



America Outdoors Final Comments to Proposed Forest Service Outfitter and Guide Permitting Directives Federal Register Notice, October 19, 2007, Forest Service Handbook and Forest Service Manual, issued October 19, 2007.

**Comments Submitted by David Brown, Executive Director, America Outdoors to the Federal Register Notice, Proposed Directives for Forest Service Outfitting and Guiding Special Use Permits and Insurance Requirements for Forest Service Special Use Permits, October 19, 2007.**

America Outdoors is an association of outfitters and guides with members and affiliates members that provide outfitting and guiding services in National Forests throughout the U.S. Approximately 1,000 outfitters and guides are members of America Outdoors and our affiliate organizations.

The first portion of our comments deal with the deficiencies in the Federal Register Notice of October 19, 2007. We then offer suggested revisions to the Forest Service Handbook to which the Federal Register Notice refers.

**Imminent negative impacts on small businesses.**

The Notice boldly states that the directives are “supporting small businesses.” 72 FR 59249. However, they will do exactly the opposite. Unless revised, the directives will have dire, negative consequences on a number of small businesses and organizations.

**The first and almost immediate consequence will be felt by those outfitters and entities currently operating their entire business or a substantial portion of it on temporary permits.** For example, one of our members in Oregon has 5,000 user days authorized under temporary permits. Many similar permittees, including guest ranches or other businesses in Colorado, have several hundred to several thousand annual service days authorized under temporary use permits. Under the new directives, these entities will automatically and immediately lose their service days because those temporary permits are invalidated by this proposed directive. Under the new directives, these businesses and organizations will then only be able to obtain one permit per year for a maximum of 100 service days, if that use is available at all, through the reduction of access to existing priority use permittees. These provisions will obviously put many companies and organizations out of business unless they are revised to provide a reasonable transition to long term permits.

While the agency purports to convert temporary permits to priority use, other restrictions, especially the cost recovery provisions included in these directives, eliminate this option for many permittees on temporary permits. While we strongly support converting these recurring uses under temporary permit to priority use, there is no affordable mechanism in the proposed directive to accomplish this. Up until now, these temporary permits have been routinely issued each year. Due to the cost recovery requirements for priority use permits in the proposed directives, some permittees will have to pay thousands of dollars to enable the agency to perform National Environmental Policy Act (NEPA) analyses in order for this conversion to proceed. NEPA requirements for individual permits and cost recovery are major obstacles to issuance of these priority use permits. That barrier is demonstrated by relatively recent agency action, which converted some guest ranch



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priority use permits to temporary use to because of the time and costs associated with NEPA compliance. NEPA costs can be substantial and beyond the capacity of many small businesses and organizations. Few outfitters can bear this cost, especially the many small outfitters who will be faced with cost recovery when they request a priority use permit to replace their temporary permit. Furthermore, they cannot be certain the agency will offer a priority use permit. In light of these impacts, the representation in the Federal Register Notice that the directives are somehow going to support and enhance small businesses is false. To the contrary, these directives will clearly have a substantial and detrimental economic impact on these small businesses.

**Long term negative impacts on small businesses**

1. **The Notice fails to disclose that shifting use from regulated priority use to loosely regulated temporary use will occur at the expense of small commercial outfitter and guide businesses and organizations.** The proposed rule pits one user group against another which will inevitably lead to a system fraught with conflicts. To provide use for temporary permits, the directive requires drawing down the capacity assigned to priority use permittees. This negative impact is guaranteed to result in a consistent reduction of days available to priority use for many small businesses and organizations that are otherwise in compliance with agency regulations. The proposal includes is no discernible method (or intent) to move service days back into priority use. While there is some reference to planning to determine the balance between temporary use and priority use, the bias in the Federal Register Notice and the attendant Forest Service Handbook Revision is to reduce use for existing priority use permittees including small businesses and organizations.

Under the directive, existing priority use permittees are required to use 100% of their allocated annual use once within the past five years to avoid reduction in their allocated use. Even with the provision that adds 10% to actual annual use, this formula virtually assures that overall allocations for priority use will be reduced because of the difficulty for any significant sized business or organization to use 100% of allocated annual use. It is extremely important to understand that this difficulty for many of these businesses is not due to their holding more service days than they need. Instead, it is caused by certain unavoidable realities of the business, and the inappropriate formula for use reductions contained in the proposed rule.

For example, in certain situations, annual service day allocations include shoulder season periods when there often is inconsistent demand. In the southeast, river outfitter permits include daily capacity limits throughout the year. Under the proposed directive, when these permittees' annual utilization is measured against their potential utilization of permit user days, the utilization will fall well below 100% because of the inclusion of the shoulder seasons in the calculation. However, during these periods, sufficient daily capacity must be retained to



ensure that, when groups do book trips, they can be accommodated. As is the case with other service industries, such as hotels, economic survival depends on maintaining this capacity even though it may not be fully used. To achieve 100% utilization of capacity, most travel businesses have to overbook in peak periods, which is not allowed by Forest Service directives and resource management plans.

A comparative example is that average hotel occupancy in the U.S. is around 65%, yet the proposed directive requires 100% utilization of permitted capacity by outfitters. The failure to understand this economic reality is a failure to understand the very business model upon which the industry is based and, consequently, the potential harm caused by the Notice.

- 2. The directives will lead to the elimination of existing use pools unless they are included in management plans.** In some areas, Forest Service permit administrators have created use pools for access by existing permittees. Outfitters contribute service days to that pool to ensure that when someone has a particularly high demand, that demand can be met through issuance of additional use under genuinely temporary permits. Such a temporary use pool is in effect in the Bob Marshall complex in Montana for outfitters with priority use permits. A second use pool provides access for institutional use, but does not require drawing down or taking use away from existing permittees. This arrangement serves as an excellent and effective model for the management of priority and temporary use while also accommodating institutional use. However, the proposed rule would invalidate this system because holders of priority use permits can only apply 30 days in advance of the trip from a common use pool for non recurring use while non priority use holders may apply 12 months in advance. The effective use management strategy in the Bob Marshall demonstrates the need to retain these days for the outfitted public to accommodate periods of higher demand. Under the proposed directive, these days and this model for use management would be permanently lost.

**Assignment of use upon review of permitted allocation will unfairly ratchet down permitted use.**

Outfitter activity and public demand for outfitted services in some National Forests are routinely disrupted due to fires, drought, blow outs, variations in snow pack, availability of hunting licenses/tags and game or low water flows. Each time one of these interruptions occurs, it either forces the outfitter to cancel reservations or adjust the length of their seasonal offerings. This situation is particularly prevalent on rivers with seasons that vary from year to year due to snow pack. As we all know, these issues are inherent risks faced by all users seeking to recreate in nature rather than an environment controlled by man. Nonetheless, it can take outfitters years to re-establish consumer confidence from natural disasters and recover from downturns such as that which occurred after 9/11 or, for hunt outfitters, from the depletion of elk herds by predation.



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Likewise, repeated fire negatively impacts consumer confidence and burned landscapes may need years to recover before a company can attract and revive a customer base. Fishing opportunities may be lost to diseases, bans, management of endangered species, or natural disasters. Negative economic impacts to rural communities are already bad enough and must not be exacerbated by a new policy that irrevocably transfers use from priority status to temporary permits. No company or organization can operate a significant business under such a scheme.

Many outfitters serve groups, which book well in advance, but may cancel due to changes in itineraries. Group bookings also make it harder to fill the last odd number slots on trips. This is especially an issue for many day trip operators. If one or two slots are unfilled, it may be difficult to fill since families or groups may want to participate as a group. While we appreciate the Forest Service making efforts to recognize business aberrations in providing a five year review period and a small percentage of additional use, the threshold for use utilization (100% of allocation) is too high given that the effective result is the permanent withdrawal of service days from the priority use pool. Adding 10% to actual use is an insufficient cushion to provide adequate capacity given the nature of the business and the fluctuations in the length of the season for many outfitters.

We understand and support the Forest Service's effort to encourage, in an appropriate way, the optimum utilization of user days and support the redistribution of use when an outfitter consistently underperforms by some reasonable margin. We also do not object to providing access opportunities for some of the groups mentioned in the Notice. Many of them are already participating under the current permitting system and hold priority use and temporary use permits. Therefore, we do not support setting up a system that is exclusive to institutional use. We agree that non profits and tax-paying businesses providing commercial services should be able to participate in all segments of permitted use as they currently do.

Unfortunately, the proposed directives in the Notice create an inflexible formula and require field staff to diminish use allocations for very good permittees who need firm capacity to meet demand, even in shoulder seasons. It does not sufficiently account for naturally occurring aberrations in demand; the nature of group buying that is especially prominent for some trips or the variations in the length of seasons for activities dependent on snow pack. The proposed directives harm many small businesses, and establish biased directives that will inexorably diminish opportunities for a number of small business entities and organizations. The directive will have significant negative economic impacts in many small communities in which these businesses operate and own property.

We have offered changes to the Special Uses Handbook attached to these comments, which present options for the management and assignment of use. These options take into account use management systems currently in place. These systems are working and



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do not unfairly penalize quality operators. We also offer a strategy to accomplish the proposed transition of many temporary use permits to priority use and allow the establishment of use pools for non recurring uses through a method that does not require reduction of allocated priority use. However, we make it clear that use pools may be unnecessary in many areas and will only add an unfunded mandate to stressed field staff.

**Bias in the directives against the small businesses and organizations serving the outfitted public.**

Only outfitters who provide services to the public under priority use permits lose access under the proposed directives even when there is additional capacity in the Forest. Companies and organizations providing outfitting services under term permits and those services authorized under the proposed temporary permits are not subject to the same stringent utilization requirements to qualify for permits or use. Demand for these temporary permits does not justify imposing different, more stringent, and unreasonable restrictions on priority use permittees. The Federal Register Notice states that increased access for institutional and religious organizations is a goal of the proposal. However, that access can be provided without requiring existing permittees to utilize 100% of their allocated capacity and without requiring reductions of priority use.

