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Outfitting on Public Lands: A Study of Federal and State Regulation

by

Arthur D. Smith, Jr.

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OUTFITTING ON PUBLIC LANDS: A STUDY OF FEDERAL AND STATE REGULATION

ARTHUR D. SMITH, JR.*

OUTLINE

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* Professor of Law, University of Idaho College of Law. I am indebted to a number of outfitters and guides as well as federal and state officials for information and advice. Special thanks are due Frank Elder, Regional Special Use Officer, U.S. Forest Service, Ogden, Utah, and Robert Weir, Recreational Special Use Officer, U.S. Forest Service, Washington, D.C., for their time and effort. Three former public land law students also deserve acknowledgment: Jerry Meyers (J.D. 1986) whose paper, "Structure & Transferability of Licenses and Special Use Permits for Outfitting and Guiding Businesses in Idaho" (April 1985), formed a starting point for this article; Steve Strack (J.D. 1988) whose paper, "Wilderness and the Search for Congressional Intent: Nature's Haven or Man's Playground?" (November 1987), provides major contributions to the analysis of wilderness management policy, and Steve Brown (J.D. 1985), boatman and guide par excellence, for my introduction to the Middle Fork. Errors and omissions are, of course, mine.

I. INTRODUCTION

Since the Second World War, outfitting and guiding on public lands has grown from widely scattered packing-for-hire arrangements, typically operating as an adjunct of some other business, to modern commercial enterprises operated primarily to supply outfitting and guiding services. While outfitting once largely served self-organized hunting and fishing parties, outfitters today typically organize parties of unacquainted individuals and are responsible for introducing significant segments of the public to a variety of wildland activities from jet or float boating, to alpine and cross-country skiing, to sightseeing, backpacking, technical climbing, and wilderness survival.

Outfitting and guiding is not confined to public land. However, in Idaho, and in most other public land states, the extent and undeveloped nature of federal forest and range land dictates that most outfitting and guiding will have a significant connection with federal lands. On federal public lands, outfitters typically operate under revocable permits which specify the nature and extent of outfitting activities and establish minimum standards of conduct. Although defeasible, the system of preferences for issuance and renewal of permits effectively provides permittees with long-term tenure.

In addition, states generally regulate outfitting and guiding activities. State regulation varies considerably; some states merely certify competence of guides for a narrow range of activities while others regulate outfitting and guiding activities and services more comprehensively. In Idaho, an industry commission, the Idaho Outfitters and Guides Board (IOGB), is charged with certifying the competence of all outfitters and guides, licensing the areas in which outfitters may operate and the services they may offer, and establishing and enforcing standards for serving the outfitted public.

As a result of heightened economic stakes, land use conflicts, and agency regulation, bar members are increasingly required to address legal aspects of outfitter activities. The purpose of this article is to outline the history and framework of federal and state licensing and regulation of outfitting and guiding activities. At the federal level, the major emphasis is on the Forest Service permit process. At the state level, the principal focus is on the regulatory system in Idaho.

II. THE OUTFITTING INDUSTRY

A. Outfitters

During the 1984-85 season there were a total of 315 licensed outfitters in Idaho and a total of 1,020 licensed guides.[1] IOGB has traditionally classified outfitter services as falling within three broad categories: hunting, boating, and general recreation. These categories are useful for describing outfitting operations. However, because outfitters are licensed individually for various combinations of specific activities in particular areas, it is easy to over-generalize.

Big game outfitters are typically licensed for elk, deer, bear, cougar, predator, and forest grouse hunts, and frequently for moose, sheep, and goats.[2] In addition, big game outfitters typically offer fishing, trail riding, and frequently, backpacking and snowmobiling activi-

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1. James M. Lansche, Jr., *The Value of Outfitting and Guiding Within the Idaho Economy and the 1984-85 Outfitting Industry Update*, 15 (prepared for the Idaho Outfitters' and Guides' Association) (Feb. 5, 1986) (hereinafter cited Lansche). A "guide" is a person who, for compensation, personally assists another engage in some form of outdoor activity, while an "outfitter" is someone who markets equipment or facilities and services for outdoor activities. *See* IDAHO CODE §36-2102(b) & (c) (Supp. 1988 Rule 3.2(c)).

2. *See* STATE OF IDAHO OUTFITTERS AND GUIDES BOARD, OUTFITTER ACTIVITY LISTING FOR 1986-87 (Aug. 13, 1986) [hereinafter OUTFITTER ACTIVITY LISTING FOR 1986-87]. Types of hunting for which outfitters were licensed during the 1986-87 season, arranged in descending order according to numbers of outfitters offering each service, are: deer (147); elk (143); bear (141); cougar (132); predators (110); forest grouse (98); goats (88); chukar (70); moose (65); sheep (60); antelope (21).

ties. Boating outfitters are predominantly float boaters but include a significant number of power boat outfitters, particularly on the lower Snake and Salmon rivers.[3] Boating outfitters also typically offer fishing and chukar hunting activities, and occasionally, backpacking. A small number of outfitters offer only specialized services, such as mountain climbing, survival training, cross country skiing, and back-country alpine skiing. Other general recreation activities such as fishing, backpacking, and trail riding are sometimes licensed separately, but are most commonly offered as part of a big game or boating license.[4]

Most outfitters are commercial operations based in Idaho but a total of sixty-three outfitters are from out of state.[5] Except for Montana outfitters, who most frequently offer big game hunting, float boating is the principal activity most frequently offered by out-of-state operators. Outfitters also include four university outdoor recreation programs at Boise State University, Eastern Washington University, Ricks College, and University of Idaho, and two therapeutic programs, Quaker Hill Conference, and the School of Urban and Wilderness Survival.

Little information is available on the ownership, size, profitability, or other socio-economic aspects of outfitters. However, the Idaho Outfitter and Guide Association (IOGA) directories[6] and personal contact suggest there is considerable diversity. Some are local "mom and pop" operations while others, especially float boaters, operate nationally and internationally. Many packing operations are run from temporary facilities on public lands, while others are a part of established guest ranches on private inholdings.[7] According to federal and state officials who regulate these activities, most outfitting businesses are owner-operated and commonly constitute the owners' principal business. A number, however, are part of larger business enterprises, and others

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3. *See* OUTFITTER ACTIVITY LISTING FOR 1986-87, *supra* note 2. Boating is offered by a total of 149 outfitters, 123 of whom offer float boating and 49 of whom offer power boating.

4. *See* OUTFITTER ACTIVITY LISTING FOR 1986-87, *supra* note 2. This residual category covers a variety of unrelated activities which, arranged in descending order according to numbers of outfitters licensed, are: fishing (260); trail riding (138); backpacking (97); snowmobiling (50); cross-country skiing (16); wagon rides (8); mountain climbing (5); back-country alpine skiing (2); sleigh rides (2); survival (1); dog sledding (1).

5. *See* OUTFITTER ACTIVITY LISTING FOR 1986-87, *supra* note 2. 21 were based in Montana, 13 in Oregon, 11 in Washington, 6 in California, 6 in Utah, 3 in Wyoming, and 1 each in Nevada, Colorado, and Oklahoma.

6. *E.g.*, IOGA, OUTDOOR IDAHO EXPERIENCES (1987).

7. *See* OUTFITTER ACTIVITY LISTING FOR 1986-87, *supra* note 2. Thirty-one outfitters use the word "ranch," "lodge," "resort," or other similar terms in their business name, indicating that outfitting is likely a part of a larger accommodation business.

are owned by groups of individuals who play little or no role in the day-to-day operation of the business.

B. Services

During 1984-85, Idaho outfitters served approximately 70,000 clients of which approximately 4,000 engaged in big game hunts, 50,000 in whitewater boating, and over 16,000 in some other form of wildland recreation. Approximately 85% of all clients served by licensed Idaho outfitters are from out of state.[8]

Big game hunting serves fewer clients than other categories and declined from a high of 5,424 clients in 1970-71 to a low of 2,790 clients in 1976-77.[9] During the 1984-85 season, 147 big game outfitters offered approximately 4,000 clients the following hunting experiences:

elk/deer	2,623
bear	796
cougar	202
predators	97
antelope	81
sheep	12
moose	8[10]

Boating outfitters serve by far the largest number of clients and boating is the fastest growing segment of the industry.[11] During 1984-85, 149 boating outfitters offered approximately 50,000 clients the following services:

float boating	
destination	18,411
non-destination	8,277
total	26,288
power boating	
destination	21,376
non-destination	826
total	22,202
other/not classified	42[12]

General recreation activities were offered to over 16,000 clients during 1984-85 and included the following:

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8. Lansche, *supra* note 1 at 1.
9. *Id.* at 2.
10. *Id.* at 13.
11. *Id.* at 2.
12. *Id.* at 11-12.

trail riding	12,288
mountain climbing	1,101
snowmobiling	1,098
cross-country skiing	910
back-country alpine skiing	500
backbacking	336[13]

Outfitter directories suggest diversity in the nature and extent of services offered by outfitters. This is confirmed by the only in-depth comparison of outfitter services in Idaho, a study of federal management of boating outfitters operating in Hells Canyon,[14] which concluded that customers had considerable choice as to price, service, and experience.

C. Economic Significance

Economic studies of the industry commissioned by the IOGA conclude that outfitting generates over $15 million in direct expenditures within Idaho annually (including fees, licenses, supplies, and incidental expenses) and stimulates over $38 million in total business activity within the state.[15] Of the approximately $15 million in direct expenditures on outfitting in 1984-85, boating accounted for $8,903,065; big game hunting, representing the highest per capita client expenditure, accounted for $5,813,658; and general recreation for $703,102.[16] The bulk of the business activity generated by outfitting occurs in three economic regions[17] which contain most of the counties in which large areas of federal public land remain undeveloped — i.e., Clearwater, Idaho, Lemhi, Custer, Valley, Boise, Elmore, and Owyhee.

III. HISTORY OF REGULATION

A. Outfitting on Federal Land

Outfitting on public lands is traditional. Recreational use of public lands is at least as old as permanent settlement and outfitting and guiding of tourists must have commenced by the time transcontinental

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13. *Id.* at 13. Although it is the most common form of general recreation, Lansche reports no figures for fishing.

14. B. SHELBY AND M. DANLEY, ALLOCATING RIVER USE 39-46 (USDA/OSU 1979).

15. Lansche, *supra*, at 5, 7.

16. *Id.* at 5.

17. *Id.* at 6, 14 (regions 2, 3, & 4).

railroads provided convenient access to western lands.[18] In any event, the existence of outfitting services in Yellowstone before the close of the frontier is well documented,[19] as are a number of accounts of colorful characters guiding hunting and fishing parties elsewhere on public lands around the turn of the century.[20]

Although the historical roots of outfitting and guiding run deep, regulation of this activity on most public land is comparatively recent. National parks are the exception. In establishing a park system, Congress provided express authority to permit commercial occupancies.[21] For a variety of reasons, including early experience in Yellowstone, visitor needs, and remote location, the Park Service early adopted a "public utility" approach to private enterprise which relied upon a small number of sizeable operators to offer a range of visitor facilities and

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18. Jim Bridger guided a number of military, commercial, and recreational ventures in the west including an extended hunting safari in 1855-56 for Sir George Gore, CECIL ALTER, JIM BRIDGER (1925). Buffalo Bill served as guide for a hunting excursion sponsored by General Sheridan in 1871, HENRY DAVIES, TEN DAYS ON THE PLAINS (Hutton ed. 1985).

19. JOHN ISE, OUR NATIONAL PARK POLICY 32, 39-40 (1961), reports stock rental and guiding services at Mammoth Hot Springs by 1878, stage service to Old Faithful by 1880, and an outfitted system of permanent tent camps by the early 1880s.

20. *E.g.*, J. CARREY & C. CONLEY, THE MIDDLE FORK AND THE SHEEPEATER WAR 130-32 (1980); Savage, *Taylor Ranch: UI's Unique Wilderness Resource*, 4 IDAHO L. REV. 13 (Winter 1986). David Lewis or "Cougar Dave," a Civil War veteran and participant in the so-called "Sheep Eater War" of 1875, outfitted and guided hunting parties in the Middle Fork country for over 50 years until the 1930s, during which time he gained national recognition for his successful pursuit of large cats. His isolated homestead on Big Creek, later known as the Taylor Ranch, is currently owned by the University of Idaho and operated as a wilderness research station.

21. Yellowstone National Park legislation, 17 Stat. 33, 34 (1872), 16 U.S.C. §22 (1982), authorized the Secretary of Interior to grant "leases for building purposes for terms not exceeding ten years, of small parcels of ground at such places . . . as may require the erection of buildings for the accommodation of visitors." Private appropriation of scenic sites prompted Congress to expressly limit the size and number of parcels which could be occupied by a single operation and to bar occupancy of, and assure access to, scenic sites. Act of August 3, 1894, 28 Stat. 222, as amended by Act of June 4, 1906, 34 Stat. 207, and the Act of March 2, 1907, 34 Stat. 1219, 16 U.S.C. §32 (1982) (maximum of ten separate tracts of a maximum of 20 acres each for terms no longer than 20 years but not including any "objects of curiosity" nor permitting exclusion of the public from "free and convenient approach" or within "one-eighth mile" of specified sites).

Organic legislation for the National Park Service in 1916 provided general authority to "grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks" and other land under Park Service management. Terms are limited to thirty years and leases which would "interfere with free access . . . by the public" to objects of interest are prohibited, 16 U.S.C. §3 (1982). This authority, supplemented by the Concessions Act of 1965, 16 U.S.C. §§20-20g (1982), form the basis for current Park Service regulation of concession operations, 36 C.F.R. pt. 51 (1988).

services.[22] As a consequence, Park Service regulation of outfitters and guides has historically been a part of Park Service concession administration.[23] On other public lands, however, outfitting and guiding has not been typically connected to long term commercial or recreational occupancies. Thus, in spite of similar vintage authority to issue concession-type permits,[24] Forest Service regulation of outfitters is based on general land management authority and was initiated at a much later date;[25] Bureau of Land Management (BLM) regulation is also more recent and is similarly premised on general management authority.[26]

Outfitting and guiding on national forest and range land typically originated as an outgrowth of some other enterprise—a livestock ranch, a guest ranch, a mining claim, the rodeo circuit or other seasonal occu-

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22. In the early years Congress was of the opinion that parks should be self-supporting and provided few resources for management. Superintendents were uncompensated and the general lack of resources lead to the management of Yellowstone and other early parks by the U.S. Army. Tourist services were unregulated and soon crowded parks and their entrances. A description of early conditions in Yellowstone is provided by WILLIAM EVERHART, THE NATIONAL PARK SERVICE 115 (1972): "They jammed into the areas authorized for permanent camps, creating an eyesore and a nuisance near the natural curiosities. They lurked at the railroad stations and attacked the tourists stepping down from the trains with the most objectionable kind of amusement-park barker's routine." Unsuspecting tourists soon "found themselves wrapped up and delivered before they had got their legs untangled." In one camp twenty cases of ptomaine poisoning were reported in one day.

