

*Compliance Manual Series*

# U.S. Forest Service Outfitter and Guide Permits

Being an outfitter or guide is incredibly demanding, but also rewarding. If you work on a National Forest, it can also be incredibly confusing given the myriad of laws, regulations and Forest Service policy directives which apply to and control your operations. And a big part of the problem is that the rules are scattered about in various locations ranging from federal statutes to federal regulations to both the USFS Manual and Handbooks. This manual is an effort to collect some of the basic concepts in the more critical rules and put them in one place, and where possible, set them out in plain speak so they make sense. The rules cannot possibly cover all the various issues that may arise, but it is important to at least have an understanding of the basic rules and, perhaps just as important, to know when a specific situation is not addressed by a particular rule thus allowing for a reasonable solution. When various issues regarding your outfitter and guide operations arise, and they will, this manual can be a valuable resource in determining what your rights are and how the Forest Service should be addressing your situation.



## **Do I need an outfitter/guide permit?**

Yes, if you are getting paid to provide outfitter/guiding services while on a National Forest. The Forest Service has stated outfitter/guide operations include “all commercial outfitting operations [even non-profit entities] involving services for accommodating guests, transporting persons, and providing equipment, supplies, and materials. It also includes commercial guiding activities wherein the guide furnishes personal services or serves as a leader or teacher.” Individuals often claim they do not need a permit using various arguments, but the courts are typically inclined to find a permit is required if the question is close. And if a paid outfitter/guide is conducting *any* activities on a National Forest, no matter how brief, it needs a permit.

Examples the agency has given of outfitting/guiding include packing, hunting, float trips, canoe or horse livery, ski touring, helicopter skiing, jeep tours, and fishing. Outfitting is defined as “renting on or delivering to National Forest System lands for pecuniary remuneration or other gain any saddle or pack animal, vehicle, boat, camping gear, or similar supplies or equipment” and includes all employees and agents. Guiding is defined as “providing services or assistance (such as supervision, protection, education, training, packing, touring, subsistence, transporting people, or interpretation) for pecuniary remuneration or other gain to individuals or groups on National Forest System lands” and also includes all employees and agents.

To avoid the need for a permit, some entities provide equipment to visitors to use on National Forests but are careful to never go on the Forest land themselves and also make sure they deliver the equipment while off the Forest. The visitor then travels into the forest on their own. The Forest Service agrees these activities do not need a permit.

### **Under what laws are outfitter/guide permits issued?**

Current Forest Service outfitter/guide permits state that they are issued pursuant to the Federal Lands Recreation Enhancement Act (16 U.S.C. § 6802(h)). That statute merely states:

The Secretary may issue a special recreation permit, and charge a special recreation permit fee in connection with the issuance of the permit, for specialized recreation uses of Federal recreational lands and waters, such as group activities, recreation events, motorized recreational vehicle use.

As a result, the applicable law places few if any restrictions on what the Forest Service can or cannot allow an outfitter/guide to do. The Forest Service's basic authorizing statute, which is often referred to as the agency's Organic Act, also provides general authorization for the agency to make rules for the use of National Forests with little or no restrictions. 16 U.S.C. § 551.

### **What requirements do I need to meet to get an outfitter/guide permit?**

First, the activity you want to engage in must be consistent with the applicable land management plan for the Forest. If so, you then need to meet the screening criteria set out in the regulations at 36 C.F.R. § 251.54(e). Among other criteria, you need to own the equipment needed, show sufficient prerequisites to conduct outfitting/guiding services such as a State license and appropriate insurance, and not merely be an intermediary for others who will provide the

services. You also need to propose the number of service days you would like to have under your permit and, among other things, identify the areas in which you want to operate, how you will operate and the periods of use. There also may be environmental analysis that have to be done to approve the permit.

### **How does the Forest Service decide if and how much outfitting or guiding will be allowed on a Forest?**

It conducts a needs assessment and a resource capacity analysis, which often are part of general plans that apply to the particular Forest. In a needs assessment, the agency considers the accessibility, size of the area, difficulty of the terrain, current levels of outfitting and guiding and demographics of visitors to the area. Resource capacity analyses are conducted if the impacts of the outfitting/guiding activities may have an undesirable impact on the desired conditions on the Forest.

### **What is a Temporary Use Permit?**

A Temporary Use Permit is a permit issue for 1 year or less. Use under these permits is allocated in increments of 50 service days, up to a maximum of 200 service days or the equivalent in quotas for temporary use permits. Only one temporary use permit may be issued per 180 days, per holder, per use area. These permits are not issued through a competitive process. Instead, they are issued to qualified applicants on a first-come, first-served basis based on a seasonal deadline or through a lottery. Notably, issuance of a Temporary Use Permit does not commit the Forest Service to authorize outfitting and guiding use in the future and Temporary Use Permits are not subject to renewal. The Forest Service also does not conduct performance evaluations for holders of Temporary Use Permits.

### **What is a Temporary Use Pool?**

It is a pool of service days in a particular area that are reserved for short-term, non-recurring, seasonal distribution during an open season to qualified permit holders who do not hold a Priority Use Permit (see below) in that use area, and thereafter may be distributed to all qualified applicants on a first-come, first-served basis.