Furthermore, while existing permittees are subject to stringent cost recovery and NEPA evaluations upon permit renewal or if they propose to modify their uses under existing permits, new applicants for temporary permits have no such burden. In fact, the agency arbitrarily exempts them from NEPA compliance by classifying these temporary uses as “minor”, when in fact the system to establish the use pool itself is a “major” action. Furthermore, the arbitrary nature of the proposal is underscored by the fact that these new temporary uses may provide some of the same services previously requested by existing permittees, but who were prohibited from doing so by the agency’s cost recovery, needs assessments and NEPA requirements. This discrepancy in documentation requirements is clearly arbitrary and capricious.

**Damage to rural economies.**

Because the directives will diminish the potential of outfitter operations to bring visitors into rural areas, and because many of those companies are located in rural communities, the proposed policy will damage rural economies. This damage will occur in two ways. First, the capacity to serve visitors and groups will be diminished by ratcheting down use allocations and eliminating outfitters’ firm capacity. Second, those outfitters located in rural areas will also lose the ability to sustain and support investments and capital improvements in their facilities and services.

Many resources have unpredictable seasons based on snow pack, water flows, availability of hunting licenses and tags and game and other factors. An example of the negative economic impacts the directives will have on rural communities is described by one of our members who offers river trips:



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“All of our California rivers (Lower Klamath, Salmon, Scott, Smith) are under a Forest Service permit. However, except for the Klamath, they are so remote and so snow-dependent that no outfitter comes even close to reaching a peak day in any given year. (Conversely, there are very few institutions seeking temporary use permits for the same reasons.) A forced formula would make us all lose user days every review period. Meanwhile, the economy of the area is dependent on tourism now that mining, logging, and fishing are gone. This could actually over time kill one of the last legitimate sources of revenue far North California has going for it.”

These operators still need capacity when flows and demand for trips are available and it cannot come from a common temporary use pool, especially one that only allows them to submit applications 30 days in advance as proposed in the directives.

### **Potential for unfair competition.**

We support the issuance of permits to qualified groups for appropriate activities in the same manner as those issued to outfitters and guides. However, the Notice states, the proposed directives are also being issued to streamline and lower administrative overhead for the issuance of temporary permits to facilitate greater participation by youth, educational and religious groups. The proposed directives omit a review of qualifications, annual performance evaluations and inspections for these temporary uses. These requirements are currently imposed on outfitter and guides, including institutions and non profits, holding priority use permittees. On the other hand, the proposed directives propose to enhance access for some groups under “lowered operating requirements”<sup>1</sup> through “streamlined” temporary use permits. Furthermore, the Forest Service took the time to establish a flat fee schedule for temporary permits and then included a separate clause that is headed Section 37 Outfitter and Guide Fees, which is blank. 37.21b provides flat fees for Temporary Permits. However, the directives seem to anticipate a different fee structure for “Outfitter and Guide Fees” for the same or similar activities offered under temporary permits. According to the permit authorization itself, 2700-4i (06/05) IV. A., a priority use holder’s fee may be adjusted to comply with new directives based on market value. This differential treatment creates the likelihood of unfair competition if some groups’ activities authorized under temporary permits provide services that directly compete with existing priority use permittees.

### **Insurance issues.**

The Forest Service Manual 2710 Special Use Authorizations, FSM 2713, proposes increased insurance requirement but has several unrealistic or unfounded proposals, including but not limited to, the proposal to set liability limits by the ranking the relative risks of the proposed activity. There is no data cited upon which to base the categorization of proposed activities by the level of risk, a decision which may be left to the sole discretion of the authorizing officer. We also object to the provisions that allow

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<sup>1</sup> Statement by Jim Bedwell, Forest Service, Director of Recreation and Cultural Resources, America Outdoors convention, Salt Lake City, Utah, November 29, 2006.



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the Regional Forester and Forest Supervisors to increase liability limits. See our comments to the Handbook that follow.

**Safety issues related to the management of use under temporary permits.**

The proposed temporary permit also creates safety concerns, especially for services to children and youth. Without some screening of qualifications, a requirement in the related Code of Federal Regulations, for activities such as rock climbing, whitewater rafting and other adventure activities, and without performance evaluations, the agency will have no ability to objectively evaluate the safety or environmental responsibility of applicants when considering the issuance of permits. Likewise, some check of an applicant's compliance with game laws should be considered prior to issuance of a permit for hunting and fishing activities. We have recommended changes to the proposed directives that enable the agency to maintain some record of performance and history of service without creating undue bureaucratic burdens.

**Impacts of directives have legal implications.**

The seriousness of the economic impacts and the arbitrary and capricious decisions justify a revision to the proposed directives. The Notice also suffers other legal deficiencies. It includes no regulatory flexibility analysis per Regulatory Flexibility Act, 5 U.S.C. § 603 *et seq.*, because the Forest Service erroneously concluded that the proposed directives would not have a significant economic impact on a substantial number of small entities. As the above discussion shows, this conclusion is not only clearly wrong, it reveals the fundamental failure on the part of the agency to fully appreciate the negative economic impacts of the directives on the small, commercial outfitter and guide. In the long run, the many outfitters and other small entities operating under existing priority use permits and temporary use permits will be negatively impacted and some forced out of business.



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## **Comments to Proposed Forest Service Handbook and Forest Service Manual**

The Forest Service has linked the changes to the Forest Service Special Uses Handbook for outfitting and guiding to the Federal Register Notice of October 19, 2008

A section by section analysis of the proposed Forest Service Handbook and America Outdoors' recommended changes follows. Our comments and proposed changes are *italicized*. We included the original text as a reference, some of which is stricken where extensive changes are recommended. We also included the original text with changes noted either through modification of existing copy or by the addition of comments.

### **Comments to Proposed FOREST SERVICE HANDBOOK**

#### **2709.11 – SPECIAL USES HANDBOOK**

#### **Chapter 40 – Special Uses Administration**

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#### **41.53 – Outfitting and Guiding**

For related authorities, policies, responsibilities, and definitions, see 36 CFR 251.50 and FSM 2320, 2340, and 2701 through 2705. Direction on fees for outfitting and guiding is in section 37 of this handbook.

Administer permits for outfitting and guiding conducted on National Forest System lands in accordance with sections 41.53a through 41.53o. Outfitting and guiding include but are not limited to packing, hunts, education, float trips, canoe or horse liveries, vehicle shuttle services, ski touring, helicopter skiing, jeep tours, boat tours, and fishing trips and may be conducted by, among others, educational, rehabilitation, and interpretive ventures and outdoor institutional organizations, including both for-profit and non-profit entities.

*Comment: We support the inclusion of these activities under 41.53.*

#### **41.53a – Authorities**

1. Federal Lands Recreation Enhancement Act (16 U.S.C. 6802(h)), which authorizes issuance of special recreation permits.
2. Term Permit Act of 1915 (16 U.S.C. 497), which authorizes term permits for structures or facilities on NFS land.

#### **41.53b – Objectives**



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1. Provide for outfitting and guiding services that address concerns of public health and safety and that foster successful small businesses consistent with the applicable land management plan.

*Comment:* We support these objectives although we believe changes are needed to the directives to achieve them.

2. Encourage skilled and experienced individuals and entities to conduct outfitting and guiding activities in a manner that protects environmental resources and ensures that national forest visitors receive high-quality services.

*Comment:* The proposals for streamlining the issuance and management of temporary use permits are inconsistent with the proposed objectives in 41.53b. to provide for the health, and safety of the visitors and protect the resources upon which the permittee operates. The proposals specifically violate CFR 251.54(e). In item 2., the agency proposes to “encourage skilled and experienced individuals and entities to conduct outfitting and guiding activities”. Under the proposed directives, it appears reducing overhead and” streamlining” are predominant goals for issuance of temporary permits. The Forest Service proposes to issue permits with no check of qualifications. Since no record of the permittees’ previous performance is maintained, operators with poor safety, service or resource practices could still receive permits. The definition of temporary uses suggests that only “minor”, non recurring uses will be permitted. However, it is not clear which activities fall under the category of “minor” uses. See our suggested changes in 41.53i, which should be considered as the very minimum to qualify for temporary use.

*The goal of streamlining the issuance of temporary permits for students and institutions has its risks. While many institutions and schools are leaders in risk management for outdoor education, streamlining the issuance of permits for groups with little experiences, as proposed in the Notice and in the Handbook, will not allow the agency to adequately screen applicants.*

*Thompson Rivers University website on research into this area cites the following incidents. “The field of outdoor education is littered with the wreckage of good field trips gone bad where students have been grievously injured or died on school-sponsored trips. Notable instances include the deaths of 12 students and one leader during a canoeing trip on Lake Timiskaming in 1978, the deaths of six students during a winter hike on the Cairngorm Plateau in Scotland in 1972, the deaths of seven students and two adults during an ascent of Mt. Hood in Oregon in 1986 and the deaths of seven students in an avalanche in Rogers Pass, BC in 2002.”*



*The need to review applicant's qualifications for temporary is particularly important since one of the goals of the proposed changes is to streamline issuance of temporary permits to reduce overhead costs to "facilitate greater participation in outfitting and guiding by youth, educational, and institutional permit holders". To permit unqualified applicants for temporary permits to conduct whitewater raft trips, climbing expeditions, mountaineering and backcountry travel in winter conditions is to invite disaster. Although the agency does propose to allow contracting with "guides" for specialized services, this proposal is fraught with problems, including the probability that the "guide" will not be endorsed under the holder's insurance policy. The directives propose that the holder of the permit has ultimate management authority, not the contractor. The provision in 41.53i (4) states "The contracting holder will exercise management authority over all the day-to-day field operations of the business, including the guiding services covered by the contract." This provision may void the "guides" liability insurance, if they have insurance. See our comments on this matter in the relevant sections of the Handbook.*

#### **41.53c – Policy**

For related direction, see FSM 2340.3 and 2703.

1. Authorize only those outfitting and guiding activities that are consistent with the applicable land management plan and that meet the screening criteria in 36 CFR 251.54(e) and FSH 2709.11, chapter 10.