Finding the parks poorly funded and poorly protected, the first Park Service Director, Stephen Mather, initiated a program to expand their popularity and use. Railroads were encouraged to provide transportation into parks and build comfortable hotel accommodations for guests. Coincidentally, the Park Service initiated a policy of licensing a principal concessioner in each park to provide a full range of tourist services in return for protection against competition. Early Park Service concession policy, is covered in WILLIAM EVERHART, THE NATIONAL PARK SERVICE 107-121 (1983); Ise, *supra* note 19 at 32-45, 209-212; CONSERVATION FOUNDATION, NATIONAL PARKS FOR A NEW GENERATION 175-77 (1985).

23. The Concessions Policy Act, 16 U.S.C. §§20-20g (1982), authorizes the Park Service to grant monopolies for providing goods and services and to regulate the services and rates of such concessions. Concessioners having supplied satisfactory service, and willing to meet the terms of the best competitive proposal, 36 C.F.R. §51.5(b) (1988), are entitled to preference on renewal. If a concession contract is not renewed, the incumbent is entitled to compensation for its possessory interest in the structures, fixtures or improvements. The Park Service also grants short-term "concession permits" for enterprises grossing under $100,000 annually, not involving substantial facilities, and providing no preference or possessory rights. 36 C.F.R. §51.3(a) (1988).

24. The Act of Mar. 4, 1915, 38 Stat. 1101, as amended, 16 U.S.C. §497 (1982), provided the Forest Service with authority to permit recreation and visitor service occupancies for terms of up to 30 years.

25. *See generally*, Section V(B), *infra*.

26. *See* 43 C.F.R. Subpt. 8372 (1987).

pation—and occurred without regulation by the Forest Service or BLM.[27] Like other traditional uses of public land, outfitting and guiding originated and grew as an exercise of the custom of citizens to enter and make reasonable use of public lands.[28] As outfitting and guiding operations became more established, the need to clarify public rights and protect public resources increasingly prompted agencies to require outfitters to obtain annual written authorization. During the 1950s, revocable permits outlining permissible stock use and land occupancy for packing operations became widely used on national forests.[29] Outfitting and guiding of whitewater trips followed a similar pattern, but, because the popularity of boating is much more recent, these operations were not generally licensed until the mid to late 1960s.[30] Similar developments occurred on public lands administered by BLM, though generally at a later date.

Over time these permits have evolved into a valuable form of property, similar to grazing permits. Initially permits were issued annually for a nominal fee. Because of low overall demand, permits were issued freely to those requesting them and customarily renewed upon request so long as a holder had complied with their terms and conditions.[31] In time, resource impacts prompted officials to limit the number of permits in particular areas. However, because growth in demand was only incremental and outfitting activities provided little prospect

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27. Interview with Frank Elder, U.S. Forest Service, Region IV (Oct. 16, 1986).

28. Although resource scarcity and environmental concerns prompted a 20th century policy of retaining title to federal land and charging for commercial use, the custom and policy of free and largely unrestricted citizen access to federal forest and range continues. Congress early provided for continued free personal use of energy and building materials, as well as assuring general citizen access to national forest and public domain, *see* notes 231-36 *infra*. Congress has also prohibited entrance fees outside of national park and national recreation areas 16 U.S.C. §460l-6(a)(1982). Both Forest Service, and BLM regulations, exempt general public use and recreation from permit requirements, *see* note 223 *infra*. General citizen access to federal public land is recognized in United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980).

29. In earlier days, outfitting and public recreation in back country areas were practically synonymous. Given the marginal profitability and relative infrequency of use, permits were rarely required until resource impacts indicated the need for regulation. *See* Dolan, *Outfitting in Montana: New Rules, New Markets*, 12 WESTERN WILDLANDS 6-7 (Winter 1987); Linford, *Guides, Outfitters and Regulation: An Historical Perspective*, 12 WESTERN WILDLANDS 2 (Winter 1987).

30. The fact that boating typically encompasses multiple districts, and even multiple forests, also delayed development of a permit system, Elder Interview, *supra* note 27.

31. *E.g.*, Forest Service Manual (FSM), 1221.53(a)-4 (1976) ("where possible to do so, past permittees who have provided satisfactory service, and have observed permit conditions, will be given preference for a permit consistent with recreation and resource management needs").

of significant revenue, agencies were not immediately prompted to reassess their permitting policy. Rather, it was administratively convenient, apparently fair,[32] and beneficial to the outfitted public,[33] to continue annual renewal of permits so long as outfitters offered a valuable service and complied with land use restrictions. Similarly, although permits have always been considered personal and agencies have long cautioned that new entrants willing to buy out an existing business would not automatically be issued a new permit, it became the practice to do so if the potential buyer was deemed qualified.[34] As the supply of new permits dwindled, succession to the operation of an original permittee became the only generally available route to entering this enterprise and permittees came to expect long-term status despite the annual, revocable, and non-transferable nature of these permits.[35]

The tremendous growth in wilderness recreation during the late 1960s and 1970s, converted many outfitting operations from part-time occupations to full-time businesses and resulted in marked increases in the value of permits.[36] The escalation in permit values was most dra-

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32. Priority of use has been a traditional basis for determining priority of right to public land resources, FOSS, POLITICS AND GRASS 69-70 (1960). Prior use is an equity which justifies non-competitive issuance of leases and permits by the BLM, 43 C.F.R. §2920.5-4 (1987).

33. Because it takes time to build a stable business and gain familiarity with a particular area, officials recognize a general relationship between prior experience, potential safety and quality of service.

34. *E.g.*, Special Use Permit, Clause No. 13 (1971) (although the permit is not transferable, "if the person to whom title to said improvements shall have been transferred . . . is qualified as a permittee and is willing that his future occupancy . . . shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy . . . may be authorized . . . if . . . desirable and in the public interest").

35. Permits also have significant territorial aspects. Although permit terms disclaim the grant of exclusive use, territoriality frequently results from relatively few places where essential authorized activities can take place. For example, in steep terrain, authorized use of a single camp ground and pasturage or corral space may effectively preclude another outfitter from operating in a sizeable surrounding area because of the absence of other suitable locations for camp facilities. In other instances physical space may be available, but the land agency has allocated such areas for general public use. Similar conditions exist with whitewater outfitters, although it is the restriction on numbers and times of launches, which accounts for a degree of exclusivity. In Idaho, this territoriality is reinforced by a state licensing system which limits the number of outfitters who can engage in particular activities and specifies the territory or time frame in which outfitters may operate.

36. J. MEYERS, STRUCTURE AND TRANSFERABILITY OF LICENSES AND SPECIAL USE PERMITS FOR OUTFITTING AND GUIDING IN IDAHO 9-10 (Research paper, April 1985) estimated full (nine-launch) Middle Fork and Main Salmon River float permits at $150,000, ten-

matic in whitewater permits where burgeoning levels of use frequently lead to moratoria on additional permits.[37] As outfitting activities intensified, so did administrative oversight. Operating plans became increasingly formal and detailed and general land use planning gave increasing attention to outfitter activities. The greater viability of outfitting as a business and the explosion in permit values also prompted agency review of outfitter permit policy.

Policy review commenced as an inquiry into the level of fees being charged outfitters and soon expanded to a broader review of the customary means of issuing and renewing permits. In 1982, a Forest Service issue paper suggested that increased profitability of outfitting operations justified wider use of prospectuses and competitive bidding,[38] a practice prescribed for other commercial occupancies in which competitive interest was apparent.[39] This approach had been used on the Kern River in California, where the Forest Service had invited bids for a three-year permit opportunity, and resulted in the replacement of an incumbent by a new applicant. The prospect of this becoming general practice galvanized outfitters and an intense period of lobbying at high levels in Washington, D.C. ensued.

Use of prospectuses and bids was attractive to agencies because it produced greater revenues and enhanced agency control of outfitter operations. On the other hand, there were doubts about the wisdom of substituting a complex comparative licensing process for a relatively simple administrative system and concern that short and unstable tenure might diminish the quality and safety of service to the public.[40] Ultimately, an agency-outfitter task force was organized and a more definitive policy was formulated. The product, announced in 1984, so-

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week deer and elk permits from $30,000 - $50,000, and three to four-week deer and elk permits from $15,000 - $30,000. Elder, *supra* note 27, estimated full float permits on the Middle Fork at $100,000 - $200,000, on the Selway at $250,000, and on the Main Salmon at under $100,000.

37. Sudden increases in permit values prompted purely speculative acquisition and sales in some instances, Linford, *supra* note 29 at 3.

38. USFS, ISSUE ANALYSIS: SPECIAL USE PERMITS FOR COMMERCIAL OUTFITTER/GUIDE OPERATIONS (Feb. 23, 1982) (hereinafter Issue Analysis).

39. *Id.* at 6. This policy is not clearly expressed. Departmental regulations, 36 C.F.R. §251.57 (1988) require only that fair market value be obtained and FSM 2712.2 (1974) unambiguously requires prospectuses and bids only when sizeable visitor services are initiated by agency planning efforts. This direction appears to be more broadly understood within the agency, however. The Issue Paper, *supra* note 38 at 6, notes competitive bids have been used for outfitter permits in two instances, the Kern River in California and the Chattooga River in the Carolinas, and that prospectuses were being prepared for other rivers in California.

40. Issue Analysis, *supra* note 38 at 4-5, 8.

lidifies outfitter tenure, increases government revenue, diminishes purely speculative holding of permits, and generally provides for more intensive scrutiny of outfitter operations.[41]

Under current policy, permits for proven outfitters will be issued for five-year terms, but are subject to annual performance review which can result in probationary status or revocation. Assuming continued consistency with land use planning and adequate service, permits will be renewed at levels of actual acceptable use, with any unused authorization subject to re-assignment. The practice of transferring permits incident to the sale of a business is confirmed so long as the seller has a record of adequate performance and the buyer is qualified. Fees have been raised substantially from $0.25 per customer day to 3% of gross revenue plus fees for camp-site reservation and stock grazing. Where competitive interest warrants, prospectuses and bids will be used for new outfitting opportunities, including re-assignment of previously authorized use, larger planned allocation of outfitting use, or authorization of new services.[42]

B. The Idaho Outfitters and Guides Board

1. Initial Regulation (1951-1961)

Given the historic connection of outfitting and guiding with hunting and fishing, it is not surprising the earliest state involvement stemmed from fish and game regulation.[43] As early as 1951, persons providing horses for hunting and fishing or assisting others in taking fish and game on a commercial basis were required to obtain annual licenses from the Idaho Fish and Game Department.[44] Although the Fish and Game Department could refuse to renew, suspend or revoke licenses for specified conduct,[45] the department was not provided with rule-making authority and was instructed to grant licenses to any ap-

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41. The Forest Service implemented this policy in February, 1984 through Interim Directive No. 34 amending FSM 2721.53. These provisions have since been renewed annually by means of a series of interim directives, the most recent of which is I.D. No. 58, (July, 1987). BLM has implemented a substantially identical policy. Development of the guidelines is treated generally in Linford, *supra* note 29.

42. *See generally*, Section V(C) *infra*.

43. This is still the case in many states. In both Montana, MONT. CODE ANN. §§37-47-101(5) & (6) (1987), and Wyoming, WYO. STAT. §§23-2-401 & 23-2-402 (1986), regulation of outfitting and guiding is confined to hunting and fishing.

44. Sec. 1 & 2, Act approved Mar. 14, 1951, Ch. 152, 1951 Idaho Sess. Laws 344-345. Unlicensed outfitting and guiding was made a misdemeanor, punishable by fines up to $300 and imprisonment for up to six months, *id.* Sec. 7 at 347.

45. *Id.* Sec. 4 at 346 (failing to perform outfitting and guiding services, making false statements in license applications, or violating fish and game laws).

plicant of "good moral character" who supplied certain basic information, posted the required bond, and paid the required license fee.[46] In 1955, administration oversight was modestly increased.[47] The history of state regulation since then is one of expanding jurisdiction and increasing regulatory authority.

2. Regulation Matures (1961-1970)

In 1961 the outfitters and guides statute underwent its first major revision.[48] Most notable was the creation of a self-governing industry commission, the IOGB, consisting of three experienced outfitters appointed by the Governor.[49] The IOGB was authorized to establish qualifications for outfitters and guides, adopt rules, license, and otherwise regulate outfitting and guiding, in order to foster the state's increasing interest in wildland recreation and assure public safety.[50] Minimum qualifications of licensees were specified[51] and the list of grounds for suspension or revocation of licenses was expanded.[52]

Accompanying these delegations of regulatory authority were various procedural protections for applicants and licensees. Although the IOGB was authorized to conduct investigation of applicants, action on license applications was required within 30 days. In addition, annual renewal of existing licensees "in good standing" was automatic upon posting of bond and payment of fees.[53] Any applicant denied a license was entitled to an opportunity to cure deficiencies justifying denial,[54]

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46. *Id.* Sec. 2 at 345 (the information required was: property owned and used in the business, experience, areas with which the applicant is familiar, and endorsement of three residents of the county in which the applicant resides).

47. Applicants were required to obtain the endorsements of the local Forest Service and Fish and Game officials. The Department was authorized to determine whether an applicant was adequately equipped to protect and serve guests and deny licenses for failure to meet this or other application requirements. Sec. 1, Act approved Mar. 15, 1955, ch. 225, 1955 Idaho Sess. Laws 497-98.

48. This is generally understood today as an industry-sponsored product arising from conflict among outfitters' hunting operations. Interview with William Meiners, Member, IOGB, (Jan. 30, 1987).

49. Sec. 6 & 7, Act approved Mar. 11, 1961, ch. 242, 1961 Idaho Sess. Laws 397, 399-400.

50. *Id.* Sec. 1 & 8 at 398, 400.

51. *Id.* Sec. 9 at 400-401 (good moral character and working knowledge of Idaho fish and game laws and U.S. Forest Service regulations).

52. *Id.* Sec. 14 at 403 (misleading advertising, conviction of a felony involving moral turpitude, failure to comply with U.S. Forest Service regulations, and dishonorable or unethical conduct toward clients were added).

53. *Id.* Sec. 9 at 401-402.

54. *Id.* Sec. 10 at 402.

and judicial review of IOGB decisions suspending or revoking licenses was de novo and included the right to jury trial.[55]

Four years later the outfitter statute was amended in three major respects. First, IOGB jurisdiction was extended beyond hunting and fishing activities to include boating on specified rivers.[56] Second, broader public interest considerations were infused into the law in several respects. The make-up of the IOGB was expanded to include two non-outfitters, one a member of the Fish and Game Commission and the other a public interest representative appointed by the Governor.[57] Public safety and wildlife conservation were expressly included in rulemaking[58] and licensing[59] authority, as well as articulated as grounds for adjusting big game territories.[60] IOGB authority to deal with licensees was also made more explicit.[61]

Finally, the legislature also formalized a system of territories among big game outfitters.[62] Applicants for big game outfitting licenses

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55. *Id.* Sec. 16 at 404. Two other features of the 1961 law are noteworthy. Following the pattern of the Fish and Game Department, most of the fees collected from outfitters and guides were deposited in a special fund available to the IOGB for carrying out its responsibilities. *Id.* Sec. 12 at 402. This self-funding scheme continues to date and presently all license fees and a portion of civil penalties for unlicensed outfitting are deposited in a special fund appropriated for the IOGB administration. IDAHO CODE §36-2111 (1977). Additionally, the penal provisions for operating without a license were reinforced by requiring proof of a valid license in order for any outfitter or guide to recover compensation for services in any civil action. Sec. 19, Act approved Mar. 11, 1961, ch. 242, 1961 Idaho Sess. Laws 397, 405. This feature also remains current. IDAHO CODE §36-2118 (1977).