The Forest Service may establish one or more open time periods, *i.e.* "open seasons," to facilitate the administration and equitable distribution of service days from a temporary use pool, such as for distribution of service days through a lottery. During an open season for a temporary use pool, qualified applicants, other than holders of a priority use permit in the use area, may apply for service days from the temporary use pool. Once an open season for a temporary use pool ends, the agency is supposed to distribute any remaining service days on a first-come, first-served basis to all qualified permit holders, including holders of a Priority Use Permit in the use area, provided that if a priority use pool has been established for the same use area (see below), applications for any remaining service days may be restricted to qualified permit holders who do not hold a priority use permit. Upon termination of a Temporary Use Permit, the Forest should return all service days allocated to the holder of that permit to the temporary use pool in that use area for redistribution during the next open season.

The Forest allocates service days to a temporary use pool based on:

- (1) A resource capacity analysis demonstrating that additional capacity exists;
- (2) A determination that service days have been insufficiently used during the first 5-years of a priority use permit; or
- (3) A determination that service days may be reallocated when a priority use permit is revoked or is not renewed.

The Forest Service may shift service days between temporary and priority use pools based on their utilization.

### **What is a Priority Use Permit?**

A permit that authorizes operations for up to 10 years. These permits are issued based on a holder's past use and performance. These permits are also subject to renewal.

### **Can I get a Priority Use Permit if I have no prior record of providing outfitting/guiding services?**

Yes, but the permit will only be for 2 years with an option to extend it up to 8 additional years. If your operations are acceptable for the first 2 years, the agency's policy is to extend the permit for an additional 8 years. If your operations are not acceptable after those 2 years, the permit will expire at the end of its term and no new permit will be issued.

### **How are service days allocated among Priority Use Permits?**

Generally speaking, use is allocated in accordance with the applicable land management plan, the applicable project implementation decision or other appropriate analysis. The agency guidelines call for it to review actual use after the 5<sup>th</sup> year of a permit and at the end of the permit term, and as a result of that review it may make adjustments to the service days allocated to that permit. If any service days then become available due to any reductions, those days may be distributed to a temporary or priority use pool, added to a new permit that could be competitively bid or simply taken out of use.

### **What is a Priority Use Pool?**

It is a pool of service days for activities in a particular area that may be distributed seasonally to Priority Use Permit holders in that area and returned to the pool for redistribution during the next open season, or distributed for the term of a permit to increase use allocated under priority use permits or to establish use for new priority

use permits. Days are allocated to a priority use pool based on a resource capacity analysis demonstrating that additional capacity exists, a determination that service days or quotas have not been used during the first 5-years of an existing priority use permit, or a from service days that had been reallocated to a permit that had been is revoked or was not renewed.

### **How does the Forest Service allocate between priority and temporary use?**

When deciding how to allocate between priority and temporary use, the agency looks at visitor needs for outfitting and guiding services, based on visitor preference surveys, use records, and trends, as well as the type, location, and amount of outfitting and guiding services that would help meet agency objectives. It also reviews the current levels of outfitting and guiding use and projected growth.

### **If I have a Term special use permit for a resort, do I need a separate permit if I want to provide outfitter/guide services?**

No, but you do need to have your Term special use permit specifically authorize you to conduct outfitter/guide services. This authorization is typically provided as a supplement to the Term permit and the use is treated as a Priority Use.

### **When will the Forest Service issue a brand new outfitter/guide permit?**

Generally, new outfitter/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; or
- 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.

### **What if there are not enough permits for everyone that might want one?**

If the Forest Service determines there is competitive interest for permits, it is supposed to issue a prospectus and seek bids for the permit.

### **Can I put a corral, tent frame or other temporary structure on the Forest?**

Yes, as long as your permit explicitly allows this. The Forest Service may allow such use if you demonstrate there is a public need for it. If you want to construct any type of permanent structure, you would have to get a Term special use permit. The structure, such as hitching posts, corrals, tent frames, permitted access routes, and shelters, must have negligible value and minimal impact on national forest resources. Permanent structures are not favored by the agency. And no structures are allowed in wilderness areas unless they are needed to meet the minimum requirements for administration of the area.

### **If I have an outfitting permit, can I hire a guide to work for me?**

Yes, but only with the prior written approval of the agency based upon a finding that the following conditions are met:

- (1) The services of the contracted guide are covered under your operating plan;
- (2) The contracted guide has all required State licenses;

- (3) The contract with the guide states that you remain responsible for compliance with all the terms and conditions of the permit, including the operating plan; and
- (4) You will exercise management authority over all the day-to-day field operations of the business, including the guiding services provided by the guide.

In addition, if on a particular day a permit holder lacks sufficient equipment or guides to accommodate the holder's customers, the agency is supposed to allow the permit holder, without prior written approval from the authorized officer, to contract for additional equipment or guides from another permit holder.

#### **Can my permit be revoked or suspended?**

Yes. A temporary or priority use permit may be revoked or suspended for the following reasons:

- 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.