***Comment:** The proposed directives and Federal Register Notice regarding the process for streamlining issuance and management for new temporary permits appear to contradict the screening requirements in CFR 251.54(e) cited above. The Federal Register Notice proposes to "decrease administrative costs of temporary use permits for both the Forest Service and the permit holders by eliminating the need for annual performance evaluations for these permits." The proposed directive that allows permittees to use contractors, which are not permit holders, does not comply with the screening requirements in CFR 251.54(e). The cited section of the CFR requires the authorized officer to reject proposed uses if "the proponent is not qualified;" thereby requiring some basic review of any permittee's qualifications.*

*A history of successful operation or conduct of proposed services in similar settings may be sufficient to qualify some applicants for authorization of temporary uses. We do not propose to dramatically increase the bureaucratic process costs for the agency or the permittee. However, at the very least the authorizing officer should have some statement of the permittees' qualifications and prior history, consistent with the screening requirements in the CFR, prior to authorizing use.*



*This issue also adds credence to the agency's goal to convert temporary permits to priority use permits which require a higher level of screening and oversight through the requirement to submit an operating plan and through annual evaluations. The complete absence of performance measures for temporary permittees', as proposed for temporary uses, and the absence of records or reports of that performance are not practices that are in the public's interest, especially when providing services to the general public and to youth, which is one of the directive's objectives. Exempting temporary uses from qualifications, operating plans and performance measures, when compared to the stricter management required of similar priority uses, is also arbitrary and capricious.*

*We do understand that some activities require significantly less regulatory oversight than those that involve higher risk activities or those conducted in remote settings away from emergency medical services. However, the directives have not distinguished which, among those uses, should be subject to less restrictive oversight, according to their level of risk. Therefore, no guidance is given to field staff as to which temporary uses should submit operating plans. The directives should require qualifications and operating plans for higher risk activities or those in remote settings. The directives should encourage the use of outfitters who are already under permit when contracting for services, especially when the proponent for temporary use is unfamiliar with the area. The contracting provisions, while in need of adjustment, authorize contracting for a permittee's services by temporary permit holders.*

2. Do not authorize any development or permanent improvements in non-wilderness in the National Forest System for outfitting and guiding services, except when there is a demonstrated public need and the structures, improvements, or installations have negligible value and minimal impact on national forest resources, as with hitching posts, corrals, tent frames, permitted routes, and shelters.

**Comment:** *We support this language in general, especially the authorization of "permitted routes", which could be especially helpful in converting temporary permits to priority use. We support adoption of the policy developed in Region 1, which allows the use of secondary trails (sometimes referred to as non system trails) through the permit that are not on the agency's map, but which every recreationist in the National Forest uses to reach overlooks, climbing areas and points of interests.*

3. Do not authorize any development, improvements, installations, or caches in wilderness areas, except as necessary to meet minimum requirements for administration of the area for the purposes of the Wilderness Act (16 U.S.C. 1133c).



4. Work with other Federal agencies, State and local authorities, outfitters and guides, and outfitting and guiding organizations to ensure that outfitting and guiding activities are consistent with applicable laws and regulations and to identify unauthorized outfitting and guiding activities. Follow procedures in FSM 5300 in investigating and preventing the occurrence of unauthorized outfitting and guiding activities.

*Comment: This provision in 4. that encourages cooperation with outfitters is a very important and positive component of the proposed directives. We believe that it should be utilized in developing use thresholds for permittees at each resource that follow the revised general guidelines we recommend in 41.53l– Allocation of Use for a Priority Use Permit. The proposed directives for issuance of temporary use may be in conflict with regulations promulgated by State licensing boards for outfitters and guides.*

5. Do not issue a separate permit for outfitting or guiding activities (such as cross-country skiing or horseback riding) to a holder of a permit or term permit for a commercial public service site (such as a pack station or resort) when the outfitting or guiding activities are part of commercial public service site operations and the commercial public service site would not exist without the outfitting and guiding activities. Include the outfitting and guiding activities in a supplement to the term special use permit.

6. Do not authorize use when an applicant owns no tangible assets, lacks the prerequisites to conduct outfitting and guiding (such as a state license, liability insurance, and equipment), and would serve only as an intermediary for others providing those services on National Forest System lands.

*Comment: America Outdoors supports this direction in 6.*

#### **41.53d – Definitions**

See FSH 2709.11, section 37.05, for definitions relating to land use fees for outfitting and guiding.

Allocation of Use. An amount of use allocated to a holder that is measured in service days or quotas and that is enumerated in a programmatic or project decision that is consistent with the applicable land management plan.

Assigned Site. A location that is authorized for use and occupancy by the authorized officer and for which a fee is paid by the holder.

Commercial Use or Activity. ~~Any use or activity on National Forest System lands (a) where an entry or participation fee is charged or (b) where the primary purpose is the sale of a good or service and, in either case, regardless of whether the use or activity is intended to produce a profit (36 CFR 251.51).~~



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***Comment:*** *While we support the general intent of the definition for commercial use or activity, we suggest adoption of a more complete definition, which is a modification of the BLM definition for commercial use. Our proposed definition follows.*

*Commercial use is defined as use of the public lands and related waters for business or financial gain, including efforts to raise funds for non profit operations.*

*When any person, group, or organization makes or attempts to make a profit, receive money, amortize equipment, or obtain goods or services, as compensation from participants in activities occurring on public lands, the use is considered commercial.*

*Commercial use may also be characterized by public advertising for participants or situations where a duty of care or expectation of safety is owed participants by service providers as a result of compensation.*

*Uses by scientific, educational, and therapeutic institutions or non-profit organizations are considered commercial when the above criteria are met. Such uses are subject to permit requirements when the above conditions exist. Non-profit status of any group or organization does not, in itself, determine whether an event or activity arranged by such a group or organization is noncommercial. Profit-making organizations are automatically classified as commercial, even if that part of their activity covered by the permit is not profit making.*

**Priority Use.** Authorization of use for up to 10 years, based on the holder's past use and performance and applicable programmatic or project decision to allocate use. Except as provided in 36 CFR Part 251, Subpart E, authorizations providing for priority use are subject to renewal (FSH 2709.11, sec. 41.53k).

***Comment:*** *We emphasize our support for this definition that provides for 10 year permits and performance-based renewal.*

***Interim Priority Use.*** *Authorization of use for a trial two-year term for a new outfitter with no prior experience prior to issuance of a priority use permit for a full ten-year term.*

***Comment:*** *We have suggested a revision of the name for this type of permit for new permittees.*

**Quota.** An allotment of use measured as the number of stock per trip, people at one time, trips per hour or per day, the number of launches per day, or other unit of measure other than a service day that is consistent with the applicable land management plan guidance and established in a programmatic or project decision.



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***Comment:** We also strongly support this definition.*

Renewal. The issuance of a new priority use permit for the same use to the same holder upon expiration of the holder's current priority use permit.

***Comment:** We also strongly support this definition.*

Resource Capacity. Amount of overall use an area can sustain without detrimental social or physical resource impacts.

Service Day. An allocation of use derived from a day or any part of a day on National Forest System lands for which an outfitter or guide provides services to a client, ~~multiplied by the number of clients on the trip.~~

*Comment: The definition of service day, as written, is confusing and we believe an inadvertent mistake. It seems to substitute an entire trip capacity for what should be one person using the forest for one day. We struck the addendum to what we thought was the intended definition.*

~~Temporary Use. Authorization of a minor, non-recurring outfitting or guiding activity for 1 season or less.~~

***Comment:** This definition for Temporary Use is inappropriate given the lack of viable alternatives to convert temporary use to priority use and given the number of businesses and or organizations providing needed services to the public under this definition.*

*The following definitions should be used for temporary uses.*

### ***Temporary Use Authorizations***

#### **Temporary Use**

- a. **Non recurring temporary use.** Authorization of a minor, non-recurring outfitting or guiding activity for 1 season or less from non recurring use pools or from an estimation of availability of capacity without the establishment of a use pool.
- b. **Non-recurring temporary use pool.** A pool established for non-recurring temporary uses. The amount of use assigned to the pool may be based on the anticipated availability of capacity as determined by underutilized capacity in general or for specific user segments without changing annual allocations from any user segment.



- c. **Temporary priority use.** *Authorization of a minor outfitting or guiding activity for 1 season or less that may be authorized from temporary priority use pools.*
- d. **Priority use pool.** *A pool that may be established for access by priority use permittees from redistribution of unutilized use allocations from priority use permittees consistent with the provisions in 41.53l or by a process that finds that additional capacity is available. Use may also be contributed voluntarily to the pool by priority use permittees. This pool is designed to allow more efficient use of capacity for priority use by authorization of additional use on a temporary basis to existing priority use permittees who show need for additional capacity.*
- e. **Interim Temporary Use Permit.** *For permits that are subject to conversion to priority use, temporary use may be authorized for up to five, one-year terms with no limits on the amount of use assigned to the permit until the Interim Temporary Use Permits can be converted to priority use status. A history of successful operation under a temporary or priority use permit will usually be sufficient to screen and qualify the applicant for an Interim Temporary Use Permit. The permit may include a clause that allows the use to roll-over for each year if no significant performance, financial, safety, or resource protection issues are found. Use may be adjusted from year to year as may be appropriate for resource conditions.*

**Comments:** *These options listed above as revised definitions for management of temporary use should be available to permit administrators to manage and assign temporary use.*

#### **41.53e – Needs Assessment, Resource Capacity Analysis, and Allocation of Use**

Allocate outfitting and guiding use in a project decision pursuant to 36 CFR part 215 or in a programmatic decision pursuant to a wilderness plan, a wild and scenic river plan, or plan for another type of congressionally designated area. Follow the direction in section 41.53e, paragraphs 1 and 2, as applicable. These procedures also may be used to allocate outfitting and guiding use when competitive interest exists for the same resources or type of use or when considering significant changes to current use or demand. Allocate use in service days or quotas for both temporary and priority use (sec. 41.53j and 41.53k).

1. Conduct a needs assessment to determine the public or agency need for authorized outfitting and guiding activities. A needs assessment may be conducted as part of public scoping during a NEPA analysis. Consider accessibility, size of the area, difficulty of the terrain, current levels of outfitting and guiding, and demographics of visitors to the area.