56. Sec. 2, Act approved Mar. 18, 1965, ch. 180, 1965 Idaho Sess. Laws 368, 371 (the specified rivers were those termed "hazardous" and identified as the Salmon, the Snake below Hells Canyon, the Clearwater, and their tributaries).

57. Act approved Mar. 18, 1965, ch. 179, 1965 Idaho Sess. Laws 366.

58. Sec. 3, Act approved Mar. 18, 1965, ch. 180, 1965 Idaho Sess. Laws 371-72 (the IOGB rulemaking authority was amended to include specific purposes of customer "health, safety, welfare and freedom from injury" as well as "conservation of wildlife and range resources").

59. *Id.* Sec. 5 at 373 (applicants were required to provide a certification from Fish & Game that they had neither been convicted nor forfeited bond on a fish and game violation for the previous 12 months); *id.* Sec. 6 at 375 (an applicant's safety record and accessibility of an area were also listed as relevant factors in a decision to issue or deny licenses).

60. *Id.* Sec. 7 at 376.

61. Although the provision for automatic renewal of licenses for existing licensees in good standing was retained, applicants had to comply with broadened application requirements. *Id.* Sec. 5 at 374. The provision allowing applicants to cure deficiencies in case of rejection was also retained, but the determination of whether the deficiency had been cured was expressly made subject to the satisfaction of IOGB. *Id.* Sec. 6 at 374.

62. Territories were first recognized by statute in Sec. 2, Act approved Feb. 25, 1963, ch. 34, 1963 Idaho Sess. Laws 176, 178 which provided simply that licenses "shall

were required to describe their area of operations[63] and, in issuing licenses, the IOGB was directed to define "the exact territorial scope" of a licensee's activities.[64] Although the IOGB was authorized to adjust outfitting areas based on territorial conflict,[65] big game outfitters were required to confine operations to the areas specified.[66]

3. The Current Law (1970 - present)

In 1970 the legislature enacted major revisions in the Outfitter and Guides statute which, together with perfecting legislation in the early 1970s, largely remain intact. This legislation expanded the IOGB jurisdiction to include virtually all types of commercial outfitting and guiding activities, significantly broadened the IOGB authority to deal with applicants and licensees, and strengthened the IOGB powers of enforcement. This enlargement of regulatory authority was accompanied by a corresponding diminution in the statutory assurances to licensees. However, the legislation of the early 1970s also reinforced the territorial aspects of licenses.

Severing the traditional focus on hunting and fishing activities, the 1970 legislation required licenses in order to lawfully outfit or guide any commercial whitewater boating activity[67] or "other recreational excursion."[68] This expansion of jurisdiction was accompanied by several provisions, procedural and substantive, which strengthened the IOGB licensing authority.

Procedural changes included: the requirement that applications be sworn; the explicit IOGB authority to prescribe the contents of appli-

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also limit the area in which such person shall operate in outfitting . . . persons . . . hunting big game."

63. Sec. 5, Act approved March 18, 1965, *supra* note 58 at 373.

64. *Id.* Sec. 6 at 375.

65. *Id.* Sec. 7 at 376.

66. *Id.* Sec. 10 at 378.

67. Sec. 1, Act approved Mar. 10, 1970, ch. 139, 1970 Idaho Sess. Laws 337, 339-40. This was achieved initially by retaining the 1965 language relating to boating on "hazardous rivers," but deleting the narrow list of rivers coming under that category, Three years later the language "streams and rivers" was adopted, Sec. 1, Act approved Mar. 17, 1973, ch. 271, 1973 Idaho Sess. Laws 567, 568.

68. Sec. 1, Act approved Mar. 10, 1970, *supra* note 67. Since 1976, IOGB jurisdiction has been defined more narrowly as covering commercial "outdoor recreational activities limited to . . . hunting . . . ; boating . . . ; fishing; and hazardous mountain excursions," Sec. 1, Act approved April 1, 1976, ch. 332, 1976 Idaho Sess. Laws 1114. However, because the definition of "hazardous mountain excursion" has been broad enough to cover most conceivable wildland recreation activities, IOGB RULES AND REGULATIONS Sec. B (1986), little significant shrinkage of IOGB jurisdiction has occurred in practice.

cations;[69] the power to include reasonable conditions and limitations in licenses; and the authority to subpoena witnesses and documents.[70] The semi-automatic renewal of annual licenses was deleted and issuance of licenses was expressly made discretionary upon the IOGB consideration of a non-inclusive list of mandatory factors.[71] However, since 1976, the annual renewal of existing licensees has been expedited by authorizing a single IOGB member to renew if no adverse information has been filed about a renewal applicant.[72] In addition, agency disciplinary procedures and judicial review of decisions were required to conform with the state Administrative Procedures Act.[73]

A number of substantive standards were also added. Lack of adequate financial capacity was included in the list of minimum statutory requirements. The IOGB was authorized to deny applications for any reason which would justify disciplinary action,[74] and the list of circumstances justifying disciplinary action was substantially expanded.[75] Territorial aspects of big game licenses were reinforced by provisions requiring the IOGB to precisely define the geographic boundaries of licenses and the activities for which a licensee was authorized. In 1973 these provisions were extended to all outfitting licenses of all kinds.[76]

The IOGB legislation was recodified in 1976 without substantive change, as part of a general recodification of fish and game legislation.[77] Since that time, changes to the IOGB law have largely been house-keeping in nature, though two or three are noteworthy. Enforce-

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69. Sec. 3, Act approved Mar. 10, 1970, ch. 139, 1970 Idaho Sess. Laws 337, 342.

70. *Id.* Sec. 2 at 340-41.

71. *Id.* Sec. 4 at 345-46. These factors are: length of time an applicant had operated in an area; experience and resources; safety record; accessibility of an area; maintenance of competition; game conservation; service to the public; and fairness. Three years later the factor of maintaining competition was deleted and the effect on the environment was added. Sec. 1, Act approved Mar. 17, 1973, ch. 270, 1970 Idaho Sess. Laws 565, 566.

72. Sec. 3, Act approved July 1, 1976, ch. 332, 1976 Idaho Sess. Laws 1114, 1118.

73. Sec. 8-9, Act approved Mar. 10, 1970, ch. 139, 1970 Idaho Sess. Laws 349-50.

74. *Id.* Sec. 4 at 346.

75. *Id.* Sec. 7 at 347-48. Major grounds included: deception in procuring a license, misleading advertising, conviction of a felony, conviction of a fish and game law or U.S. Forest Service regulation within the preceding five years, unethical conduct toward clients or breach of contract with clients within the preceding five years, unlicensed operation or employment of unlicensed guides within the preceding two years, and inhumane treatment of an animal which endangered a client. In 1971 any inhumane treatment of an animal was added, Act approved Mar. 24, 1971, ch. 211, 1971 Idaho Sess. Laws 921, 922, failure to offer services to the general public was added in 1972, Act approved Mar. 17, 1972, ch. 400, 1972 Idaho Sess. Laws 1164, 1165, and in 1976, violation of IOGB rules was added, Sec. 4, Act approved July 1, 1976, ch. 332, 1977 Idaho Sess. Laws 1114, 1119.

76. Sec. 1, Act approved Mar. 17, 1973, ch. 270, 1973 Idaho Sess. Laws 565, 566.

77. Sec. 2, Act approved Mar. 11, 1976, ch. 95, 1976 Idaho Sess. Laws 315, 386.

ment powers were expanded in 1978 by the addition of civil penalties for violation of license requirements[78] and, in 1982, misdemeanor penalties for violation of specific license requirements were added.[79] In 1984, the law was updated to include violation of BLM regulations as an additional ground for disciplinary action and the definition of "failure to serve the general public" was expanded to include non-use of a license.[80] In 1988, the legislature authorized the IOGB to impose administrative penalties of up to $5,000,[81] and increased fines and civil penalties to $5,000 per violation.[82]

4. Residence Requirements

Residence is a common requirement of state licensing schemes and was traditionally required in Idaho unless the home state of a non-resident applicant permitted Idaho outfitters to operate there. In 1982, the residence requirement was removed.[83] Also, from 1955 to 1982, non-resident applicants paid significantly higher license fees. A slight differential existed thereafter until 1988 when the distinction between resident and non-resident fees was eliminated altogether.[84]

IV. STATE LICENSING AND REGULATION

A. Regulatory Framework

Idaho statutes establish a comprehensive regulatory system.[85] Any person or organization outfitting or guiding a broad range of recreational activities within the state is required to obtain a license from the IOGB. Unlicensed outfitting or guiding subjects a person to civil[86] and criminal[87] penalties. Further, a valid license is a prerequisite to civil recovery of fees for services.[88] Licenses are issued for a license year which begins on April 1 of each year and extends to March 31 of the following year.[89]

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78. Sec. 7, Act approved Mar. 17, 1978, ch. 131, 1978 Idaho Sess. Laws 292, 300-301.
79. Sec. 5, Act approved Mar. 23, 1982, ch. 174, 1982 Idaho Sess. Laws 458, 462-63.
80. Sec. 2, Act approved April 4, 1984, ch. 262, 1984 Idaho Sess. Laws 632, 634-35.
81. Sec. 10, Act approved Mar. 31, 1988, ch. 269, 1988 Idaho Sess. Laws 886, 894.
82. *Id.* Secs. 11 & 12 at 894-95.
83. Sec. 2, Act approved Mar. 23, 1982, ch. 174, 1982 Idaho Sess. Laws 458, 460.
84. Sec. 7, Act approved Mar. 31, 1988, *supra* note 81 at 891-92.
85. IDAHO CODE §§36-2101 to 36-2119 (1977).
86. *Id.* at §36-2117A.
87. *Id.* at §36-2104(a).
88. *Id.* at §36-2118.
89. *Id.* at §36-2102(g).

IOGB is authorized to: establish rules and regulations; issue, adjust, suspend or revoke licenses; investigate violations of law; and cooperate with other government agencies on matters relevant to its mission. Rulemaking authority is broadly formulated and includes procedural requirements, qualifications and equipment requirements, as well as "any and all" requirements "deemed necessary . . . for . . . safeguarding" the welfare of consumers of outfitting and guiding services "and for the conservation of wildlife and range resources."[90] Licensing authority is also broadly conceived. General provisions authorize the IOGB to investigate the qualifications of applicants to conduct outfitting and guiding services, issue licenses subject to such "restrictions and limitations" as it deems "reasonable," and to suspend or revoke licenses for cause.[91] Finally, the IOGB is given broad authority to enforce legal requirements including the power to subpoena witnesses and documents as necessary to conduct any hearing[92] as well as the authority to employ investigative agents and police officers.[93]

B. IOGB Jurisdiction

1. Purposes of Regulation

The legislative declaration of policy contains at least four considerations which appear to justify regulation of outfitters and guides: (1) the public interest in the state's "invaluable . . . natural resources"; (2) the "vital importance" of the "tourist trade" to the state; (3) the outfitted public's interest in "health, safety, welfare and freedom from injury"; and (4) the "right of the general public" to enjoy recreational pursuits not employing outfitters and guides. However, the declaration also provides that licensing and regulation is for the "explicit purpose of safeguarding health, safety, welfare and freedom from injury or danger" of consumers of such services,[94] potentially indicating narrower legislative purposes.

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90. *Id.* at §§36-2107(b) & (d).

91. *Id.* at §§36-2107(a) & (c). Specific sections further amplify this authority. Issuance of licenses is covered by §36-2109, adjustment of licenses by §36-2110, and termination of licenses by §36-2113. *See* Sections C(1) & (2), *infra*.

92. *Id.* at §§36-2107(d) & (f).

93. *Id.* at §36-2107(h).

94. *Id.* at §36-2101, which provides in pertinent part:

> The natural resources of the state of Idaho are an invaluable asset . . . . The tourist trade is of vital importance to the state of Idaho, and the recreational value of Idaho's natural resources is such that the number of persons who are each year participating in their enjoyment is steadily increasing. The intent of this legislation is to promote and encourage . . . participa[tion] in the enjoyment and use of the . . . natural resources of Idaho, and the fish and game

Two different formulations of the scope of IOGB authority are suggested by this language. One is a "consumer protection" interpretation which would confine regulation to the safety or welfare of the outfitted public. Because the conservation of wildlife and other natural resources, the health and stability of the outfitting industry, and the extent and nature of non-outfitted activities all have relevance to the safety or quality of experience which can be secured by the outfitted public, this formulation gives IOGB considerable berth; however, it would foreclose outfitter regulation where these objects could not rationally be related to interests of consumers of outfitting services. A broader "public interest" formulation is also possible. This would sanction any regulation of outfitters reasonably related to the broader public interest in resource conservation, industry stability, or interests of either the outfitted or non-outfitted public. While this question has not been squarely faced, the structure of the act, its history and administration, and those decisions which address the scope of IOGB authority, tend to support the broader public interest reading.

The strongest indication of intent to authorize regulation of outfitters for public purposes beyond the interests of consumers is the historic concern for wildlife and natural resources. Licensure under the 1951 statute was confined to outfitting of hunting and fishing activities and was administered by the Fish and Game Commission. Enforcement of fish and game laws was a prominent factor in issuing and revoking licenses.[95] Although the 1961 statute gave primary emphasis to consumer protection, it also strengthened features concerning fish and game laws and added requirements concerning national forest regulations.[96] Since then, amendments to the law have emphasized broad concern with wildlife and natural resource conservation. In 1965 a Fish and Game member was added to the IOGB, conservation of wildlife and range resources was expressly made a basis for IOGB rulemaking,

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> therein, and to that end to regulate and license those persons who undertake for compensation to provide equipment and personal services to such persons, for the explicit purpose of safeguarding the health, safety, welfare and freedom from injury or danger of such persons, in the exercise of the police power of this state. It is not the intent of this legislation to interfere in any way with . . . the right of the general public to enjoy the recreational value of Idaho's . . . natural resources when the services of commercial outfitters and guides are not utilized . . . .

95. Sec. 4, Act approved Mar. 14, 1951, ch. 152, 1951 Idaho Sess. Laws 344, 346.

96. Sec. 9, Act approved Mar. 11, 1961, ch. 242, 1961 Idaho Sess. Laws 397, 400-01, required applicants to have a working knowledge of state fish and game laws and national forest regulations. *id.* Sec. 14 at 403, provided that non-compliance with Forest Service regulations or conviction of fish and game laws were grounds for revocation of a license.

and game conservation was made a consideration in adjusting outfitter territories.[97] In 1970, game conservation was included as a factor in issuance of licenses,[98] and in 1973, impact on the environment was added as a factor.[99] Consistently, current IOGB regulations broadly interpret the outfitter statute as authorizing regulation to "protect, enhance, and facilitate management of Idaho's fish, wildlife, and recreational resources."[100]

A broad public interest interpretation of authority is also evidenced by IOGB rules and decisions relating to the interests of the general public. In 1965, the interest of the non-outfitted public was expressly recognized in the outfitter law.[101] Current rules require consideration of the impacts of proposed activities on "use by the general public" in deciding to issue licenses,[102] and require consideration of "public" as well as "client safety" in deciding whether territorial conflict requires adjustment of outfitter territories.[103]

IOGB interpretation of "public need," a factor which must be considered in issuing new licenses,[104] is also relevant. In *In re Application of Dick Alf's*,[105] a purchaser of an outfitting business sought a license which included fishing and bird hunting, activities for which his seller had been previously licensed. IOGB refused to authorize these activities because of the potential impact on non-outfitted use and the determination that outfitter services were not needed. This decision was challenged before Hearing Officer Mullaney who interpreted the IOGB law as requiring new applicants to demonstrate a general public interest in outfitting services, not merely a potential customer demand:

> [T]he issuance of an outfitters license is based primarily on *the public convenience and necessity*. It is not based on commercial opportunity. The Hearing Officer doubts that any individual has a legal right to commercialize directly Idaho's fish and

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97. Sec. 2, Act approved Mar. 18, 1965, ch. 179, 1965 Idaho Sess. Laws 366-367; Sec. 3, Act approved Mar. 18, 1965, ch. 180, at 372; *id.* Sec. 7 at 376.