In such case, the agency is supposed to give the permit holder notice before revoking or suspending a permit and a reasonable opportunity to correct noncompliance. However, an immediate suspension of all or part of a permit may be imposed when deemed necessary to protect public health or safety or the environment. Notice and an opportunity to correct deficiencies are not required before imposing an immediate suspension.

#### **Will my permit operations be evaluated?**

Yes, if they are under a Priority Use Permit. The agency uses three performance ratings:

acceptable, probationary and unacceptable. The frequency of your evaluations depends largely on any prior deficiencies in your operations. You must be given notice of the result of your evaluation.

#### **What happens if I get a bad evaluation?**

If you receive an annual rating of probationary, the agency will issue you a letter of probation and may suspend all or part of your permit. If you receive a rating of probationary in the last year of your permit term, the agency may reissue a new priority use permit for only 2 years, with an option to extend the permit term for up to 8 years. If your next annual rating is probationary or unacceptable, the agency will revoke the permit unless the permit is about to expire. If the permit will expire in the current calendar year, the agency will notify you that it is not reissuing the permit and will allow it to expire. But if your next annual rating is acceptable, you will be returned to good standing and your probation will end.

If your annual rating is unacceptable, your permit will be revoked unless the permit will expire in the current calendar year, in which event the agency will notify you that the permit will not be reissued and will instead expire.

#### **Will I be given notice if the agency intends to suspend or revoke my permit?**

Yes. You must be given notice of any performance ratings and, if bad, informed of your right to appeal the performance rating or any suspension or revocation of the permit based on the annual rating.

Before suspending or revoking a priority use permit, the agency must give written notice 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. If the agency

anticipates giving you a potential annual rating of probationary, it must 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. If the agency anticipates giving you a potential annual rating of unacceptable, it must 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.

#### **Will I be given a chance to fix the problems before my permit is suspended or revoked?**

Yes, as long as there is no immediate threat to public safety or the resources. The agency must give you a reasonable opportunity to take corrective action as determined by the agency. The time between the negative evaluation and your annual rating will be viewed as an adequate opportunity to take corrective action for purposes of suspension or revocation of a permit or outfitting and guiding supplement to a term permit.

#### **Can I appeal a decision to suspend or revoke my permit?**

Yes. Permit holders may appeal a performance ratings of probationary and unacceptable, as well as a suspension or revocation based on those ratings. However, if your permit terminates due to its own terms, that termination is not subject to appeal.

#### **How are my fees determined?**

If your outfitter/guide services are provided in connection with a resort, lodge or other structure requiring a Term permit, the Forest Service uses the Graduated Rate Fee System to determine fees under outfitter/guide permits. However, if you have a Temporary Use Permit but your revenues

do not exceed the ceiling set by the agency, you pay a flat fee based on the number of service days authorized under your permit. If your revenues do exceed that ceiling, you have the option of either paying a fee of 3% of your adjusted gross revenue or a per client fee based on your average client-day charge. Additional adjustments made by made to your fees based on your particular operations. In addition, you may have to pay a fee for any assigned sites you have.

#### **Can I sell my Priority Use Permit?**

Technically, no. However, you can enter into a purchase agreement with another party under which you agree to have your permit terminated so that the other entity can acquire it. The entity which wants to acquire your permit will have to be approved by the agency. This process would also apply if the controlling interest of the permit holder changes, such as when a new person obtains a majority share of stock in the company holding the permit. If the sale falls through and the controlling interest in the original permit holder has not changed, the permit can be reissued to the original permit holder. Before agreeing to terminate your permit, you will want to ensure the agency will either issue it to the new entity or return it to you if the sale does not go through.

#### **When my Priority Use permit ends, will it be put out for competition?**

Maybe. The agency's policy states that, as long as your operations have been satisfactory, the permit *may* be renewed without competition. However, except for certain permits in Alaska, the policy is not to renew the permit if there is a need to limit use and there is competitive interest by preferred operators for those services.

### ***Background on the Forest Service Manual and Handbook***

This manual contains a summary of selected provisions from the Forest Service Manual (FSM) and Forest Service Handbooks (FSH) (as of May 2019) related to audits of special use permit operations. The Forest Service Manual and Handbooks are internal agency guidance. They are prepared and issued by the Forest Service pursuant to 7 C.F.R. § 2.7. They are designed to assist Forest Service employees in carrying out their duties under the laws and regulations to manage activities within the National Forest System. These provisions, which at times reiterate federal statutes and federal regulations, are distinct from those legal authorities and set out the agency's internal policy, practices, and procedures. The Forest Service has stated that these provisions serve “as the primary basis for the internal management and control of all programs and the primary source of administrative direction to Forest Service employees.” The provisions are periodically updated by either amendments or interim directives, which are in place only for a designated period time.

### ***Disclaimer***

This manual does not constitute legal advice, which requires a review of your specific factual situation. Nor does its distribution create an attorney-client relationship. It is also without any warranty of any kind, without limitation. If we can be of any specific assistance to you, please contact us through [www.gardenlawfirm.com](http://www.gardenlawfirm.com).