- a. When conducting a needs assessment for outfitting and guiding activities in a wilderness area, assess whether these activities are necessary for realizing the recreational or other wilderness purposes of the area and the extent to which the activities may be authorized consistent with maintaining the wilderness character of the area. Consider whether authorizing the activities would impede the Forest Service's ability to meet the recreational and other goals of the Wilderness Act.
  - b. Review previous needs assessments when reauthorizing use to ensure that they remain relevant to current and projected use trends, and update them if necessary.
2. When reliable information suggests that resource capacity has been reached, conduct a resource capacity analysis to assess the amount of use and types of activities that may be conducted without detrimental environmental and associated impacts. The analysis may be conducted at a programmatic level or at a project level to address specific activities or geographic areas. In analyzing resource capacity, consider:
- a. The applicable land management plan and other applicable programmatic and project decisions.
  - b. Inventoried conditions.
  - c. Current visitor use (amount, type, length of stay, and group size).
  - d. Correlation of visitor use to plan guidance and inventoried conditions.
  - e. The results of management actions, such as vegetation treatments, watershed rehabilitation, and findings from monitoring.
3. Determine the allocation of use *between outfitted and guided visitors and self-outfitted, non-guided visitors*. Further, determine the allocation of outfitting and guiding use between priority and temporary use. In allocating between priority and temporary use, consider:
- a. Visitor needs for outfitting and guiding services, based on visitor preference surveys, use records, and trends.
  - b. Type, location, and amount of outfitting and guiding services that would help meet agency objectives.
  - c. Current levels of outfitting and guiding use and projected growth.

**~~Distribute the allocation for temporary use pursuant to section 41.53j, paragraph 7.~~**



***Comment:** We oppose the requirement to reduce priority use as the principal means for establishing temporary use pools. The direction in the original proposed text in 3 is confusing so we inserted new text in an effort to capture what we think was meant in this section.*

#### **41.53f – When Permits Are Required**

1. Individuals or entities conducting outfitting or guiding activities on National Forest System lands must be authorized under a special use permit, either form FS-2700-XX for temporary use, form FS-2700-4i for priority use, or a supplement to form FS-2700-5 or FS-2700-5c when outfitting and guiding are authorized in connection with a commercial public service site.
2. Outfitters based off National Forest System lands who rent and deliver equipment or livestock to the public on National Forest System lands must obtain a permit if they, their employees, or agents occupy or use National Forest System lands or related waters in connection with their rental programs.
  - a. For example, a permit is required if a boat livery operator provides service, including delivery or pickup of boats, at sites on National Forest System lands.
  - b. No permit is necessary if an operator's customers transport rented equipment to and from National Forest System lands or if services are provided to Forest Service employees, Forest Service contractors, or other federal officials in the course of their official duties.

#### **41.53g – Issuance of New Outfitting and Guiding Permits**

1. Generally, authorize outfitting and guiding under the Federal Lands Recreation Enhancement Act (16 U.S.C. 6802(h)). Authorize outfitting and guiding under the Term Permit Act of 1915 (16 U.S.C. 497) when the outfitting or guiding activities are part of commercial public service site operations and the commercial public service site would not exist without the outfitting and guiding activities.
2. New outfitting and guiding permits may be issued when one or more of the following occurs:
  - a. An allocation of use is increased, a resource capacity analysis demonstrates that capacity exists, or a needs assessment supports a public need.
  - b. A permit is revoked or terminates and a new permit is not issued to the holder.
  - c. Service days or quotas allocated to a holder are reduced.



d. Competitive interest in an area or activity arises where no outfitting and guiding permits have been issued for that area or activity and where the proposed use is consistent with the applicable programmatic or project decision.

e. An application has been submitted to provide outfitting and guiding services for an area or activity that has not previously been authorized and for which there is no competitive interest.

3. Determine whether there is competitive interest in the opportunities described in section 41.53g, paragraph 2a through 2c. For opportunities in which competitive interest exists, including the opportunity described in paragraph 2d, solicit applications through issuance of a prospectus (FSM 2712.2).

a. When evaluating applications submitted in response to a prospectus, consider the applicants' experience, knowledge of the area to be authorized, financial capability, performance record as an outfitter or guide, and other pertinent factors. Use form FS-2700-4i, or a supplement to form FS-2700-5 or FS-2700-5c, as applicable, when issuing outfitting and guiding permits through a competitive process.

*Comment.* We generally agree with the criteria in FSM 2712.2 and in 41.53g above except that fee bidding should not be a criterion for consideration or selection of applicants. Therefore, the "minimum fee" consideration in FSM 2712.2 should not be applied to outfitter and guide permits. The agency practice of charging the same fee for the same activity is appropriate and should be continued. This practice of requiring the same fee for the same activity was required by the federal court decision in *Tongass Conservancy v Glickman*.

4. For opportunities described in paragraphs 2a through 2c in which no competitive interest exists and for an application meeting the criteria in paragraph 2e, document the determination of no competitive interest, and issue a permit if the applicant meets applicable requirements (36 CFR 251.54; FSM 2712).

*Comments:* We generally support this provision in 4. for qualified applicants.

#### **41.53h – Applications for Outfitting and Guiding Permits**

1. Encourage proponents and applicants to submit proposals and applications using standard form SF-299, Special Use Application and Report (FSH 2709.11, sec. 11.3). Require proponents and applicants to identify the services to be performed, proposed number of service days or quotas, National Forest System lands to be occupied, modes of transportation to be used, proposed season of use and itinerary, and other matters relating to the proponents' and applicants'



operations in sufficient detail for the authorized officer to make a decision on the request in accordance with regulatory requirements.

2. Proposal, application, and authorization procedures in 36 CFR 251.54 and FSM 2712 apply to proposals and applications for outfitting and guiding permits.

***Comment:** Some description of the applicant's qualifications to perform the services should be provided for priority and temporary uses and included on the application form in 1. Experience conducting the services or activities and an operating plan for proponents unfamiliar with the area should be basic considerations for higher risk activities and for remote locations. The use of the word "minor" in describing temporary uses and the proposal to streamline temporary use applications do not adequately describe which types of use will be authorized under the proposed temporary permit. Activities that involve technical skills, special environmental practices or which present higher risks should not be authorized under a streamlined temporary permit unless some basic review of qualifications, first aid certifications or operating plans are provided for. Qualifications for specific activities under the environmental conditions present and qualifications to perform first aid and emergency evacuation procedures for backcountry use should be described in the application or operating plan as appropriate. An exception to these requirements may be appropriate in states that license outfitters and perform screening and reviews for state licenses prior to the issuance of the Forest Service permit. In Idaho, where outfitters are required to hold state licenses, the state and the Forest Service jointly review outfitter applications with the state conducting a final screening with Forest Service input to qualify the preferred applicant. The state of Idaho identifies the preferred licensee/permittee, whose name is forwarded to the Forest Service. The Forest Service should coordinate with state licensing agencies regarding the applicant's qualifications for a permit and not duplicate screening processes performed by states. In other cases, applicants who have a long history of providing services, can state that experience on the application and provide proof of their experience.*

3. Conduct environmental analysis for outfitting and guiding applications in accordance with FSH 1909.15, the National Environmental Policy Act Handbook.

#### **41.53i – Requirements for Temporary and Priority Use Permits**

1. Record the following on temporary and priority use permits:
  - a. The type of authorized service or activity (such as big game hunting, white water rafting, or fishing trips).
  - b. The resource area (such as wilderness area, river, or administrative unit) in which the activity is to be conducted.



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- c. The allocation of use in terms of service days or quotas, including the unit of measure for the quotas.
- d. The modes of transportation to be used and other factors necessary to reflect the nature and scope of the activity.

2. Require an approved operating plan for the term of the permit and, if appropriate, an annual itinerary. Specify authorized use of assigned sites in the operating plan and annual itinerary.

*Comments: See our comments above regarding the situation in which the requirement for operating plans for temporary permits (41.53h 2.) should be implemented.*

3. Specify in the permit the amount of livestock to be used for transportation of people and equipment, and specify if grazing is permitted. Do not issue a separate livestock use permit. Include a clause that requires the holder to record and report the amount of authorized grazing that occurs. Grazing should be reported using the Annual Grazing Statistical Report (form FS-2200-j).

4. Require holders to submit a report of actual use within 30 days of the close of their operating season.

5. Require the holder or the holder's employees to conduct the day-to-day activities authorized by the permit, except as provided in paragraphs 5a through 5c. To ensure that services and equipment contracted under paragraphs 5a through 5c are covered by the contracting holder's insurance policy, require the insurance policy obtained by the holder to include an endorsement covering contracted services and equipment. Use the endorsement in FSM 2713.1, paragraph f, exhibit 01, for this purpose.

*Comment: See our comments in the insurance section. Both insurance agents and some large permittees which currently contract for services question the endorsement proposals in 5 for contractors.*

- a. Ancillary services that support the use authorized by the permit may be provided by a party other than the holder or the holder's employees, but (other than unanticipated, intermittent services authorized by paragraph 5c) only with prior written approval from the authorized officer.

*Comments: See our proposed additions to the language in a. below.*

*Whenever possible, the contractor should be an existing permittee to ensure that the services are consistent with applicable regulations and permit requirements for use of the area. (Guides providing these services, unless permitted and established businesses, will not be covered by workers*



*compensation, may not have sufficient liability insurance, and certainly will not comply with licensing laws in some states.)*

Examples of ancillary services covered by this subparagraph include provision of:

- (1) Special equipment or livestock.
- (2) Food and shuttle services.
- (3) For a limited number of trips, a specialized guide for people with disabilities or for highly technical trips. Require applicants and holders who would like to contract for ancillary services to submit the contract for these services with their application or at the beginning of each operating season, as appropriate. When the holder contracts for ancillary services, the holder is responsible for compliance with all terms and conditions of the permit in connection with provision of the ancillary services. Ensure that the ancillary services are covered under the holder's operating plan, and that the contract for ancillary services states that the holder remains responsible for compliance with all the terms and conditions of the permit, including the operating plan.

b. A holder authorized to provide solely outfitting services may contract with a guide *or an outfitter* who already holds a permit at the resource, but only with the prior written approval of the authorized officer, based upon a finding that the following conditions are met:

***Comment:*** *In b. we added "or an outfitter", to broaden the options to outfitting businesses from subcontracting with "guides", which implies individuals.*

The services of the contracted guide are covered under the contracting holder's operating plan.