98. Sec. 4, Act approved Mar. 10, 1970, ch. 139, 1970 Idaho Sess. Laws 337, 345.

99. Sec. 1, Act approved Mar. 17, 1973, ch. 270, 1973 Idaho Sess. Laws 565-66.

100. IOGB RULES AND REGULATIONS, Sec. A (1986). Also, in 1971, inhumane treatment of stock was added as grounds for license revocation, Sec. 1, Act approved Mar. 24, 1971, ch 211, 1971 Idaho Sess. Laws 921-922. Since the 1970 statute had already included inhumane treatment of stock which endangered a guest as a basis for revocation, *see* Sec. 7, Idaho Sess. Laws, *supra* note 98, this is also convincing evidence of a broader public interest conception of IOGB authority.

101. Sec. 1, ch. 180, Idaho Sess. Laws, *supra* note 97 at 370.

102. IOGB RULES AND REGULATIONS 19(f) (1986).

103. *Id.* at 24(c)(iii) (1986).

104. *Id.* at 19(b) (1986).

105. Nos. 80-2, 80-3 (before the State IOGB, filed July 9, 1980).

> game which is owned or held in trust for the people of Idaho by its sovereign government.[106]

Concluding that the concern for general public use and the policy against licensing bird hunting in accessible areas were reasonable, Officer Mullaney recommended the denial be sustained.

IOGB policies designed to provide stability and continuity in existing permits also suggest the perception of a broader public interest in the economic well-being of the industry as a whole. From the outset, annual licenses have been required. However, the legislature also initially provided licensees with assurance of long-term continuity by guaranteeing them a right of renewal, unless there were grounds for disciplinary action.[107] Although this provision was deleted in 1970, IOGB regulations continue to provide incumbents in good standing considerable assurance of continued licensure.[108] Stability is also promoted by the practice of licensing purchasers of existing outfitting businesses [109]

In *In re Application of Willis Benjamin*,[110] an applicant who was denied a license to outfit float fishing on the Henry's Fork, challenged the rationality of the policy which gave preferential access to incumbents and their purchasers. Hearing Officer Mullaney concluded that such preferences were justified by both "ease of administration" and the public interest in the stability and continuity of outfitter services:

> Given the annual license concept in the law, if some priority or consideration for another annual license were not offered to an outfitter, he would risk the capital outlay to start or expand an outfitting business only to have himself edged out by another applicant the next year and have just one market for his business, the new outfitter. Encouraging stability and continuity in outfitting services to the public is a public benefit. It seems to the Hearing Officer that so long as the Board scrutinizes the purchaser of an outfitters business using the standards in the state law, the public is protected and the service continued. Allowing transfer of the priority right to another license to the purchaser seems reasonable under the law . . . .[111]

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106. *Id.* at 5.

107. Sec. 9, Act approved Mar. 11, 1961, ch. 242, 1961 Idaho Sess. Laws 397, 401-02.

108. *See* notes 194-98 *infra*.

109. *See* notes 219-22 *infra*.

110. No. 80-1 (before the State IOBG filed Sept. 11, 1980).

111. *Id.* at 8-9.

A broad view of legitimate regulatory purposes is also represented by *Idaho Wilderness School, Inc. v. Lanham*,[112] a civil rights action challenging a moratorium on new licenses for floating the Middle Fork. The moratorium was adopted by the IOGB in 1971 at U.S. Forest Service urging and was designed to protect the quality of the wilderness experience and the environment as well as public health and safety.[113] Rejecting plaintiff's claim for "lack of substance," Judge McNichols interpreted IOGB jurisdiction broadly:

> The action taken by the Board in determining to limit the number of commercial operations on the impacted rivers through the licensing power authorized by statute constituted a proper exercise of administrative discretion. The moratorium regulations had a rational relationship to legitimate state interest, *i.e.*, the protection of the health, safety, and general welfare of the public.[114]

In sum, although the statute confines regulation to commercial outfitting activities, it has been widely interpreted to authorize regulation which reflects a broad public interest in such activities, including wildlife and environmental protection, general public recreation, and industry stability, as well as the protection and enhancement of the safety and quality of experiences for the outfitted public.

2. Activities Regulated

The legislative declaration of policy cautions that licensing and regulation of outfitting and guiding is not intended to interfere with public recreational activities which do not rely on "commercial" outfitting and guiding services nor is it intended to prevent owners of stock from "accommodat[ing] friends" where no "consideration" is involved.[115] The statute defines an outfitter as:

> [A]ny person who, while engaging in any of the acts enumerated herein in any manner: (1) advertises or otherwise holds himself out to the public for hire; (2) provides facilities and services for consideration; and (3) maintains, leases, or otherwise uses equipment or accommodations for compensation for the conduct of outdoor recreational activities limited to . . .

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112. No. 3-74-11 (D. Ida., filed May 28, 1976).
113. *Id.* at 3.
114. *Id.* at 7.
115. IDAHO CODE §36-2101 (Supp. 1988).

> hunting . . . boating . . . fishing . . . and hazardous desert or mountain excursions.[116]

A guide is defined as:

> [A]ny natural person who is employed by a licensed outfitter to furnish personal services for the conduct of outdoor recreational activities directly related to the . . . activities for which the . . . outfitter is licensed . . . . [E]xcept: (1) any employee of the state of Idaho or the United States when acting in his official capacity, or (2) any natural person who is employed by a licensed outfitter solely for . . . caring for . . . livestock, cooking, woodcutting, and transporting people, equipment and personal property on public roads.[117]

Supplying stock or equipment to hunters or fishermen for "temporary use" and "for accommodation and not for compensation or gain" is also expressly excepted from these definitions.[118]

The statutory definition of outfitting contains at least three distinct elements: (a) a public holding out of services and equipment or accommodations; (b) compensation; and (c) conduct of specified activities. Guiding, on the other hand, requires only the latter two, and thus potentially has broader reach. However, because of the additional requirement that guides be employed by a licensed outfitter or themselves be licensed as outfitters, unlicensed outfitting may be involved even though there is no public holding out of services.

(a) Public holding out.

In an opinion on IOGB jurisdiction over educational institutions offering courses in survival, rafting, and other outdoor skills, the Idaho Attorney General advised that public offering or "holding out" is not present where equipment and services are incidently available to a restricted membership. However, where membership is simply a means of gaining access to equipment and services, or restrictive only in form, the act applies.[119] As applied to educational institutions, the opinion

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116. *Id.* at §36-2102(b).

117. *Id.* at §36-2102(c) (Supp. 1989). This subsection also provides that any person not so employed who "offers or provides facilities or services as specified in subsection (b)" (definition of outfitter) is in violation of the act. Prior to 1988, a guide was defined as one who, "for compensation . . . furnishes personal services" for the conduct of specified recreation activities; the statute further specified that any guide not employed by an outfitter was "deemed to be an outfitter." IDAHO CODE §36-2102(c) (1977).

118. IDAHO CODE §36-2103 (1977).

119. Att'y Gen. Op. No. 78-34 at 135-36 (August 23, 1978).

concludes that public holding out is not present if courses are confined to "full time students and their families," but occurs if courses are open to any member of the public by "simply enrolling . . . on a part-time or one-time basis."[120] Alternatively, the opinion notes that an organization also may be engaged in outfitting if instructors are compensated, because guides are required to be employed by a licensed outfitter or be licensed themselves as outfitters.[121] This analysis has subsequently been applied in two advisory opinions issued by the Attorney General's office.[122]

While the requirement of public "holding out" appears essential to the definition of outfitting, there may be good policy reasons for inter-

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120. *Id.* at 138.

121. *Id.* at 136-37. Because state and federal employees engaged in official duties are excluded from these requirements, the opinion indicates this analysis would not apply to public educational institutions where such instruction is part of an instructor's regular contract, *id.* at 138.

122. The most recent is an opinion dealing with two therapeutic programs, the Quaker Hill Conference and the School of Urban and Wilderness Survival. Letter from Jim Jones, Idaho Att'y Gen., to Glen R. Foster, Legal Guidelines of the Att'y Gen. 221 (Sept. 19, 1983). This opinion acknowledges that if activities are confined to a limited membership the element of "holding out" is not present, but emphasized that the "activity must be a benefit of membership, not the sole reason for membership." Since neither organization confined activities to members, this element was determined to be present. In addition, because both programs employed instructors, they were required to be licensed as guides; either the instructors or the organizations were required to obtain outfitting licenses. *Id.* at 231-32.

The Attorney General also applied this analysis in an earlier unpublished advisory opinion, concerning the purpose and effect of a contract purporting to sell a hunting camp and equipment. Letter from Jim Jones, Idaho Att'y Gen., to Henry R. Boomer, Idaho County Deputy Prosecutor (January 24, 1983). In the contract under review a group of twelve "buyers" purported to purchase a "complete hunting camp outfit" for $20,000. However, the arrangement clearly contemplated more than a mere sale of stock and equipment, because the annual $1,000 payment of each individual "buyer" was first to be applied to "all expenses related to big game hunting for the year including maintenance of equipment and animals for the entire year and food and other related expenses for hunting." This suggested that the parties may actually have been bargaining for outfitting and guiding services, anticipating that "purchase payments" would regularly be consumed by such expenses. The Idaho County prosecutor was advised that the legality of the contract could be determined only after inquiry into the circumstances surrounding its execution and performance. The contract might constitute unlicensed outfitting depending on the manner in which the "buyers" were identified and organized (*i.e.*, whether there was any manner of public holding out of services) and whether the nature and value of the "seller's" performance and use of stock and equipment during the year indicated that outfitting services were the principal benefit of the bargain. Alternatively, the prosecutor was advised that the manner in which the "seller" organized and participated in annual trips might indicate that he was being compensated for furnishing personal services, and thus engaged in unlicensed guiding, and indirectly, unlicensed outfitting as well.

preting this requirement narrowly.[123] A necessary aspect of achieving statutory purposes is the effective discouragement of unlicensed outfitting. If the holding out element is too stringently interpreted, the integrity of the supervisory scheme may be subverted by close membership arrangements designed to avoid regulation. This seems to be appreciated by the legislature in its use of the phrase "in any manner . . . advertises or otherwise holds . . . out" in the statutory definition, as well as in the emphasis on the element of compensation elsewhere to distinguish between regulated and non-regulated activities. Where access to equipment and services is the principal reason for purchasing membership in a group, the consuming public is arguably involved both immediately and prospectively. Further, the recurrent nature of activities inherent in such an arrangement is likely to implicate other public concerns relevant to IOGB regulation. In light of this, the IOGB might be able to justify prophylactic rules interpreting this element, such as permitting it to be found whenever there is substantial potential for public participation or permitting it to be rebuttably presumed where there is clear proof of compensation beyond sharing of expenses.[124]

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123. So long as guides can legally operate only when licensed as, or employed by, an outfitter, this point is largely academic. However, public safety and recreation might be enhanced by permitting self-outfitted parties to employ licensed guides, especially on whitewater trips.

124. The element of public availability of services appears in other sections of the statute but in a decidedly different context. In contrast to those situations where a close group seeks to avoid IOGB jurisdiction, are those instances where a close group desires the territorial advantages which come with an outfitters license, but seeks to limit the availability of its facilities and services. IDAHO CODE §36-2113(a)(13) (Supp. 1988) subjects an outfitter's license to suspension or revocation for non-use, limiting services to a restricted membership, or failure to offer services to the general public, and, under §36-2108(c), these would be grounds for rejecting an application. Further, IOGB RULES AND REGULATIONS 9 (1986) provides that an outfitter license will not be issued to any individual or organization "which limits its services to a membership or does not offer services to the general public."

Whereas the purpose of public "holding out" is a jurisdictional requirement serving to separate activities which the legislature intends to regulate from those it does not, the requirement of making services available to the public is a standard of licensee performance designed to assure a high degree of access to services which are by their nature limited. Conversely this requirement is designed to prevent a close group from pre-empting or monopolizing a public resource. Thus, there are good policy reasons for regulators to establish high standards of public availability in order to implement legislative purposes.

(b) Compensation.

This element has been interpreted broadly to effect the legislative intent to protect consumers relying on payment for services in order to undertake potentially hazardous activities. As noted above, the legislature has repeatedly emphasized its intent to regulate outfitting and guiding undertaken "commercially," for "consideration," for "hire" or for "compensation or gain," and expressly excepted only uncompensated "accommodation" of friends and noncommercial "general public" recreation, where, presumably, people rely upon their own or a friend's skill and judgment. Thus, activities undertaken by public and nonprofit organizations have consistently been held to fall within IOGB jurisdiction so long as leaders or instructors are compensated. As stated in a 1983 advisory opinion: "One of the purposes of the Act is to provide a means for the consumer to determine whether the outfitter is qualified to provide equipment or services for one or more of the enumerated activities. Profit seeking is not an element of the definition . . . ."[125]

The term "compensation" is broadly defined in IOGB rules to include any payment or barter beyond sharing of food, travel, and other incidental expenses. This includes:

> the receipt . . . of goods, services, or cash in exchange for outfitted or guided activities with the intent of generating revenues in excess of out-of-pocket costs. A bona fide sharing of out-of-pocket travel expenses by members of a recreational party shall not be deemed compensation. However, such out-of-pocket expenses may not include depreciation, amortization, wages, or other profit-oriented charges.[126]

This rule further defines "out-of-pocket costs" as "the direct costs attributable to a recreational activity. Such direct costs shall not include: (1) compensation for either sponsors or participants, (2) amortization or depreciation of debt or equipment, or (3) costs of non-expendable supplies."[127]

(c) Types of activities.

