified by the agency. Agencies should have the authority to deny transfer of the permit if the sale price exceeds a reasonable value and jeopardizes the viability of the business or quality service to the public. Transfers should also be prohibited if the sale price includes any valuation of the permit. Permit administrators should, however, recognize that the value of a business is equal to more than the sum of the value of the assets. The public's demand for the services of an outfitter is based on years of work, ingenuity, quality service, innovation, and technical skill. It is appropriate for the sale price to reflect these values.

5. Permit terms should not create liability exposure to permittees for the inherent risks of the activity. Strict liability clauses in some permits have required outfitters and other permittees to accept liability regardless of negligence or prohibited assumption of risk agreements. These are not appropriate for recreation service permits and will ultimately impair permittees' ability to obtain affordable insurance. Permittees should be responsible for their own negligence, but not for the negligence of the customer or for the inherent

risks of the activity, provided that the customer has received reasonable warning about the apparent risks.

6. **Allocation of use to outfitters.** Providing outfitters with a stable allocation of user days during the term of the permit is an essential element of an outfitter and guide permitting policy. In a regulated environment, where use is fixed by the agency for resource protection, outfitters must be given a specific allocation of that use as a basis for budgeting, financing operations, investing in equipment, and training the appropriate number of guides and support personnel. So called "Freedom of Choice Allocation" scenarios that lump all use (self-guided and outfitted) into a common pool and require the public to obtain a permit from the agency before contacting a guide or outfitter will undermine investment and quality of service. Even if the public demands an outfitter's services, there is no certainty that the customer will be able to obtain a permit from the agency. Allocations may be adjusted upon renewal of the permit to reflect actual use levels if a permittee has been unable to utilize assigned use, except when drought, economic factors, or other extenuating circumstances have resulted in uncontrollable hardship.