- 1) The contracted guide or outfitter has all required state licenses and appropriate Forest Service permits.
- 2) The contract for the guiding services states that the contracting holder remains responsible for compliance with all the terms and conditions of the permit, including the operating plan.
- 3) ~~The contracting holder will exercise management authority over all the day to day field operations of the business, including the guiding services covered by the contract.~~ Require applicants and holders who would like to contract for guiding services to submit the contract for these services and additional documentation establishing that all the foregoing requirements are met. Require applicants and holders to



submit this documentation with their application or at the beginning of each operating season, as appropriate. A holder contracting for guiding services is responsible for compliance with all the terms and conditions of the permit in connection with provision of those services.

- c. When on a particular day a holder lacks sufficient equipment or guides to accommodate the holder's customers, allow the holder, without prior written approval from the authorized officer, to contract for additional equipment or guides from another holder. When a holder contracts for additional equipment or guides from another holder under this subparagraph, the contracting holder is responsible for compliance with all the terms and conditions of the permit in connection with provision of the contracted equipment and services.

Do not approve requests to transfer all or part of the authorized use to others. If a holder is unable or unwilling to provide the services authorized by the permit, revoke the permit or reduce the allocation of use. If appropriate, assign all or part of the holder's use to others in accordance with section 41.531, paragraph 4.

*Comments: Contracting for ancillary services for temporary uses, if they are for outfitting and guiding, should be done through outfitters with permits if they have capacity available to accommodate the use. This is especially important since the proposed oversight of temporary uses is minimal and existing priority use permittees or permit holders will be subject to evaluation, inspections and regulations. However, it is not appropriate for the contractor to cede management of trips to the permit holder if that permit holder has no experience providing the service or activities in the first place. This may also void the contracted party's insurance, which may be the primary coverage in most circumstances. Many insurers will not cover the activities of subcontractors. In some areas, outfitters are allowed to swap service days without compensation for them when another outfitter has the need for capacity. This practice may be authorized in the management plan and should not be prohibited where reasonable and there is no compensation for use days.*

#### 41.53j – Issuance of Temporary Use Permits

- ~~1. Authorize temporary use on form FS-2700-XX, Temporary Use Permit, for 1 season or less. Allocate a maximum of 100 service days or the equivalent in quotas.~~
- ~~2. Only 1 temporary use permit may be issued per holder, including holders of priority use permits, per area specified in the needs assessment, capacity analysis, or other pertinent analysis, per calendar year.~~
- ~~3. Issue temporary use permits non-competitively.~~



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~~4. Issuance of a temporary use permit does not commit the Forest Service to authorize outfitting and guiding use in the future. Temporary use permits are not subject to renewal.~~

~~5. Those that do not hold a priority use permit may apply for a temporary use permit 12 months in advance of the proposed use.~~

~~6. Holders of a priority use permit may not apply for a temporary use permit until 30 days in advance of the proposed use.~~

***Comment:** The proposed directive on temporary use is unworkable and should be deleted and in its place we offer the following language below. We also offer the following as options for issuance of temporary use.*

1. *Authorize temporary use on form FS-2700-XX.*
2. *An Interim Temporary Use Permit may be authorized for consecutive, one-year terms for up to five years with no limits on the amount of use assigned to the permit until the Interim Temporary Use Permit can be converted to priority use status. Interim Temporary Use Permits may be reissued if necessary. Outfitters with a history of operations who are eligible for priority use permits should routinely qualify for an interim temporary use permit.*
3. *Temporary use for non recurring uses may also be authorized from use pools, which are not drawn from priority use or priority use pools, under the following conditions. We emphasize that the following are options for managing use that may not be appropriate at every resource.*

*a. Priority Use Pool. A pool for temporary priority use from use redistributed from or contributed voluntarily by priority use permittees may be established for use by existing priority use permittees.*

*b. A Non-recurring Use Pool for non-recurring use may also be established that is independent of priority use but is determined by the availability of capacity at the resource at the time. The capacity established for the nonrecurring use pool may also be established by Forest planning and resource management planning.*

*For example, if the resource is under capacity either through under utilization of priority use or self-guided use or if self-guided use is not regulated and therefore under capacity, then a temporary use pool may be established for non-recurring use. Permit administrators may issue the permits on a first-come, first-served basis or through a lottery.*

*c. Use pools that are in existence at the time of the issuance of this directive shall not be invalidated if they are working and meet the*



*objectives of the directive. We believe that it is important to note that use pools are not needed at every resource because there is either no demand for them or no need. They should not be forced on permit administrators where existing systems are working.*

4. Only 1 one temporary use permit may be issued per holder, including holders of priority use permits, per area consistent with resource needs assessments, capacity analysis, or other pertinent analysis, per calendar year.
5. Issue temporary use permits non-competitively.
6. *Applications for temporary use shall include a description of the permittees' qualifications, experience, first aid qualifications, and may require operating plans and evacuation procedures, where appropriate. Notice of game and fish violations or convictions of federal or state laws or previous permit violations shall be included on the application. References from previous permit administrators, as may be appropriate, shall also be provided and a listing of permits held for the past two years to the extent practical shall be included.*
7. *Issuance of a temporary use permit or interim temporary permit does not commit the Forest Service to authorize outfitting and guiding use in the future. Temporary use permits are not subject to renewal.*
8. *Upon termination of a temporary use permit, all service days or quotas allocated to the holder of that permit shall be returned to the common pool except for use authorized under an Interim Temporary Use Permit.*
9. Add national or regional clauses to a temporary use permit as necessary to address site-specific circumstances.
10. *Annual performance evaluations and monitoring may be required for temporary use permits where indicated. Temporary use permittees shall provide a report at the end of the period indicating any significant injuries or resource impacts and a record of their performance report kept on file for five years. Failure to accurately report incidents may render the holder ineligible for future permits.*

*(Note: Outfitters have reported to us that some groups issued temporary permits in the past left trash and fouled areas in which they operated. Unfortunately, since these uses are not subject to inspection or evaluation, other permittees are at risk of being cited for these abuses. Any use of sensitive areas for extended periods should be subject to the requirement for an operating plan, post operation reporting or evaluation to assure that the*



*area is left clean and that the practices appropriate for the area were followed.)*

- 11. An operating plan may be required, at the discretion of the authorized officer, for a temporary use permit. Basic operating plans are generally required for higher risk activities or activities in remote settings. Operating plans should be required for extensive overnight backcountry use. A daily itinerary is required when an operating plan is not required.*
- 12. If cost recovery provisions apply to priority use permits, they should apply proportionally to temporary permits. However, we recommend that cost recovery for NEPA compliance not be applied to outfitter and guide permits. We support the exemption of 50 hours of work annually from the requirement for cost recovery for permit administration.*
- 13. Applicants for temporary permits with a history of not utilizing previous permits for non recurring use, may be denied temporary permits in the future.*

#### **41.53k–Issuance of Priority Use Permits**

1. Authorize priority use for up to 10 years. Generally, use form FS-2700-4i, Special Use Permit for Outfitting and Guiding, to authorize priority use. When outfitting or guiding activities are part of commercial public service site operations and the commercial public service site would not exist without the outfitting and guiding activities, use the supplement to form FS-2700-5, Term Permit, or form FS-2700-5c, Resort/Marina Term Permit, to authorize priority use. When authorizing outfitting and guiding with a term permit, the use may be authorized for the entire term of the term permit, provided that the environmental analysis evaluated the use for that term and the decision based on that analysis approved that term

*2. When a proponent or applicant for a priority use permit has no previous record of providing outfitting and guiding services that are equivalent or similar to the services to be authorized under the permit, issue an Interim Priority Use Permit for 2 years, with an option to extend the term for up to 10 years.*

***Comment:*** *Please note that new permittees may need a longer period to establish their use. Therefore, by extending the term to 10 years after the two-year trial priority use permit, the first use review will occur 7 years after the initial Interim Priority Use Permit was issued and then again upon conclusion of the permit term.*

*3. If the holder of a 2-year interim priority use permit performs acceptably for the first 2 years, and if the holder's use is consistent with the applicable land*



*management plan or project implementation decision, the authorized officer shall extend the permit for up to 10 years. If the holder receives an unacceptable performance rating at the end of the 2-year period, the permit shall terminate. Ratings shall be subject to appeal.*

*4. Except as provided in 36 CFR 251.124(b), when a priority use permit terminates, the permit is subject to renewal without competition, provided that the use authorized by the permit is consistent with the applicable land management plan, applicable laws and regulations, and the terms of the permit and the holder has performed satisfactorily as demonstrated by acceptable annual performance ratings. These determinations shall be made in accordance with 36 CFR 251.54 (proposal and application requirements and procedures); ~~36 CFR 251.58 (cost recovery)~~; 36 CFR 251.64 (renewal); and FSH 2709.11, section 11.2, paragraph 2 (proposals involving existing uses).*

***Comment:*** *We support the renewal provisions in 4. However, the provision, which includes a cost recovery requirement, is precisely why the Federal Register Notice of October 19, 2007 was misleading by purporting to support small business. The rule stipulates application of cost recovery to priority use permits, including the costs for NEPA analyses, but there is no similar requirement for temporary uses or temporary permits, which is an arbitrary and capricious decision. Cost recovery for NEPA compliance should not be applied to recreation permits. We believe the agency should perform NEPA evaluations where necessary as part of their programmatic responsibilities since the availability of outfitting and guiding services to the public is a fundamental programmatic service to the recreating public. We also eliminate the provision that allows permit decisions to be made at the sole discretion of the authorizing officer because these decisions can be made arbitrarily.*