The definition of outfitter and guide, is confined to "recreational activities limited to" hunting, boating, fishing, and "hazardous desert or mountain excursions." This too has been broadly interpreted to ef-

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125. Letter to Glen Foster, *supra* note 122 at 230.
126. IOGB RULES AND REGULATIONS Sec. B (1986).
127. *Id.*

fect the various purposes of outfitter legislation. Thus, where activities involve potential risk and members of the public rely upon the skills of compensated leaders or instructors, the fact that an activity is undertaken for instructional or therapeutic reasons rather than for pleasure has not been recognized as a basis for exempting it from IOGB regulation.[128] Likewise, the catch-all phrase "hazardous desert and mountain excursions" has been defined broadly by IOGB regulation to encompass:

> outfitted or guided activities which are conducted in a mountainous environment or in mountainous terrain and which are sufficiently dangerous or hazardous in nature so as to constitute a potential danger to the health, safety, or welfare of participants involved in such activities. These activities shall include, but are not limited to, trailrides, backpacking, technical mountaineering/rock climbing, cross-country skiing, backcountry alpine skiing, and snowmobiling.[129]

Outfitting and guiding of bird hunting is clearly within the scope of IOGB jurisdiction, and can be conducted only if such activities are licensed by the IOGB. However, the policy has been to permit such outfitting only incident to some other licensed activity.[130] This policy apparently reflects the IOGB's judgment that in readily accessible areas, considerations of resource conservation, impacts on general public use, and the relative safety of such activities, all tend to indicate that commercially supported activities are not desirable or needed by the public.[131] However, where less hunting pressure exists, and where access is potentially hazardous, the public interest may be served by outfitting services.[132]

3. Federal-State Jurisdiction

Because almost two-thirds of the land in Idaho is federal and because the federal estate contains the lion's share of the remote country attractive to hunters and whitewater enthusiasts, most Idaho outfitters operate on federal forest and range and must, in addition to state li-

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128. Op. No. 78-34, *supra* note 119; Letter to Glen R. Foster, *supra* note 122 at 228-30.

129. IOGB RULES AND REGULATIONS Sec. B (1986).

130. IOGB RULES AND REGULATIONS 48 (1986) provides: "Upland game bird hunting and waterfowl hunting are not licensable activities for outfitting and/or guiding. However, chukar, Hungarian partridge, and forest grouse hunting may be licensed in connection with another outfitted activity."

131. In re Application of Dick Alf's, *supra* note 105 at 8-10.

132. *Id.*

censes, obtain special use permits from either the U.S. Forest Service or Bureau of Land Management. In addition, outfitters operating on navigable waters are potentially subject to federal regulation of navigation and interstate commerce. Not surprisingly, this dual authority is a source of controversy.

With few exceptions, federal lands in Idaho are held by the federal government under Article IV of the United States Constitution, authority which has been long recognized as non-exclusive, but supreme. Thus, federal and state regulation operate concurrently unless state authority is preempted by particular federal regulation.[133] A similar situation exists on navigable waters within the state. State law applies unless preempted by federal regulation of commerce or unless state regulation is determined to discriminate against or impose unreasonable burdens on interstate commerce. Two separate, but similar, challenges to state authority over outfitters illustrate these general principles.

In *Grand Canyon Dories, Inc. v. IOGB*,[134] plaintiff sought a judgment declaring that the Outfitters and Guides Act was preempted by various federal statutes regulating interstate commerce. Judge Walters rejected these arguments, holding that neither the Interstate Commerce Act, nor the Small Passenger Carrying Vessels Act, applied to plaintiff's boat outfitting on the Snake River. In addition, the court held that neither the Coast Guard Act, nor the Federal Boat Safety Act, were intended to be exclusive nor did they conflict with state regulation of outfitters and guides. However, Judge Walters agreed that the differential between annual fees charged non-residents and residents were not reasonably justified and, therefore, unconstitutionally discriminated against interstate commerce.[135]

A few years later, Grand Canyon Dories mounted an almost identical attack on the Outfitters and Guides Act in federal district court. Dismissal of this action was affirmed by the Ninth Circuit in *Grand Canyon Dories, Inc. v. IOGB*.[136] The opinion in this case provides useful guidance for an area of law noted for case-by-case determinations.

In regulating commercial outfitting and guiding to assure safety and adequacy of service and protect unique and scenic resources, the

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133. COGGINS AND WILKINSON, FEDERAL PUBLIC LAND & RESOURCES LAW 171-73; 191-230 (2d ed. 1987) describes the general principles and presents the principal public land cases in this area.

134. No. 58815 (4th Dist., Ada County, Mar. 15, 1978).

135. *Id.* at 11. At the time, the differential was $150 vs. $50 for outfitters and $100 vs. $15 for guides.

136. 709 F.2d 1250 (9th Cir. 1983). The reported decision does not reveal whether IOGB pleaded res judicata.

state was characterized as exercising "traditional police power" functions[137] which should be upheld unless there were "clear and manifest congressional indication of an intent to preempt"[138] or "direct conflict"[139] with federal regulation. In articulating controlling principles, the court relied heavily on *Ray v. Atlantic Richfield*,[140] a Supreme Court decision which signaled federal courts to approach assertions of preemption cautiously.

In *Ray*, the lower court had broadly invalidated a state law regulating oil tankers operating in Puget Sound, an activity already subject to considerable federal regulation. To the extent that uniformity was perceived as essential to federal regulation or to the extent that compliance with federal and state regulation was impossible, the Court affirmed. However, the Supreme Court recognized several aspects in which the state regulation was aimed at distinctive local concerns and merely supplemented federal aims. Relying on this approach, the Ninth Circuit in *Grand Canyon Dories*,[141] determined that neither the Federal Boat Safety Act, the Small Passenger Carrying Vessels Act, nor the Wild and Scenic Rivers Act preempted state regulation of commercial whitewater activity. In contrast to Judge Walter's decision, however, the Ninth Circuit upheld the differential between nonresident and resident fees, which had diminished considerably since 1978, concluding that the difference in fees was "too small to have anything but an incidental effect on interstate commerce, and the act otherwise regulated even-handedly."[142]

Recent Supreme Court decisions continue to display sensitivity to distinctive state and local concerns in the face of extensive federal regulation. Thus, in *Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm'n*,[143] the Court held that extensive federal safety and environmental regulation of nuclear power plants did not preempt state site regulation based on economic considerations. In *California Coastal Comm'n. v. Granite Rock Co.*,[144] the Court held that federal land use regulation of mining on federal land did not preempt concurrent state environmental regulation.

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137. *Id.* at 1254, 1256.

138. *Id.* at 1252.

139. *Id.* at 1254.

140. 435 U.S. 151 (1978).

141. 709 F.2d at 1250 (9th Cir. 1983).

142. *Id.* at 1257. At the time, the differential was $175 vs. $100 for outfitters and $100 vs. $50 for guides.

143. 461 U.S. 190 (1983).

144. 480 U.S. 572 (1987).

While the potential for disharmony between federal and state authorities is substantial, the history has been one of cooperation. Permission of land agencies has historically been required of applicants seeking state outfitting licenses,[145] and federal agencies require a state license in order to obtain a federal outfitter permit.[146] Furthermore, federal and state responsibilities have traditionally been divided along lines similar to those for managing wildlife on federal lands. That is, federal authorities have primarily focused on land resources while the state has primarily focused on fish and game and the outfitted public. However, the new federal policies for outfitting and guiding permits require increased federal oversight of the availability, safety, and adequacy of service, thus increasing the potential for federal-state conflict. In an effort to minimize this potential conflict, the IOGB and U.S. Forest Service Regions 1 (northern), 4 (intermountain), and 6 (northwest) have adopted a Memorandum of Understanding (MOU) which outlines respective roles and responsibilities of federal and state authorities.[147]

The MOU is largely procedural. The Forest Service agrees to recognize the outfitting and guiding industry in Idaho in its forest planning process, to communicate with the IOGB concerning applications for state licenses on national forest land, to advise the IOGB about problems arising from location or relocation of reserved campsites for outfitters, and to assist in enforcement and performance review. In a similar fashion, the IOGB agrees to notify the Forest Service of changes in licensing procedures and IOGB policies and regulations, communicate with the Forest Service about licensing conflicts relating to national forest land and adjustments in outfitter operations, assist in enforcing federal regulations, and participate in developing performance review standards. The MOU further provides for close coordination of license amendments, transfers of business ownership, and new outfitting opportunities, including, impaneling a joint federal-state selection committee.

Important differences still remain. In 1986, the Intermountain Regional Forester proffered an amendment to the MOU consisting of guidelines addressing three topics: performance ratings; new opportunities; and business transfers.[148] Federal performance ratings are a sore spot with the IOGB which finds its former independence in this area

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145. *E.g.*, IOGB RULES AND REGULATIONS 16(b) (1986).

146. Dolan, *supra* note 29 at 8. As a consequence, each government possesses an effective veto over an outfitting license.

147. Memorandum of Understanding between USDA, Forest Service and Idaho Outfitter and Guides Board (October 4, 1985).

148. Letter from J.S. Tixier, Regional Forester, Ogden, Utah, to Bill Meiners, Vice-chairman, IOGB (June 3, 1986).

threatened. IOGB argues that where states provide a system for evaluating the availability, adequacy, and safety of service, federal involvement is unwarranted and is likely to cause conflict.[149] Federal authorities on the other hand, insist that federal oversight of availability and adequacy of service are essential features of the new federal policies which solidify outfitter tenure on federal lands, and therefore, must be independently scrutinized by federal managers. Differences in the use of comparative proceedings to evaluate applications for "new" outfitting opportunities,[150] has also been a point of conflict.

C. IOGB Licensing

1. Acquiring a License

Outfitters and guides are separately licensed. Outfitters who perform guiding activities must be qualified to guide[151] or employ licensed guides.[152] Guides must be employed by licensed outfitters or be licensed as outfitters.[153]

(a) Guide licenses.

All applicants are required to obtain a first aid card and be familiar with emergency procedures.[154] Applicants must also supply an outfitter's certification of their qualifications, their first-hand knowledge of the area in which they will be guiding, and their ability to read and understand a map and compass.[155] IOGB regulations set forth different standards for guiding big game hunting,[156] float boating,[157] power boating,[158] cross country skiing,[159] alpine skiing,[160] mountaineering,[161] and

149. Letter from William Meiners, Chairman, IOGB, to R. Max Peterson, Chief, U.S. Forest Service (January 15, 1987).

150. *See* note 186 and accompanying text *infra*.

151. IDAHO CODE §36-2112 (1977) permits licensed outfitters to guide without a separate license if the IOGB determines an outfitter possesses the necessary qualifications. IOGB RULES AND REGULATIONS 5(c) (1986) provides that outfitters qualified to guide will be issued both an outfitter and guide license at no additional fee.

152. IOGB RULES AND REGULATIONS 5(b) (1986).

153. IDAHO CODE §36-2102(c) (Supp. 1988).

154. IOGB RULES AND REGULATIONS 1 and 32(a) (1986). In addition, ski guides must have an Advanced Red Cross card or equivalent, *id.* at 32(a), 42(b)(ii), 43(a).

155. *Id.* at 32(b) i-iii.

156. *Id.* at 33.

157. *Id.* at 34-39.

158. *Id.* at 40.

159. *Id.* at 42.

160. *Id.* at 43.

161. *Id.* at 44.

snowmobiling.[162] Standards for hunting guides focus on knowledge of habits of game and the care of meat and trophies. Standards for boating guides emphasize the extent of experience on particular rivers and equivalent whitewater. Standards for ski guides emphasize Professional Ski Instructor Association (PSIA) certification or the equivalent training.[163] Typically applicants are first licensed as "trainees" or "apprentices" and operate under direct supervision of licensed guides until the necessary experience is gained to qualify as a guide. In addition, qualification as a lead guide for float boating or cross country skiing requires additional experience and certification. Standards for boating guides also varies according to whether the stretch of water has been classified as especially hazardous.[164]

(b) Outfitter licenses.

Applicants for new licenses are in a different position than applicants seeking annual approval to continue established activities. In the absence of reasons for questioning the availability and adequacy of an existing licensee's performance, renewals are essentially automatic. However, new applications, including first time proposals, expansion of activities by an established licensee, reassignment of relinquished use, and sales of existing operations, require decisions concerning the qualifications of an applicant and permit the IOGB to make decisions concerning the viability and impacts of a proposed service relatively unencumbered by investment-based expectations. Consequently, new application requirements involve considerable more detail and an in-depth inquiry by the IOGB.

Beyond the statutory requirements that applications be signed and sworn and accompanied by a $5,000 performance bond,[165] new applicants must obtain written consent from landowners on whose property they propose to operate. They must also submit an operating plan which sets forth in detail the nature and extent of proposed activities and their precise location,[166] the resources and capacity of an applicant

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162. *Id.* at 45.

163. *Id.* at 43(b). Alpine ski guides must also have at least 40 hours of Forest Service avalanche training or its equivalent.

164. *Id.* at 34.

165. IDAHO CODE §§36-2108(a), (b) (Supp. 1988).

166. IOGB RULES AND REGULATIONS 16(c)(i) - (c)(vi) (1986) requires a list of activities, a detailed map and worded description for land activities and put in and take out points for boating, a detailed description of how and when activities will be conducted, the location of camps, and the number of guests to be accommodated.

to provide the proposed service,[167] and means to assure safety and provide emergency medical care for guests.[168] New applicants must also provide five references, three of whom testify to an applicant's competence and experience, and two of whom testify to an applicant's character and financial responsibility.[169] Additionally, the applicant must pass a written and/or oral examination on the outfitter law and outfitting procedures.[170]

The IOGB is required to evaluate a proposal in light of the physical characteristics of the area,[171] existing levels of public use,[172] and the probable impacts of proposed activities on the environment.[173] The IOGB also determines the adequacy and acceptability of the operating plan,[174] and whether there is a public need for the proposed services.[175] The applicant is evaluated on the basis of prior experience in the area, experience with proposed activities, adequacy of equipment and resources, past record, financial responsibility, knowledge of relevant laws and regulations, business and managerial ability.[176] Licenses will not be issued to any applicant who does not propose to serve the general public,[177] and may be denied for any conduct which is ground for disciplinary action.[178] Ultimately, an applicant has the burden of establishing that his/her proposal will serve the "public convenience and necessity."[179] An applicant denied a license is entitled to a fair hearing under the state Administrative Procedures Act (APA) if written re-

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167. IOGB RULES AND REGULATIONS 16(c)(vii) & (viii) requires a list of equipment, facilities, and stock detail concerning the number of guides and other employees and their activities, and proof of financial capability.

168. IOGB RULES AND REGULATIONS 16(c)(ix) (1986).

169. *Id.* at 14.

170. *Id.* at 18.

171. IDAHO CODE §36-2109(b)(4) (Supp. 1988) requires the IOGB to consider accessibility, terrain, and normal weather conditions during the period of proposed use.

172. IDAHO CODE §36-2109(b)(5) (Supp. 1988) requires consideration of the number of persons who can be adequately served in an area and IOGB RULES AND REGULATIONS 19(f) (1986) requires consideration of use of an area by the general public as well as existing licensed use.

173. IDAHO CODE §36-2109(b)(5) (Supp. 1988) and IOGB RULES AND REGULATIONS 19(g) (1986) require the IOGB to consider effects on the environment and the amount of game which can be harvested.

174. IOGB RULES AND REGULATIONS 19(h) (1986).

175. *Id.* at 19(b).