*When the cost recovery rule was issued, we were told it would not impact outfitters because permit renewal could be accomplished within the 50 hour credit allowed for permit administration and NEPA. Unfortunately, that has not been the case and the elimination of the alternative for granting temporary permits for more than 100 user days immediately forces cost recovery for NEPA evaluations onto permittees in order to obtain priority use or the permittee will be forced out of business altogether. In most cases, permittees cannot bear the costs for NEPA processes, which were developed outside the market environment and applied to businesses with much greater economies of scale. The agency should use CE's wherever possible. It would appear that if temporary permits have been issued repeatedly for the same activity and scoping finds no significant negative impacts, then use of CE's are justified to convert the permit to priority use especially if there are no significant changes in the activities.*



5. In renewing a priority use permit, the authorized officer may prescribe new terms and conditions. Make any changes to use allocations in accordance with section 41.531, paragraph 3.
6. When a priority use permit for activities other than sport hunting and fishing in a Conservation System Unit in Alaska expires, the permit shall not be reissued if there is a need to limit use and there is competitive interest by preferred operators in providing visitor services (16 U.S.C. 3197; 36 CFR 251.124(b)).
7. When notified by a holder that a change in ownership of or a controlling interest in the holder's business entity is being considered, inform the holder that:
  - a. A priority use permit is a privilege acquired by demonstrated acceptable performance and is not transferable, either upon the sale of the business entity or the sale of a controlling interest in the business entity;
  - b. The permit is not real property, does not convey any interest in real property, and may not be used as collateral;
  - c. Upon consummation of a change of ownership of or controlling interest in the business entity, the holder's permit terminates; and
  - d. The party who acquires ownership of or a controlling interest in the business entity may be issued a permit if the authorized officer determines that the prospective holder meets Forest Service requirements, including financial and technical capability.
8. Instruct the holder to submit form FS-2700-3a, Request for Termination of an Application for Special-Use Permit, for relinquishment of the permit.
9. Instruct the party who acquires ownership of or a controlling interest in the business entity to submit:
  - a. An application for a permit on Form SF-299 or the equivalent.
  - b. Documentation of the change in ownership, including properly executed documents showing a transfer of ownership of the equipment or other assets used by the business, and for businesses based on private land, properly executed documents showing a transfer of ownership of the real and personal property used by the business; or
  - c. Documentation of a change in a controlling interest, including properly executed documents showing a transfer of a controlling interest in the business entity.



10. If the change of ownership or control is not consummated and the original holder has relinquished the permit, the permit may be reissued to the original holder. Prior to reissuing the permit, require the original holder to submit documentation establishing ownership of or a controlling interest in the business entity.

*Comment: We generally support 6 – 10 above.*

#### **41.531–Allocation of Use for a Priority Use Permit**

1. When issuing a priority use permit, allocate use in accordance with the applicable land management plan, the applicable project implementation decision, or other appropriate analysis.

~~2. During the 5<sup>th</sup> year of a priority use permit, review actual use, and adjust the allocation of use to match the highest amount of actual use in 1 calendar year during that period.~~

~~a. Add an additional 10 percent to this amount in consideration of market fluctuations, availability of state hunting licenses, and natural phenomena that may have adversely affected the holder's ability to utilize the authorized use fully, provided that the combination of the highest amount of actual use in 1 calendar year and the additional 10 percent of use shall not exceed the original amount of allocated use.~~

~~b. Amend the permit to reflect the adjusted allocation of use.~~

*Comment: For the reasons, explained in the prefacing comments, this strategy to redistribute use from priority use to loosely regulated temporary use is inappropriate and will damage many small entities. A proposed new paragraph can be found below to replace the language in 2. Many permittees have operated their businesses under the standards for capacity utilization that have been in place for the past 25 years. To change that standard retrospectively is unfair and unnecessary, if not illegal.*

*2. During the 5<sup>th</sup> year of a priority use permit, review use using periods of peak use at the resource for measuring actual use.*

*a. Use may be increased to actual use,*

*b. remain the same or*

*c. be diminished if the permittees' utilization falls significantly below average utilization of annual allocation by permittees providing the same service at the resource.*



*To determine utilization of annual allocations, do not use shoulder seasons or periods when permitted activity is not feasible even though the permit term may cover these months. Use shall not be reduced unless the permittee's utilization falls significantly below the average utilization of allocation for the permittees providing the same services at the resource during the peak season. The average utilization of allocation by permittees providing the same service at a resource and under similar operating conditions may be the basis or guide upon which reassignment of use is based. The actual threshold to be used as the basis to reassign use and the peak season period shall be established in consultation with permittees at the resource and shall encourage an optimum utilization of allocated capacity consistent with resource conditions, economic factors, variations in snow pack, the availability of hunting licenses/tags and game, fire and drought and similar factors.*

*Use reviews may be suspended when economic or environmental factors have seriously compromised the ability of the permittee to attract business. In some instances, a permittee may be isolated in a remote area. Under those circumstances, a threshold based on average utilization is not appropriate. In those instances the permit administrator may work with the permittee to establish a reasonable expectation for permit utilization based on prevailing conditions.*

*Use redistributions of allocated capacity after use reviews that are adverse to the permittee are subject to appeal.*

*When a permittee falls 20% below the average utilization of allocated capacity for all the permittees providing the same service under similar conditions at a resource, then use may be assigned at the highest level of actual use plus 25%, (provided there are no extenuating circumstances, such as fire, illness in the family, drought, gasoline shortages or economic disruptions that justify a waiver of use redistribution).*

*The unused allocation may*

- a. be assigned to a priority use pool for existing permittees,*
- b. held in reserve in the event that there is a likely prospect that the permittee will recover prior to the next review period or changes in conditions at the resource require that the use not be authorized.*

*A permittee who has lost use after utilization review may be assigned additional use up to their original allocation when actual use recovers or exceeds the average utilization of permittees at the resource for two consecutive seasons. The permittee may also draw use from the priority use pool for existing priority use permittees prior to the next review period.*



3. *When renewing priority use permits, the allocation of use may be maintained, increased, or decreased, provided that the allocation is consistent with paragraph 1.*

~~*a. When a priority use permit is about to terminate and the holder has applied for renewal of the permit, review actual use during the last 5 years of the permit, and adjust the allocation of use to match the highest amount of actual use in 1 calendar year during that period.*~~

~~*b. Add an additional 10 percent to this amount in consideration of market fluctuations, availability of state hunting licenses, and natural phenomena that may have adversely affected the holder's ability to utilize the authorized use fully, provided that the combination of the highest amount of actual use in 1 calendar year and the additional 10 percent of use shall not exceed the amount of allocated use during the last 5 years.*~~

**Comment:** *As proposed, 3 a. and b. in the proposed directives represent a grave threat to most small businesses and organizations with priority use permits. This language is unacceptable and threatens the viability of their operations over the long term. New language for 3a., b., is provided below.*

*When a priority use permit is about to terminate and the holder has applied for renewal of the permit, review actual use during the last 5 years of the permit. Review use using peak season use periods at the resource for determining actual use.*

- a. Use may be increased to actual use,*
- b. remain the same or*
- c. be diminished if the permittees' utilization falls significantly below average utilization of permittees at the resource.*
- d. Do not include shoulder seasons use to measure utilization of capacity or periods when permitted activity is not feasible even though the permit term may cover these months. Use will not be adjusted unless the permittee's utilization falls significantly below the average utilization of allocation for the permittees providing the same services at the resource. The actual threshold to be used as the basis to reassign use shall be established in consultation with permittees at the resource, but shall encourage an optimum utilization of allocated capacity consistent with resource conditions, economic factors, variations in snow pack, the availability of hunting licenses/tags and game, fire and drought and similar factors.*

*Use reviews may be suspended when economic or environmental factors have seriously damaged the ability of the permittee to attract business. In some*



*instances, a permittee may be isolated in a remote area. Under those circumstances, a threshold based on average utilization is not appropriate. In those instances, the permit administrator may work with the permittee to establish a reasonable expectation for permit utilization based on prevailing conditions.*

*When a permittee falls 20% below the average utilization of allocated capacity for all the permittees providing the same service under similar conditions at a resource, then use may be assigned at the highest level of actual use plus 25%, (provided there are no extenuating circumstances, such as fire, illness in the family, drought, gasoline shortages or economic disruptions that justify a waiver of use redistribution).*

*Use redistributions of allocated capacity after use reviews that are adverse to the permittee are subject to appeal.*

*The unused allocation may*

- a. be assigned to a priority use pool for existing permittees,*
- b. may be assigned to a permittee based on their demonstrated need for increased capacity based on actual use after a use review,*
- c. be held in reserve in the event that there it is likely that the permittee will recover prior to the next review period.*

*A permittee who has lost use upon review may be assigned additional use up to their original allocation when their actual use recovers or exceeds the average utilization of permittees at the resource for two consecutive seasons. The permittee may also draw use from the priority use pool for existing priority use permittees prior to the next review period.*

*4. When use is not allocated pursuant to paragraphs a. and b:*

- a. Reallocate the use through a solicitation process; or*
- b. Reserve the use pending completion of a resource capacity analysis.*

***Comment:*** *4. has been changed to reflect that a common pool for Non-recurring permits does not require drawing down use from existing priority permittees.*

#### **41.53m—~~Reduction of~~ Changes in Use Based on New or Changed Decisions**

*New or changed decisions may establish a level of outfitting and guiding that results in an ~~permanent~~ increase or a reduction of a holder's allocation of use. When considering renewal of priority use permits in this situation:*



- 1) *Use may be increased when capacity analysis or other assessments indicate the availability of increased capacity. Distribute use to existing holders if they are utilizing all or a high percentage of their capacity and the new capacity is not sufficient to sustain a new permit holder or there is no competitive interests. Use may also be distributed proportionally or through the issuance of a prospectus. Follow the direction in 41.53l. or through 4 in this section if appropriate.*

*When plan amendments or under utilization of overall allocations for priority use indicate the need to reduce allocations:*

- 2) *Request holders to reduce use voluntarily;*
- 3) *Proportionally reduce use for affected holders; or*
- 4) *Reallocate the amount of available use through issuance of a prospectus when the reduced allocated capacity is insufficient to sustain the operations of existing permittees.*

*Under 4) limit the solicitation to holders of a priority use permit. Base allocation of available use on the applicants' proposed services, experience, knowledge of the area to be authorized, financial capability, performance record as an outfitter or guide, and other appropriate factors.*

**Comment:** *41.53m should not be written in such a way as to assume that the changed conditions will only lead to reductions in use, therefore we have amended it as written above. As originally written, this provision further adds further bias to these directives toward use reductions through a nebulous justification, ie, "changed conditions" that may not be substantiated. Business cannot justify investments under such capricious conditions. Some of our members reach their capacity limits in mid season and could utilize additional allocated capacity, for example. Capacity studies and other assessments may also result in a need for increased capacity.*

#### **41.53n—Administration of Outfitting and Guiding Permits**

1. Ensure that the terms and conditions of permits, including operating plans, are met and that the authorized use is consistent with applicable federal, state, and local law.
2. The authorized officer may revoke or suspend a temporary or priority use permit:



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- a. For noncompliance with federal, state, or local laws and regulations;
- b. For noncompliance with the terms of the permit;
- c. For failure of the holder to exercise the rights and privileges granted by the permit;
- d. With the consent of the holder; or
- e. At the discretion of the authorized officer, for specific and compelling reasons in the public interest (36 CFR 251.60(a)(2)(i)).

3. The authorized officer shall give the holder notice before revoking or suspending a permit pursuant to section 41.53n, paragraph 2a through 2d. The authorized officer shall give the holder a reasonable opportunity to correct noncompliance before revocation or suspension of a permit pursuant to paragraph 2a and 2b (36 CFR 251.60(e)).

*Comment: We strongly support this provision in 3 above. We do not propose any changes for 41.53 m and n.*

4. The authorized officer may impose an immediate suspension of all or part of a permit when deemed necessary to protect public health or safety or the environment in accordance with 36 CFR 251.60(f). The authorized officer does not need to give the holder prior notice and an opportunity to correct deficiencies before imposing an immediate suspension (36 CFR 251.60(e)). Monitor outfitting and guiding operations by conducting inspections (FSM 2716.5). Notify the holder in writing of the results of the inspection. Include in the notice:

- a. Any noncompliance;
- b. A time frame for correcting the noncompliance and;
- c. The consequence for failing to correct the noncompliance within the stated time frame.

6. Take immediate action, including imposing a temporary suspension, if there is an immediate threat to public health or safety.

7. Findings from inspections are ~~not~~ subject to administrative appeal.

*Comments: We strongly object to the language in 7 above. Since inspections are a significant factor in determining annual evaluations, they should be subject to appeal.*



8. Inspections and other documentation shall be used as a basis for annual performance ratings (sec. 41.53o, para. 4).

#### **41.53o—Administration of Priority Use Permits**

1. Priority Use Authorized Under a Term Permit. Treat outfitting and guiding authorized under a term special use permit as priority use.

*2. Monitoring. Monitor operations authorized under priority use permits to verify compliance with permit terms and conditions during the season of use. Extension of a 2-year interim priority use permit depends on documentation of satisfactory performance.*

*Comment: This language is changed to be consistent with the new interim priority use permit.*

3. Performance Standards. Forest Supervisors shall develop specific, objective performance standards for inclusion in each permit or operating plan in consultation with District Rangers and holders, outfitting and guiding licensing agencies, advisory councils, *professional associations*, and other federal and state land management agencies. At a minimum, Forest Supervisors shall develop specific standards for compliance with the terms of the permit, the operating plan, and the itinerary; public service; and protection of natural resources. Forest Supervisors also shall develop a scoring system or other means for correlating the standards to the performance ratings in section 41.53o, paragraph 4.

*Comment: Professional outfitter associations have extensive experience and valuable perspectives to provide to the agency in this area and should be included in establishing performance standard, which should also apply to holders of temporary permits.*

4. Ratings. Evaluate the holder's overall performance using 3 performance ratings: acceptable, probationary, and unacceptable. Base these ratings on the specific performance standards included in the holder's permit or operating plan.

5. Rating System. Rate the holder at the end of the holder's operating season.

- a. Probationary Rating. If the holder receives an annual rating of probationary, issue a letter of probation, and consider in the letter of probation suspending all or part of the permit as a result of the probation. If the holder receives a rating of probationary in the last year of the permit term, consider reissuing priority use permit for 2 years, with an option to extend the priority use permit term for up to 8 years.

- b. Consecutive Probationary or Unacceptable Rating. If the holder's next annual rating is probationary or unacceptable, revoke the permit or outfitting



and guiding supplement to a term permit in the notice to the holder of the rating, unless the permit is about to expire. If the permit will expire in the current calendar year, notify the holder in writing that the permit will not be reissued, and allow it to terminate.

***Comment:** We emphasize support for the language contained in 6. a. and b. in the directive that requires the agency to notify the holder of any deficiencies that would lead to revoking the permit.*

c. Consecutive Acceptable Rating. If the holder's next annual rating is acceptable, the holder returns to good standing. Notify the holder in writing that the probation has ended.

d. Unacceptable Rating. If the holder's annual rating is unacceptable, revoke the permit or outfitting and guiding supplement to a term permit in the notice to the holder of the rating, unless the permit will expire in the current calendar year. If the permit is about to expire, notify the holder in writing that the permit will not be reissued, and allow it to terminate.

e. Notice. Provide notice to the holder of the annual rating. Include in the notice a statement of the holder's right to appeal the annual rating, along with suspension or revocation of the permit based on the annual rating pursuant to section 41.53o, paragraph 5a, 5b, or 5d.

6. Before suspending or revoking a priority use permit or outfitting and guiding supplement to a term permit under section 41.53o, paragraph 5a, 5b, or 5d:

a. Notice. Give written notice to the holder after a mid-season evaluation (or end-of-season evaluation, for a short operating season where a mid-season evaluation is not feasible) that failure to correct identified noncompliance will result in an annual rating of probationary or unacceptable, as applicable. For a potential annual rating of probationary, include in the notice that a first annual rating of probationary may result in suspension of the permit and that a second consecutive annual rating of probationary will result in revocation of the permit or outfitting and guiding supplement to a term permit. For a potential annual rating of unacceptable, include in the notice that a single unacceptable rating will result in revocation of the permit or outfitting and guiding supplement to a term permit.

b. Opportunity to Correct Deficiencies. Give the holder a reasonable opportunity to take corrective action prescribed by the authorized officer. The period between the evaluation and the annual rating constitutes adequate opportunity to take corrective action for purposes of suspension or revocation of a permit or outfitting and guiding supplement to a term permit.



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7. Administrative Appeal. Holders may appeal annual ratings of probationary and unacceptable, along with suspension or revocation based on those ratings pursuant to paragraph 5a, 5b, or 5d, under applicable federal regulations. As provided by 36 CFR 251.60(a)(2)(iii), termination of a permit is not subject to appeal.

**Chapter 30—Fee Determination**

\* \* \* \* \*

**Section 37—Outfitter and Guide Fees. \* \* \***

\* \* \* \* \*

*Comment: The lack of a fee policy in the directives may make it difficult to accurately and adequately comment on these new proposed directives. One issue of concern is that outfitter and guide fees appear to be separated from fees for temporary permits. At the very least, without a substantive basis for levying flat fees for temporary uses while omitting the fees for the same activities and services offered by outfitters and guides, the fee portion of the directives possibly present another arbitrary and capricious decision.. In Tongass Conservancy v. Glickman the court held that the agency must charge the same fee for the same activity, hence the development of the Alaska flat fee policy. We believe the same basic fee policy should apply to outfitters and guides, institutions and other groups providing the same or similar services. The fees in 37.21b should apply to outfitters and guides if they are applied to temporary uses.*

**37.21b—Flat Fee for Temporary Use Permits**

Charge a flat fee for temporary use permits of \$150 for permits authorizing 1 to 50 service days or the equivalent in quotas, or \$300 for permits authorizing 51 to 100 service days or the equivalent in quotas. Provided however that if revenue will exceed \$10,000 for up to 50 service days or \$20,000 for 51 to 100 service days or the equivalent in quotas, determine the fee pursuant to 37.21c.

**FOREST SERVICE MANUAL  
CHAPTER 2710—SPECIAL USE AUTHORIZATIONS  
FSM 2713—Preparing Special Use Authorizations**

\* \* \* \* \*

**2713.1—Liability and Insurance**

1. Inherent Risks.

a. Engaging in most activities on National Forest System lands involves inherent risks. Swimming, boating, skiing, horseback riding, mountain climbing, and even hiking, camping, and picnicking involve inherent risks.

b. All concession activities authorized by the Forest Service (see FSM 2340.5), including resorts, ski areas, marinas, and outfitting and guiding that



cater to the vacationing or traveling public, involve hazards to users in varying degrees.

c. Individuals engaging in activities on National Forest System lands, regardless of whether they involve concessions, assume these risks. While concessionaires must provide a safe operation, safe equipment, and good supervision and meet other requirements relating to public safety, the public assumes inherent risks not related to these operating requirements, such as encountering dangerous weather or being injured by snakes or other wild animals.

***Comment:** We appreciate and support the agency's recognition of the inherent risks involved in outdoor activities as stated in 1 a., b., and c. The permit language in the actual permit authorization should be modified to reflect the inherent risks identified in 1. a.*

*The current authorization language in FS 2700-4i (06/05) III. G. HEALTH, SAFETY, AND ENVIRONMENTAL PROTECTION does not reflect the astute observation in this section of the proposed directives. The current permit language inappropriately states:*

*"The holder shall promptly abate as completely as possible and in compliance with all applicable laws and regulations any activity or condition arising out of or relating to the authorized use and occupancy that causes or threatens to cause a hazard to public health or the safety the holder's employees or agents or harm to the environment (including areas of vegetation or timber, fish, or other wildlife populations, their habitats, or any other natural resources)."*

*While holding the permittee to strict liability standards by the requirement to "abate" "any activity or condition arising out of or relating to the authorized use", the language in G. also exempts the agency from any risks or inspections of the forests to eliminate the hazards referenced above.*

*The permit language in G. should be modified to reflect the correct and appropriate observations in 1. a., b., c. and state that the permittee should take reasonable actions to manage the risks of the activity without compromising the reasonable enjoyment and challenge provided by many outdoor activities.*

## 2. Insurance.

a. When to Require Liability Insurance. To protect the public and the Federal Government from injury, loss, or damages for which concessionaires may be liable, require concessionaires to carry liability insurance. Require



other holders to carry liability insurance if appropriate based on the likelihood and severity of injury.