176. IDAHO CODE §§36-2109(b)(1),(2),(3) & (c) (Supp. 1988); IOGB RULES AND REGULATIONS 19(c),(d),(e),(i),(j) (1986).

177. IOGB RULES AND REGULATIONS 9 (1986); In re Willis Benjamin, *supra* note 110 at 9-10, 13.

178. IDAHO CODE §36-2109(c) (Supp. 1988).

179. In re Dick Alf's, *supra* note 105 at 5, 22.

quest is made within twenty days of receiving notice of denial.[180] The applicant is also entitled to judicial review of IOGB action as provided in the APA.[181]

Traditionally, licenses were issued to the first qualified applicant. As moratoria on the number of outfitters on rivers became more widespread, waiting lists were developed to determine priority in case it was later determined that additional applicants could be accommodated.[182] Currently, Rule 28 provides public advertisement and comparative consideration when new opportunities for outfitted river use become available[183] or when any licensed use is relinquished and the IOGB determines to relicense such use.[184] Persons desiring direct mail notification of such opportunities can place themselves on a waiting list by submitting a complete application for a river or area of interest and filing annual notices of continued interest thereafter.[185] Because Rule 28 does not cover the transfer of an established business, use of comparative procedures to evaluate new applicants will remain exceptional.[186] Also, the present rule does not address new proposals in areas which are not currently limited. However, since Forest Service policy is to entertain competitive applications in such instances, the IOGB may find it convenient to do likewise.[187]

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180. IDAHO CODE §36-2114(b) (Supp. 1988).

181. IDAHO CODE §36-2115 (1977).

182. *See* Idaho Wilderness School, Inc. v. Lanham, *supra* note 112 at 4.

183. IOGB RULES AND REGULATIONS 57 (1986) currently limits the number of outfitters on all rivers open to outfitting.

184. IOGB RULES AND REGULATIONS Sec. B (1986) defines relinquishment as including failure to re-apply or other voluntary surrender, or loss of use through non-use or revocation.

185. IOGB RULES AND REGULATIONS 28(a) & (c) (1986).

186. In In re Willis B. Benjamin, *supra* note 110, an applicant argued that a predecessor regulation establishing waiting lists for new river use opportunities applied to transfers of established operations. However, the Hearing Officer held that the applicant lacked standing to assert this argument as he was not in a position of priority on a waiting list. As this decision indicates, IOGB policy is to favor established outfitters and this is reinforced by current federal outfitter policies which, in effect, permit non-competitive transfer of established operations.

187. Unless lack of competitive interest is documented, FSM 2721.53f(3) (I.D. No. 58, 1987) provides for competitive applications in such cases, as well as in instances of planned increases in outfitter use and relinquishments. *See* notes 263-68 and accompanying text *infra*.

2. Maintaining a License

(a) Authorization.

Licenses must specify the activities which an outfitter is authorized to offer, including, where appropriate, the species of game to be hunted, the exact territorial limits of an outfitters area of operation,[188] and must be based on the periods and levels of use established in an operating plan.[189] Hunting territories and other land-based activity areas are defined by maps and legal descriptions. As between big game outfitters, these assignments of activities and areas are normally exclusive. However, because opportunities are sharply limited, hunting for goats and sheep are typically licensed statewide by a special license amendment. In other cases, historical patterns of joint use for former predator species such as cougar and bear have been continued, and fishing and trail riding are also frequently licensed for joint use. Boating outfitters must provide detailed maps for land-based activities.

Operating outside of an assigned area or conducting activities for which an outfitter is not licensed are prohibited and subject a licensee to disciplinary action.[190] However, by special permission, one outfitter may be employed as a guide by another outfitter so long as the activities are within those for which an outfitter is licensed to guide and the relationship is strictly employer/employee.[191] The IOGB is authorized to adjust outfitter territories for reasons of game harvest, in cases of territorial conflict between big game outfitters, or to protect client safety.[192] These considerations are amplified by rules which detail factors relevant to such adjustments.[193]

(b) Renewal.

The term of an outfitter's license is a single license year.[194] Once acquired, however, it is effectively renewable indefinitely unless for-

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188. IDAHO CODE §36-2109(b) (Supp. 1988).

189. IOGB RULES AND REGULATIONS 20 (1986).

190. IDAHO CODE §36-2110(a)(2) (Supp. 1988).

191. IOGB RULES AND REGULATIONS 6 (1986).

192. IDAHO CODE §36-2110(b) (Supp. 1988).

193. IOGB RULES AND REGULATIONS 24(b) (1986) lists changes in wildlife harvest, new restrictions, environmental changes, and new information as relevant to wildlife concerns. Rule 24(c) lists past incidents, extent of legal use, public and client safety concerns, and environmental and operational factors indicating which outfitter can best use a disputed area as relevant to territorial conflict. Rule 24(d) lists changes in environment, change in public use, change in outfitter operations, and past incidents as relevant to client safety.

194. IDAHO CODE §36-2109(a) (Supp. 1988).

feited by proscribed conduct. Although the statute no longer circumscribes IOGB authority to make full inquiry into an applicant's performance or need for service at the time of renewal, certain procedural protections are provided for incumbents. Action on renewal applications is required within thirty days and a single IOGB member is authorized to renew an application if no adverse information is on file.[195] Although "tenure" in an area ceases at the end of an annual license year, "priority" to an area is maintained by filing timely annual applications.[196] In practice, an incumbent in good standing is entitled to a presumption of continuing public need for service,[197] and renewal is accomplished with a minimum of formal requirements.[198]

The principal inquiry on renewal is the degree to which an outfitter has exercised authorized use. Like the U.S. Forest Service, the IOGB has adopted a "use it or lose it" policy, though the standards do not appear especially rigorous. Outfitters seeking renewal must report actual use for the preceding year. If the IOGB determines that an outfitter has failed to use at least 40% of "use capability" for any authorized activity in two of the preceding three years, notice will be given and a hearing held on whether to renew a license for the unused capacity.[199] Nonuse may be waived for "good cause."[200]

(c) Disciplinary action.

Licensees are subject to a variety of disciplinary measures, ranging from formal warnings and reprimands to curtailment or cancellation of licenses, to civil and criminal penalties. Central is the ability of the IOGB to refuse renewal,[201] or suspend or revoke[202] an outfitters license. The law specifies a list of actions justifying termination of a license including: deception in obtaining a license;[203] violation of federal or state law;[204] unlicensed activities;[205] violation of IOGB rules and regu-

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195. *Id.* §§36-2109(c) & (d).

196. IOGB RULES AND REGULATIONS 25 (1986).

197. In re Application of Dick Alf's, *supra* note 105 at 22.

198. Renewals are accomplished by filing a short form which is primarily concerned with reporting outfitting service for the past year. Some long established operators maintaining the same service year after year have never been required to file detailed operating plans.

199. IOGB RULES AND REGULATIONS 22 (1986). Use capability is determined by the IOGB based on federal resource plans in light of local conditions, *id.* at 22(a).

200. *Id.* at 22(b).

201. IDAHO CODE §36-2109 (Supp. 1988).

202. *Id.* at §36-2113.

203. *Id.* at §36-2113(a)(1).

204. *Id.* at §36-2113(a)(3),(4),(6) cover conviction of a felony, conviction of violating federal land management regulations, and conviction of fish and game violations.

lations;[206] and inadequate or unprofessional conduct of operations.[207] A written accusation by "any person" requires IOGB investigation,[208] after which the IOGB may determine no action is warranted, in which case the file remains confidential, or the IOGB may initiate hearings under state APA procedures to suspend or revoke a license.[209] In 1988, the legislature authorized imposition of administrative fines up to $5,000 for each violation in lieu of termination or restriction of an outfitter's activities.[210]

In addition, the IOGB may seek civil penalties in district court for any violation of the outfitters law or any IOGB rules and regulations.[211] Civil penalties range from $100 to $5,000 for each separate violation and a person found to have violated the statute or regulations is required to recompense IOGB costs, including attorney fees, "for preparing and litigating the case."[212] Finally, violations of particular sorts,[213] including deception in acquiring a license, misleading advertising, breach of contract with a client, unlicensed operation or employment of unlicensed guides, or violation of IOGB regulations dealing with client safety or welfare or conservation of wildlife or range resources, subjects a licensee to misdemeanor penalties[214] which include fines ranging from $100 to $5,000 or imprisonment up to ninety days.[215]

3. "Transferring" a License

Any outfitter has a certain amount of stock and equipment required to conduct business. This may include facilities for guests, as well as to provide for livestock in the off-season. Sale of the business would normally include these facilities as well as client lists, which are

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Conviction includes forfeiture of bond, suspended sentence, probation or withheld judgments, *id.* at §36-2113(b).

205. *Id.* at §36-2113(1)(8) and (9) cover activities beyond those authorized in a license and the employment of unlicensed guides.

206. *Id.* at §36-2113(a)(14).

207. *Id.* at §§36-2113(a)(2),(5),(7),(10),(12) and (13) cover misleading advertising, unethical conduct, breach of contract with a client, inhumane treatment of stock, and failure to serve the public.

208. *Id.* at §36-2114(a). *See* Three Rivers Ranch v. IOGB, No. 89165 (4th Dist., Ada County, July 31, 1986) (proper remedy to challenge underuse of license).

209. The manner of handling the investigation of convictions is addressed by IOGB RULES AND REGULATIONS 8(b) (1986).

210. IDAHO CODE §36-2113(c) (Supp. 1988).

211. *Id.* at §36-2117A.

212. *Id.* at §36-2117A(d).

213. *Id.* at §36-2116(a) (Supp. 1988).

214. *Id.* at §36-2116(b).

215. *Id.* at §36-2117.

especially important to big game outfitters because of a relatively high degree of return customers involved. However, a major part of the value a buyer places on an outfitting business is attributable to the priority access to public lands or waters enjoyed by an existing licensee.

The term of an outfitter's license is limited to a single year and unauthorized transfers are prohibited.[216] IOGB regulations address license transfers of two sorts: agreements between outfitters to sublet or assign licensed use, and an actual sale of an outfitting business. The former is strictly prohibited.[217] However, so long as the relationship is strictly employer/employee and involves no sharing of profits or equipment, an outfitter may be employed as a guide by another outfitter upon written approval by the IOGB.[218] These rules are designed to and assure that licenses are issued to those willing to use them to serve the relevant public.

However, anti-speculation policy does not prevent an outfitter from capturing the value of a permit incident to a complete sale of an outfitting business, if the IOGB is satisfied with the qualifications of the prospective buyer. Thus, although licenses "are not transferrable" and sale of the business "does not require the Board to transfer the area of operation . . . to the purchaser or to issue to him an outfitter license;"[219] ". . . an applicant who has negotiated a purchase agreement with a licensee may be given priority for a license if he meets all other outfitter requirements."[220]

This approach reserves to the IOGB the selection of qualified outfitters and permits redeterminations of need for service and other relevant considerations. A contract buyer must apply as a new applicant and carries the burden of demonstrating that continued outfitting is in the public convenience and necessity.[221] On the other hand, in order to promote stability and continuity of outfitting services, the IOGB has traditionally assured an existing licensee that a contract purchaser will receive "due consideration" and if the IOGB is satisfied with his/her

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216. *Id.* at §36-2109(a) provides: "Said license shall . . . be valid for the licensing year . . . provided, that no outfitter's or guide's license may be assigned or otherwise transferred either by any holder thereof or by the operation of law except as provided in this chapter."

217. IOGB RULES AND REGULATIONS 21 (1986) provides: "An outfitter shall not sublet or enter into any third party agreements involving the use of his activities, areas, or license."

218. *Id.* at 6.

219. *Id.* at 26(a).

220. *Id.* at 26(b).

221. In re Application of Dick Alf's, *supra* note 105.

qualifications and the appropriateness of continued service, the prospective buyer invariably succeeds to the seller's priority position.[222]

V. FEDERAL REGULATION OF OCCUPANCY AND USE

A. Special Use Authorization

Except for general public access and recreation, all uses of national forest land not specifically regulated by other authority, *i.e.*, timber, grazing, and minerals, are considered "special uses" which must be approved by an authorized officer.[223] Special use authorizations may take the form of leases, easements, or permits. For a broad variety of occupancies and uses, including outfitting and guiding, the most common are permits issued under general management authority. Specific authority to issue term permits for summer homes, resorts, and commercial establishments[224] may be used where outfitting operations are incident to a more permanent occupancy. However, most outfitting and guiding does not involve significant investment in permanent improvements on national forest land. In addition, because a large amount of outfitting occurs in wilderness areas, authority contained in the Wilderness Act of 1964,[225] which permits commercial services in aid of recreation and other purposes is often relevant.

B. Federal Permit Authority

The principal authority for permitting outfitting and guiding occupancy on national forest lands is the general management section of the 1897 National Forest Organic Act: "The Secretary . . . may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ."[226] The

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222. In re Willis Benjamin, *supra* note 110.

223. 36 C.F.R. §251.50(a) (1988). Although subject to closure orders, "noncommercial use or occupancy . . . for camping, picnicking, hiking, fishing, hunting, horse riding, boating, or similar recreational activity" is exempt from special authorization requirements unless it is an organized group activity expected to attract 25 or more persons, *id.* §251.50(c); §251,51. Use of forest roads and trails is also generally excepted, *id.* 251.50(d). BLM regulations are similar. 43 C.F.R. §2920.1; §8372.1 (1987).

224. 16 U.S.C. §497 (1982).

225. 16 U.S.C. §1133(d)(5) (1982).

226. 30 Stat. 11, 16 U.S.C. §551 (1982), (hereinafter referred to as Section 551). This legislation served as the primary management authority for the Forest Service from 1905, when the forest reserves were transferred from the Department of Interior to the Department of Agriculture, until adoption of the Multiple Use-Sustained Yield Act, 16 U.S.C. §528-531 (1982), in 1960. A similar grant of management authority to the Secretary of Interior is contained in Section 2 of the Taylor Grazing Act, 43 U.S.C. §315a

authority to "regulate occupancy and use" and to "preserve the forests" constitutes a broad managerial grant which, in turn, was a product of a larger congressional decision to return forest reserves to a wide range of active uses.[227] Not surprisingly, Section 551 has historically received liberal interpretation by agencies and the courts.[228] As a result, the federal authority to permit and regulate outfitting appears well-settled. Nonetheless, a brief survey of the origin and interpretation of this authority provides perspective on current regulation.

As originally proposed in 1893, the organic legislation would have authorized regulation of "occupancy," sale of timber of "commercial value," preservation of "forest cover," and exclusion of land more suitable for agriculture than forestry.[229] This legislation was considered by Congress for the next four years. Although the provisions for commercial sale of timber were controversial and ultimately circumscribed, authority to permit and regulate other activities was consistently broadened.[230] Ultimately, the term "occupancy" was changed to the

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(1982), BLM's principal management statute prior to passage of the Federal Land Management and Policy Act (FLPMA) in 1976. FLPMA, 43 U.S.C. §1732(b) (1982) currently provides BLM with broad authority to issue "easements, permits, leases, licenses, . . . or other instruments as . . . appropriate" for regulating use and occupancy on public lands.

227. Forest land set aside as "public reservations" by presidential order under authority of the Act of Mar. 3, Sec. 24, 26 Stat. 1103 (1891), was understood to serve watershed purposes, but lacked other management direction. Although poorly policed, such reservations were understood to preclude all cutting of timber and grazing, Circular of May 5, 1891 and Notice of April 14, 1894 reprinted in S. Exec. Doc. No. 45, 53d Cong., 3d Sess. 4, 7 (1895), as well as removing land from settlement, mining, and other disposal laws.

228. Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 ORE. L. REV. 1, 52-60 (1985); Annotation, Validity, Construction, and Application of Federal Statute (16 U.S.C §551), 19 A.L.R. FED. 492 (1974).

229. H.R. 119, 53d Cong. 1st Sess. (1983), as reprinted 25 Cong. Rec. 2371 (1893).

230. *See* Wilkinson & Anderson, *supra* note 228 at 48-52. Timber sale authority originally covered both forest reserves and unreserved public domain. On forest reserves the sale authority was opposed because of concern that logging would impair watersheds important to agriculture and settlement and would result in monopolization of timber resources by large commercial operators, 25 CONG. REC. 2374, 2431-32 (1893). Off the reserves timber sale authority was opposed because it would interfere with customary free use of timber by settlers which had been recognized by statute two years earlier, *id.* at 2432-33 (1893). The bill was also opposed because it lacked provisions for mining and grazing, *id.* at 2372, 2431, 2432. The following year when the bill was amended to restrict sale authority, and provide for free use of timber by settlers, access for mineral prospecting, and restoration of mineral as well as agricultural land to entry, 27 CONG. REC. 85, 86, 364 (1894), it passed the House by a substantial margin, *id.* at 367. This same pattern continued in the Senate where additional restrictions were placed on sale of timber and further guarantees of local use, specifically including ingress and egress, pasturage, water appropriation, and citizen access were added by committee and passed summarily, 27 CONG. REC. 2779-80 (1895). In June of 1897, a bill incorporating the substance of the

phrase "occupancy and use"[231] and Congress assured that, subject to agency regulation, reserves would be open to a number of specific activities including free personal use of timber and stone,[232] access to private properties within reserves,[233] prospecting and mineral location,[234] and appropriation of water,[235] as well as general public access for "all lawful purposes."[236]

The authority to permit occupancy was the subject of early expansive interpretation by the executive branch. In a 1905 opinion concerning a commercial fishing operation in Alaska, the Attorney General advised that the Forest Service was authorized to permit occupancy of national forest land for any activity "consistent" with national forest purposes for such duration as "reasonable" under the circumstances, as well as to charge for such use.[237] Armed with this opinion, the Forest Service implemented a system of grazing permits and fees which was subsequently upheld by the Supreme Court in *United States v. Grimaud*,[238] an opinion which represents an expansive reading of agency authority to regulate use.[239] As a result, the Forest Service has

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1895 Senate bill passed both houses as part of a Senate-sponsored rider to the Sundry Appropriations Act designed to temporarily suspend the doubling of forest reservations by a lame-duck president (Cleveland). *See* J. Ise, *United States Forest Policy* 129-139 (Yale 1928); C. Steen, *The United States Forest Service: A History* 30-35 (Univ. of Wash. 1976).

231. 16 U.S.C. §551 (1982).

232. 16 U.S.C. §477 (1982).

233. 16 U.S.C. §478 (1982).

234. 16 U.S.C. §§478, 482 (1982).

235. 16 U.S.C. §480 (1982).

236. 16 U.S.C. §478 (1982). Similar recognition of general public access and customary local use is contained in the Taylor Grazing Act, 43 U.S.C. §315 (hunting and fishing), §315d (free use of fuel and building material and grazing of domestic livestock), and §315e (mining and ingress and egress).

237. Permit for Use and Occupancy of Forest Reserves, 25 Op. Att'y Gen. 740 (1905). The Secretary of Agriculture asked three questions: (1) whether he was authorized to "grant a permit or lease"; (2) whether the permit or lease could extend for longer than a year; and (3) whether a reasonable "compensation or rental" could be imposed. However, the issue of real concern was authority to charge fees for commercial use, especially grazing, Wilkinson & Anderson, *supra* note 228 at 100-103; Gifford Pinchot, BREAKING NEW GROUND 272 (1947).

238. 220 U.S. 506 (1911).

239. Specifically, the Supreme Court held that Congress could constitutionally delegate the authority to define offenses relating to national forests so long as punishment was legislatively defined, and held the imposition of fees was within the authority granted by Section 551. On a more general level, *Grimaud* represents a broad interpretation of Forest Service management authority. *Compare* Brooks v. Dewar, 313 U.S. 354 (1941) (similar reading of general management authority in the Taylor Grazing Act).

historically used revocable permits[240] to authorize and regulate a variety of uses and occupancies on national forests including grazing,[241] rights of way,[242] recreational and commercial facilities,[243] and many others.[244] Over time, many of these administrative systems have matured into express statutory authorizations which supplement or supplant general permit authority. However, for many uses, including

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240. Because the Forest Service lacked authority to encumber federal title, see Letter of June 8, from the Secretary of Interior to the Secretary of Agriculture, 33 L.D. 609, 610 (1905), the Attorney General cautioned that permits should be revocable for breach or in the event reservations were terminated, *see* Use and Occupancy of Forest Reserves, *supra* note 237 at 472-73. Permits issued under general management authority constitute "permissive license . . . [which] continues until it is no longer needed or until terminated . . . ." FSM 2711.1 (1986), but are revocable for any reason of public interest. 37 C.F.R. §251.60(c) (1988); FSM 2716.3-2 (1972). Courts have variously described such permits as non-compensable "privileges," Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944), and "tenanc[ies] at will," Mountain States Tel. & Tel. v. United States, 499 F.2d 611, 616 (Ct. Cl. 1974). In real property terms "license" seems the most appropriate description, *see* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 346-47 (2d ed. 1975).

241. Initially, permits were issued and renewed annually. Following World War I the Forest Service adopted five-year terms as part of an agreement with stockmen to increase grazing fees. S. Dana & S. Fairfax, FOREST AND RANGE POLICY 136 (1980). By the 1930s, terms for grazing permits had increased to ten years and permits contained an express right of renewal, *see* Bell v. Apache Maid Cattle Co., 94 F.2d 847, 849 n.1 (9th Cir. 1938). This administrative system continued until 1950 when it was adopted by congress in Sec. 19 of the Granger-Thye Act, 64 Stat. 82, 88, 16 U.S.C. §580 (1982) in order to assure ranchers, concerned with recent grazing reductions, of their customary tenure, *see* H.R. Rep. No. 1859, 81st Cong., 2d Sess. 3 (1950).

242. Until enactment of Sec. 2 of the National Forest Roads and Trails Act, 78 Stat. 1089 (1964), 16 U.S.C. §533 (1982), the Organic Act provided the only general authority for permitting rights of way across national forests, *see* Rights of Way Across National Forests, 42 Op. Att'y Gen. 127 (1962). Rights of way for national forest and public lands are now governed by Title V of FLPMA, 43 U.S.C. §§1761-1771 (1982).

243. By 1914, "several thousand" permits for summer residences, resorts, stores, and other structures had been issued by the Forest Service; however, the indeterminate nature of general permits frequently limited the willingness of permittees and lenders to invest in desirable improvements, Letter of July 22, 1914 from Secretary Houston to Chairman Lever, reprinted in 52 CONG. REC. 1787 (1915); *see also* H.R. Rep. No. 2792, 84th Cong., 2d Sess. (1952). In 1915, Congress enacted specific authority to permit recreation and public convenience facilities to occupy up to 5 acres for as long as 30 years, 30 Stat. 1101 (1915). This authority was amended in 1956 to include commercial and industrial uses and increase the acreage limit to 80 acres for all uses except summer homes, 70 Stat. 708, 16 U.S.C. §497 (1982). Although term permits issued under authority of Sec. 497 are subject to revocation to satisfy higher public use, the government is obligated to compensate for improvements in such circumstances, 36 FSM 2711.3 (1986). *See also* Hearings on H.R. 1809 before Subcomm. No. 2 of the House Comm. on Agriculture, 80th Cong., 1st Sess. 3 (1947).

244. There are presently 50,000 to 60,000 special use permits for all kinds of activities on national forests from beehives to rights of way. Interview with Robert Weir, U.S. Forest Service, Washington, D.C. (Mar. 9, 1987).

outfitting and guiding, Section 551 remains the principal basis of management authority.

Since *Grimaud*, legal challenges to the scope of Forest Service authority to regulate occupancy and use have been of two sorts: those questioning agency authority to restrict or otherwise condition use, and those questioning agency authority to license or otherwise approve occupancy. As to the former, courts have liberally related a wide range of management and regulations to forest protection;[245] many have also interpreted Section 551 to authorize any regulation promoting a public interest in national forests.[246] Interpretation of authority to permit occupancy has been less frequent, but similarly broad. So long as reasonably related to a public interest, courts have upheld licensing of exclusive use[247] as well as use of revocable permits to accommodate potentially long-term occupancies.[248]

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245. Major decisions, other than *Grimaud*, justifying Forest Service authority based on forest protection include: Hunt v. United States, 278 U.S. 96 (1928) (reduction of deer population); Jones v. Freeman, 400 F.2d 383 (8th Cir. 1968) (hog impoundment procedures); United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979) (fire closure on adjacent non-federal land).

246. Thus, Section 551 was held to justify restrictions on customary activities in order to protect general visitor use, United States v. Reeves, 39 F. Supp. 580 (D. Ark. 1941)(leash law); *contra*, United States v. Minchew, 10 F. Supp. 906 (D. Fla. 1935), as well as to provide wilderness recreation, United States v. Perko, 133 F. Supp. 564 (D. Minn. 1955), well before recognition of recreation as a management objective in the Multiple Use Act of 1960. *See also* McMichael v. United States, 355 F.2d 283 (9th Cir. 1965) (section 551 as a basis for restrictions on motorized vehicles); United States v. Hymans, 463 F.2d 615 (10th Cir. 1972) (section 551 as a basis for restricting nude bathing in a concentrated public use area). Cases recognizing agency authority to regulate and charge for commercial use also reflect a broad view of the scope of section 551, *e.g.*, Utah Power & Light Co. v. United States, 243 U.S. 389 (1916); Mountain States Tel. & Tel. v. United States, *supra* note 240; United States v. Richard, 636 F.2d 236 (8th Cir. 1980); United States v. Hells Canyon Guide Service, Inc., 660 F.2d 735 (9th Cir. 1981).

247. Heath v. Aspen Skiing Corp., 325 F. Supp. 223 (D. Colo. 1971); Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975); Sabin v. Berglund, 585 F.2d 955 (10th Cir. 1978).

248. Wilderness Society v. Morton, 479 F.2d 842, 851-875 (D.C. Cir. 1973), a decision invalidating revocable permits issued by the BLM to accommodate service areas adjacent to the Alaska Pipeline right-of-way, raises the most serious questions concerning the limits of agency authority to permit occupancy. In this decision the D.C. Circuit held that, because of long-term environmental impacts and the long-term need for their use, permits for areas outside the right of way were de facto irrevocable and, therefore, ultra vires. The court also held that revocable permits were governed by width limitations in Sec. 28 of the Mineral Leasing Act because Congress intended that section to be the exclusive authority for permitting pipeline occupancy.

These same arguments have not been successful in challenges to similar exercises of permitting authority by the Forest Service. Since 1915, major ski area facilities have been permitted by 80-acre term permits issued under 16 U.S.C. §497 (1982). However, because 80 acres is typically inadequate to encompass ski lifts, runs, and other support

A broad reading of Forest Service authority to permit occupancy and regulate use accords with the central congressional policy of assuring wide, but supervised, citizen access and use which pervades this legislation. Thus, Forest Service authority is unlikely to be successfully challenged, absent procedural error or lack of rationality.

C. Regulation of Outfitters and Guides

Traditionally, special use permits for outfitting and guiding were largely issued and administered in accordance with general regulations and directives for special use authorizations.[249] Although general standards remain relevant, most details concerning issuance and administration of outfitting and guiding permits are currently governed by Forest Service Manual provisions adopted in 1984.[250]

1. Activities Regulated

Because resource impacts are a principal focus, the Forest Service definition of outfitting and guiding lack the same emphasis on elements of compensation or public offering of service which are important at the state level. Moreover, in contrast to state regulation where the definition of outfitting and guiding also defines the scope of gov-

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facilities, these have historically been permitted by revocable permits issued under authority of Section 551. Courts have rejected arguments that this dual permit practice exceeds Forest Service authority, holding that Section 497 was neither intended to be the exclusive basis for permitting commercial occupancy on national forests, nor were revocable permits rendered irrevocable by association with investment-backed 30-year permits, Sierra Club v. Hickel, 433 F.2d 24, 34-36 (9th Cir. 1970); Wilson v. Block, 708 F.2d 735, 756-760 (D.C. Cir. 1983). In 1986, Congress authorized 40-year ski area permits for areas as large as necessary to accommodate operations and ancillary facilities, 16 U.S.C. §497(b) (Supp. 1986).

The limits of revocable permit authority was also raised in Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971) where a 200-acre permit was issued to accommodate a pulp mill required by a 50-year timber sale contract, but the issue was mooted by a successful patent application for the area. Whatever the durational limits on revocable permit authority, the relatively short-term and temporary occupancy authorized by outfitter and guide permits is safely within judicially recognized boundaries.

249. 36 C.F.R. Subpart B (1988) and FSM Title 2700 cover special uses. FSM Chap. 2720 provides detail concerning a variety of particular permits. Prior to 1984, FSM 2723.53 covering outfitting and guide permits, provided only modest additional guidance.

250. FSM 2721.53 (Int. Dir. 58, 1987). *See* note 41 *supra*. Regional directives for outfitters and guides south of the Salmon River are issued by Region 4, headquartered in Ogden, Utah, and appear at FSM 2721.53 (1987). Regional directives for outfitters and guides north of the Salmon are issued by Region 1, headquartered in Missoula, Montana, and appear at FSM 2340.8 as well as FSM 2721.53 (1987).

ernment jurisdiction, federal definitions may serve to identify whether an outfitting or some other type of permit is required.

"Outfitting" includes any "provision of equipment, supplies, livestock, and materials" and "guiding" includes any "provision of assistance" in outdoor recreation activities.[251] Although not expressly stated, "provision" of outfitting or guiding services must ordinarily be commercial; however, outfitting and guiding permits are required of institutional and semi-public groups[252] engaging in specified activities regardless of fees charged.[253] Fees may be waived if non-profit organizations or their employees receive no gain and special standards may apply to calculation of fees for non-profit and educational institutions.[254]

Additionally, outfitting and guiding must involve some occupancy of national forest "land or waters."[255] Permits may be waived if use is limited and infrequent, involving 50 service days or fewer, and the use is "expected to have little or no effect on public liability, health, safety, the environment, fees to the Government, or other . . . uses."[256] Although outfitting and guiding permits may authorize temporary structures or permanent improvements with limited value to be placed on national forest land, these permits are designed for activities involving little or no development or permanent improvement.[257]

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251. FSM 2721.53c(1), (2) (Int. Dir. 58, 1987).

252. Examples are "religious, conservation, youth, fraternal, service clubs, and social groups; educational institutions . . . [and] applicants who operate commercially on a limited intermittent or irregular basis in providing service to select customer clientele rather than the public at large." FSM 2721.53j-1 (Int. Dir. 58, 1987).

253. FSM 2721.53j(2) (Int. Dir. 58, 1957). "Non-commercial" recreation is exempt from permit requirements unless group activities are involved, *see* note 223 *supra*.