#### b. Imposing Insurance Requirements

(1) Permit Requirements. When a holder is required to carry liability insurance, include clause B-10 in the permit from FSH 2709.11, section 52.2, unless an insurance clause is already included in the applicable Forest Service standard form. This clause requires the holder to provide the Forest Service with a copy of the insurance policy. In addition, before issuance of the permit, require the holder to submit a certificate of insurance on industry standard form ACCORD 25-S that lists the policy limits of coverage.

***Comment:** We see no reason why the permittee should be required to provide the permit administrator with a full copy of the insurance policy when certificates listing the agency as an additional insured should be sufficient and show the limits of coverage. If necessary, the region can review the policies issued by insuring companies to various outfitters and address any changes to the insurance company. Given the small number of insurers writing policies for outfitting and guiding, these policies should be made available to permit administrators through the regional offices and those policies identified on the certificate issued by the company. In many cases, a policy for the current season may not be available at the time the permit is issued since the old policy may expire after the start of the season. The term of the insurance policy may not match the initiation of the permitted use each year, therefore it may not be possible to provide a copy of the policy that covers the entire year if the policy expires prior to the initiation of permitted use. Furthermore, policies are often not issued to permittees immediately after coverage is bound. Full insurance policies are usually 50 pages or more in length and may take up to 30 days or more to be delivered to the insured. We think requiring the permit administrator to obtain a copy of the policy is unnecessary paperwork that most permit administrators should not be burdened with.*

(2) Naming the United States as Additional Insured. Ensure that any insurance policy covering use and occupancy of National Forest System lands names the United States as an additional insured. Obtain documentation, such as an endorsement or declarations page, from the holder to verify that this requirement has been met.

c. Type of Coverage. Require liability insurance to provide coverage for third-party property damage, personal injury, and death that arise in connection with the authorized use and occupancy. Liability insurance may be either in the split limit or combined single limit format.



(1) Split Limit. A policy in the split limit format lists separate coverage limits for third-party property damage, personal injury or death to 1 person, and personal injury or death to more than 1 person.

(2) Combined Single Limit. A policy in the combined single limit format lists a single coverage limit for third-party property damage, personal injury or death to 1 person, and personal injury or death to more than 1 person.

d. Minimum Amount of Coverage Generally. Except as provided in paragraph 2e below for National Forest System roads subject to an investment sharing agreement or a reciprocal easement, this paragraph addresses minimum amounts of coverage for liability insurance. At a minimum, require split limit policies to meet the applicable coverage amount in all three columns of the following table. At a minimum, require combined single limit policies to meet the coverage minimum of the applicable coverage amount for injury or death to 2 or more persons.

Level of Risk	Third-Party Property Damage	Injury or Death To 1 Person	Injury or Death To 2 or More Persons
Low <sup>1</sup>	\$30,000	\$ 300,000	\$ 500,000
Medium <sup>2</sup>	\$30,000	\$ 500,000	\$1,000,000
High <sup>3</sup>	\$30,000	\$1,000,000	\$2,000,000

~~<sup>1</sup>Low associated injuries generally are not likely to result in death or permanent disability and are not likely to occur.~~

~~<sup>2</sup>Medium associated injuries are likely to result in death or permanent disability, but are not likely to occur or are not likely to result in death or permanent disability, but are likely to occur.~~

~~<sup>3</sup>High associated injuries generally are likely to result in death or permanent disability and are likely to occur.~~

***Comment:** We are concerned that the arbitrary assignment of risk categories to activities by some Forest Service personnel in Regional offices who may be unfamiliar with the activities will result in varying insurance requirements among Regions. This will present a significant challenge for outfitters operating in several Forest Service Regions who may be subject to varying liability insurance limits based on regional variations in the assignment of risks. It is also possible that coverage for so-called high risk activities where injuries are “likely to result in death or permanent disability” will probably not be available. The agency offers no data as the basis is for establishment of this definition. We believe this section defining the various risk levels should be stricken and reconsidered with input from the industry and insurers.*



*Assigning inappropriate risk categories to activities may influence the availability of insurance or increase liability.*

~~(1) The Regional Forester may increase the minimum coverage amounts in the table above on the basis of the amount of use, likelihood and severity of injury, protection of users, potential liability of the United States, and cost of the insurance.~~

~~(2) The Forest Supervisor may increase the national or regional minimum coverage amounts based on a case-specific risk assessment. The same coverage limit in an insurance policy may apply both per occurrence and in the aggregate, that is, a coverage limit may apply a limit per incident and per year, regardless of how many incidents occur. Therefore, it may be appropriate to increase the minimum coverage amounts that apply to claims in the aggregate, especially if a holder has operations in multiple locations on National Forest System lands.~~

***Comment:** The inclusion of minimum liability insurance limits in the directives will limit the agency's ability to adjust them, if necessary, in the event that limits are not available through the insurance markets. We recommend that these limits be subject to modification without the requirement to issue a Notice in the Federal Register.*

*Our experience has been that the personnel assigned to insurance issues in some Regional and Forest Supervisors' offices are not always fully informed about insurance issues and have proposed inappropriate limits of liability that were not even available on the market. At one point, Region 8 proposed raising liability limits for whitewater rafting on Class IV and V rivers to \$5 million and rock climbing to \$3 million. (FSM, Supplement, R8, 2700-2002-3, Chapter 7, page 5-7, August 15, 2002.) Those coverages were not available and certainly not affordable, even in today's market. We recommend that on issues such as liability insurance limits, that the agency adopt national guidelines as provided in this directive since liability insurance markets are national in scope. However, as guidelines, the limits should not require a Federal Register notice with OMB clearances to be adjusted. Therefore, 1. and 2. should be stricken and replaced with the language below. Furthermore, we are unaware of any circumstances where awards to plaintiffs exceeded the limits of liability and the agency was responsible for recovery.*

*Proposed language:*

*(1) Liability limits may be adjusted to reflect the availability of coverage limits in the insurance market and the reasonableness of rates.*



e. National Forest System Roads Subject to an Investment Sharing Agreement or a Reciprocal Easement. National Forest System roads that have been jointly developed and are cooperatively owned by the Forest Service and large corporate landowners or state land management agencies are subject to an investment sharing agreement or a reciprocal easement (FSM 7731.3). The investment sharing agreement or reciprocal easement has requirements for commercial users to carry liability insurance for personal injury and third-party property damage. Regions that have these roads under their jurisdiction shall establish a minimum amount of liability insurance for commercial users of these roads.

***Comment:** We understand the interests of private land owners in this matter and only ask that the agency not succumb to unreasonable liability insurance requirements.*

f. The Boy Scouts of America (BSA). BSA operates several organization camps under a special use permit and conducts a variety of events and programs on National Forest System lands. BSA's insurance policy is on file with the Forest Service National Insurance Center. Therefore, it is unnecessary to obtain a copy of BSA's insurance policy or a certificate of insurance from BSA when issuing a permit to BSA.

***Comment:** If a national insurance guidance is appropriate for the Boy Scouts and other federated non profits, then outfitters and guides should not be subject to varying regional or local insurance policy requirements or the requirement to provide a copy of the insurance policy to every permit administrator.*

g. Endorsement for Contracted Outfitting and Guiding Services and Equipment. To ensure that services and equipment contracted by an outfitter or guide pursuant to FSH 2709.11, section 41.53i, paragraphs 5a, 5b, or 5c, are covered by the outfitter's or guide's insurance policy, require the endorsement in exhibit 01 to this paragraph to be included in the outfitter's or guide's policy.

***Comment:** This portion of the directives is unworkable or unaffordable in that a holder's insurer will likely not provide coverage for contractors or subcontractors or may have limits and exclusions for certain activities if contractor's coverage is provided. The fact that the agency wants to promote the use of "guides" as subcontractors without the stipulation that they hold permits, at least for some more technical experiences, is not in the public interest. The proposed directive that allows permittees to use contractors who are not already permitted does not comply with the screening requirements in CFR 251.54(e). unless those guides have undergone the screening process required by the permitting process or by a state licensing board.*



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*Regarding insurability of contractors, please see the note below from one of the agents who writes coverage for Forest Service permittees.*

*“Insurance underwriters accept coverage based on the application/qualifications of the applying entity. They do not want to pick up the liability for any operator acting as a sub (contractor) or otherwise. The underwriters would want the permit holder to have their own insurance--- having said that, there is very little interest in the insurance marketplace for “one off”(sic) trips or for holders without proper experience.”*

*A better practice would be to require the contractor to provide coverage and a certificate and to use permitted outfitters whenever possible for contracting services.*

### **FSM 2713.1, Paragraph f, Exhibit 01**

#### **Endorsement for Contracted Outfitting and Guiding Services and Equipment**

The following contracts entered into by the insured for the provision of services and equipment in connection with outfitting and guiding authorized under a Forest Service special use permit are insured contracts for purposes of this policy **[Include the provisions below that apply, with additional detail as necessary, and delete the rest.]**:

1. Contracts for ancillary services that support the use authorized by the permit, such as provision of:
  - a. Special equipment or livestock.
  - b. Food and shuttle services.
  - c. For a limited number of trips, a specialized guide for people with disabilities or for highly technical trips.
2. When the insured is authorized to provide only outfitting services, contracts for guiding services.
3. Contracts for additional equipment or guiding services entered into when on a particular day the insured lacks sufficient equipment or guides to accommodate the insured’s customers.