254. FSM 2721.53j(2), j(9), j(10) (Int. Dir. 58, 1987).

255. *Id.* 2721.53b(3). This limitation excludes mere rental of equipment unaccompanied by service or commercial transaction within a national forest. Thus, in In re Nantahala Outdoor Center, No. 08110986 (June 1, 1984), the Chief held that no permit was required for a business which rented and transported rafts for customers floating the Nantahala River where delivery and pick up occurred entirely on private land beyond forest boundaries. On the other hand, where equipment rental is combined with delivery of rafts to launch site, or other service, on national forest land, a permit is required, United States v. Richard, 636 F.2d 236 (8th Cir. 1980). Recent decisions indicate that Forest Service regulation could be extended further if necessary to regulate activity affecting national forest resources, United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979); United States v. Brown, 552 F.2d 817 (8th Cir. 1977).

256. FSM 2721.53f(6) (Int. Dir. 58, 1987).

257. *Id.* at 2721.53, 2721.53b(1). Term permit authority is used for uses involving substantial permanent improvements. *Id.* at 2721.53b(4).

2. Acquiring a Permit

Permits are largely issued at the Forest Service level.[258] Applications must describe the project in sufficient detail to enable the Forest Service to determine the physical scope of a proposal, its feasibility, environmental impacts, safety, and public benefits. Applicants must also provide sufficient information to determine whether an applicant has the technical and financial capability to perform the requested activity.[259] Issuing officials are broadly authorized and directed to complete whatever level of environmental analysis, consultation, hearings, or other action which may be necessary to evaluate an application.[260]

So long as justified by broader land use and public interest considerations, established levels of satisfactory use by established permittees will normally be reauthorized at five-year intervals.[261] Similarly, barring changes in general considerations, use authorized under existing permits will normally be reissued to qualified purchasers of existing outfitting businesses.[262] In such circumstances, qualifications and performance of a single applicant and the adequacy of a single plan of operation will usually provide the principal focus for a decision.

However, in cases of "new permits," including circumstances where additional capacity or need is identified by agency planning, where use is reallocated from an existing permittee, or where proposals for new activities or areas are received by the Forest Service, comparative evaluation of competitive applications is prescribed.[263] Where the extent of competitive interest is unknown, the availability of a new opportunity is to be advertised.[264] If competitive interest is determined to be absent, a permit may be issued to the first qualified applicant.[265] Otherwise, applications must be invited from all those known to be interested.[266] This is typically accomplished by means of a prospectus

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258. Forest Supervisors are the delegated authority to act on term permits involving planned investment of $250,000 or less and all revocable permits. Supervisors may redelegate to Rangers authority to authorize temporary uses (one year or less), uses with negligible impacts (*e.g.*, buried telephone cables) and standardized permits at already approved sites (*e.g.*, summer home or radio-electronic sites). FSM 2710.43-44 (1986).

259. 36 C.F.R. §§251.54(e)(2), (e)(3) (1988). FSM 2721.53f(1) (Int. Dir. 58, 1987) provides that application procedures in 36 CFR §251.54 are "fully applicable" to outfitter/guide applications and also references general standards in FSM 2712.

260. 36 C.F.R. §251.54(f) (1988).

261. FSM 2721.53d(2)(d) and 2721.53g(2) (Int. Dir. 58, 1987). *See* notes 285-87 and accompanying text *infra*.

262. *Id.* at 2721.53f(2)(b). *See* notes 328-32 and accompanying text *infra*.

263. *Id.* at 2721.53f(3).

264. *Id.* at 2712.2-1 (1974).

265. *Id.* at 2721.53f(3)(d) (Int. Dir. 58, 1987).

266. *Id.* at 2721.53f(3)(b) & (c).

describing the nature of the opportunity and expected performance.[267] Once proposals are received, the Forest Service is to select the best qualified applicant in light of past experience and knowledge of general area, financial ability, economic viability to existing permittees, past performance, return to government, and other relevant factors.[268]

In general, applications may be denied on numerous grounds including: inconsistency with the general public interest, applicable laws, or land use policies; incompatibility with other land uses; or an applicant's lack of technical, financial, or other relevant qualifications.[269] Where an application is written, denial must be in writing.[270] Disappointed applicants are entitled to appeal internally to higher officials.[271]

3. Terms and Conditions

(a) Duration.

Each special use authorization must specify its duration and renewability and must be limited to a term "no longer than is necessary to accomplish the purpose of the authorization and is reasonable in light of all circumstances."[272] Outfitting and guiding was traditionally authorized by revocable "annual permits" which, although limiting use authorization to a single year, were renewable indefinitely so long as the Forest Service was satisfied with a permittee's performance and the continuation of a particular land use.[273]

The quality of indefinite renewability supplied permittees security from displacement by similar operations, but the annual nature of permits left permittees potentially subject to abrupt changes in use autho-

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267. *See generally*, FSM 2712.2-2 (1972).

268. FSM 2721.53f(3)(b) (Int. Dir. 58, 1987). FSM 2712.1-4 (1974) apparently contemplates the possibility of bonus bidding. However, under FSM 2712.4 (1972), public interest considerations are to control.

269. 36 C.F.R. §251.54(h) (1988).

270. FSM 2712.5 (1972).

271. 36 C.F.R. §211.18 (1988) provides broad rights of internal appeal of forest officials' decisions by any interested person. Thus, FSM 2712.5 (1972) language asserting no rights of appeal under Section 211 is clearly antiquated. Appeals are informal and principally based on written submissions.

272. 36 C.F.R. §251.56(b) (1988).

273. FSM 2711.1 & 2711.3 (May 1974) defined annual permits as:

> [R]evocable instruments . . . [which] serve as permissive license[s] renewed annually by the payment of the required fee. Annual applications are not necessary. The permit continues until it expires by its own terms, or until terminated . . . . The Forest Service may amend the permit at any time, when it is in the public interest to do so. [However] the normal practice is to make such changes effective at the beginning of the payment period.

rizations. In order to provide a greater measure of stability, the Forest Service authorized insertion of "tenure" provisions in outfitting and guiding permits which assured that periodic reassessment of use authorization would occur only in intervals of three to five years.[274] Use of the tenure provisions was at the discretion of Forest Supervisors and generally limited to situations where an outfitter had established a record of high quality service, where management plans allowed confident prediction of needed service and environmental impacts over the period involved, and where security of expectations were important to continued operation.[275]

Under current directives, revocable permits are classified as "permits" or "temporary permits." The former are defined the same as "annual permits" were previously.[276] The latter are defined to exclude the quality of indefinite renewability.[277] Outfitter directives incorporate this dichotomy as well as expand the former "tenure" provisions. Permits for outfitters may authorize either temporary use or priority use. Temporary use is assigned for one season or less with no commitment to renew.[278] Priority use is assigned for a definite period up to five years[279] with the expectation of renewal at actual use levels if continued outfitting is determined to serve public needs.[280]

Temporary use is assigned to outfitting which is episodic as well as outfitting not generally available to the public.[281] Temporary use is also assigned to commercial permittees whose use is in some sense "probationary." This may occur because annual performance review has rated a permittee's service less than satisfactory and will be revoked at the year's end unless deficiencies are cured.[282] Temporary use is also assigned to new permittees who lack a two-year record of acceptable performance and will be converted to priority use after two years if the

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274. For example, FSM 2721.53a(3) (1976) provided that although terms of a year or less were ordinarily to be used for outfitting permits, use could be authorized for up to five years by use of standard clause E-4 if determined "appropriate" by Forest Supervisors.

275. *E.g.*, FSM 2721.53a(3) (R-4 Supp. 1981).

276. *Compare* FSM 2711.1 (1986) with note 273 *supra*.

277. FSM 2711.2 (1986) defines a temporary permit as: "[A] permit that, by its own terms, is to terminate less than 1 year after its approval date. All other provisions applicable to permits apply fully to temporary permits. Issue temporary permits for seasonal or short-duration uses . . . ."

278. FSM 2721.53c(5) (Int. Dir. 58, 1987).

279. *Id.* at 2721.53c(4).

280. *Id.* at 2721.53d(2)(a) & (d).

281. *See* note 252 *supra*.

282. *See* note 320 *infra*.

Forest Service is satisfied with a permittee's performance.[283] If capacity is available, temporary use may also be assigned to an established permittee who desires to expand authorized activities.[284]

Priority use is assigned to established permittees who have performed acceptably for at least the previous two years. The initial level of priority use is assigned to reflect the highest two year's actual use over the past five years.[285] Priority use may be issued for periods up to five years and, if possible, timed to coincide with periodic revision of management plans.[286] Renewal of permits is discretionary and use levels are subject to revision at the expiration of each term; however, unless conditions have changed, the policy is to reauthorize the level of use which a permittee was able to achieve.[287] Priority use may be increased on renewal if a permittee is assigned and uses temporary use under an outstanding permit. In addition, priority use must be reduced if a permittee consistently fails to use less than 70 percent of assigned use,[288] unless assigned use is withheld for public purposes or waived at a permittee's request in time to be reassigned to other users.[289] In spite of the greater assurance provided permittees by lengthened cycles for reassessment of use levels, permits remain revocable either for poor performance or based on broader public interest considerations.[290]

(b) Possessory rights.

Unlike state licenses, federal permits do not purport to grant rights of exclusive use in a given territory. However, land-based outfitters have historically been permitted to occupy particular sites as bases for more extensive operations. Under current directives, permittees may reserve particular sites for the period of planned use at a set annual rental. Regional guidelines go into considerable detail concerning the location and selection of these sites.

Permits require preparation of operating plans covering activities for the term of the permit as well as submission of annual itineraries of projected use, including planned use of specific campsites.[291] Regional guidelines require "designated" sites for staging or base facilities to be described with particularity in permits and these are normally reserved

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283. FSM 2721.53d(1), 2721.53f(3)(b) - (d), 2721.53g(4) (Int. Dir., 58, 1987).
284. *Id.* at 2721.53d(3)(c).
285. *Id.* at 2721.53d(1), (2)(a).
286. *Id.* at 2721.53g(2).
287. *Id.* at 2721.53d(2)(d).
288. *Id.*
289. *Id.* at 2721.53d(3).
290. *See* notes 323-24 *infra.*
291. FSM 2721.53g(3)(b) & (g)(6) (Int. Dir. 58, 1987).

for a permittee's use during the season of operation by posting signs.[292] Use planned for other "undesignated" sites is described generally in permits, but such sites are available only on a "first come, first served" basis.[293] Unless need for a greater number is established, outfitters are limited to use of three undesignated sites which are not to be occupied more than three days in advance of, or following, active use.[294]

Since a considerable amount of outfitting and guiding takes place in wilderness areas, standards designed to harmonize outfitting and guiding activities with wilderness restrictions and general public use also apply. General guidance requires that structures and facilities be located away from "main trails, streams, lakes, key interest features, and non-outfitted public use areas."[295] More specifically, campsites are to be "limited to the minimum area needed,"[296] located to avoid conflict with other outfitters as well as with the general public, and generally be situated at least 200 feet from main trails and 100 feet from water banks.[297] Directives also apply to the duration and type of facilities which may be placed at particular sites. Outside of wilderness areas, standards concerning the nature and extent of improvements are comparatively flexible, permitting necessary permanent and semi-permanent facilities as long as they are not in conflict with other users.[298] Inside wilderness areas, only "temporary" structures and facilities "necessary" to serve the public are authorized, and "permanent improvements such as cabins, toilet buildings, or tent frames with floors and sides" are specifically prohibited.[299] All equipment and material, other than frames and poles of native material, must be removed at the end of the season. No new caches are to be authorized and existing permitted caches are to be phased out.[300]

(c) Other conditions of performance.

Federal regulations provide broad authority to condition permits as necessary to assure compliance with laws and regulations, protect

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292. *Id.* at 2721.53c & g (R-1 Supp. 1987); 2721.53-4(2)(a) (R-4 Supp. 1981).
293. *Id.*
294. *Id.* at 2343.8-6(3)(b) (R-1 Supp. 1987); 2721.53-5(2)(a)(3) (R-4 Supp. 1981).
295. FSM 2323.13g (1986); 2343.8-4 (R-1 Supp. 1987); 2321.53(3) (R-4 Supp. 1981).
296. *Id.* at 2343.8-4 (R-1 Supp. 1987); 2321.53-7(6)(a) (R-4 Supp. 1981).
297. *Id.* at 2343.8-4 (R-1 Supp. 1987).
298. *Id.* at 2343.8-4(1) (R-1 Supp. 1987); FSM 2721.53-6(3)(a) (R-4 Supp. 1981).
299. FSM 2323.13g (1986).
300. *Id.* Further direction on location and design of camps and other facilities is contained in management plans for particular wilderness areas. Implementation of recent national directives and standards for outfitters in the Frank Church Wilderness prompted a legal challenge in the Idaho federal district court, *see* Sec. VI(C) *infra*.

the environment, protect economic potential, efficiently manage federal resources, and protect other users.[301] General terms and conditions are established in standard clauses incorporated into individual permits. In addition, each permit must include an operating plan describing the permittee's operation. For permits with terms longer than one year, annual itineraries projecting annual use must also be approved.[302] Activities must be described in detail, including the type and quantity of use, dates and routes of travel, location of sites for camping or other facilities, modes of transportation, number of livestock, and the persons employed and their qualifications.[303]

Payment of fees for permits is required annually in advance and it is stated policy to establish fees at fair market value.[304] Fees for outfitting activities which are not part of a larger permitted recreational facility consist of a permit charge for general occupancy, a charge for reserved campsites, and a charge for authorized livestock grazing.[305] Permit fees are currently set at three percent of adjusted gross revenue. This is estimated annually in advance based on anticipated levels of client service at current prices and adjusted annually to reflect actual revenue for on-forest activities.[306] Permittees are charged for the full amount of authorized use unless non-use is waived sufficiently in advance to permit reassignment to other users.[307] Permittees pay a minimum of $100 for any reserved campsite and standard grazing fees for any authorized grazing use on national forest land.[308]

All permittees must agree to indemnify the United States for claims and judgments caused by their occupancy.[309] All permittees which "cater to the vacationing or traveling public" are also required to obtain liability insurance naming the government as coinsured and providing minimum levels of coverage,[310] which may be increased by regional offices.[311] Forest Supervisors may waive the insurance require-

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301. 36 C.F.R. §251.56(a) (1988).
302. FSM 2721.53g(3)(b) (Int. Dir. 58, 1987).
303. *Id.* at 2721.53g.
304. 36 C.F.R. §251.57(a) (1988).
305. FSM 2721.53i(1)(b) (Int. Dir. 58, 1987).
306. *Id.* at 2721.53i(2)(b) & (c).
307. *Id.* at 2721.53i(3).
308. *Id.* at 2721.53(4) & (5).
309. 36 C.F.R. §251.56(d) (1988).
310. FSM 2713.32 (1979). National minimums for property damage are $10,000; minimums for personal injury are $100,000 for a single individual and $200,000 for more than one.
311. Region 1 requires $250,000 coverage for personal injury to more than one person in outfitter permits, FSM 2713.32 (R-1 Supp. 1987); Region 4 adopts national minimums, *id.* (R-4 Supp. 1984).

ment in low risk undertakings not applicable to outfitting and guiding.[312] Difficulty in obtaining liability insurance during the mid-eighties threatened a number of outfitter operations and prompted the Forest Service to authorize regions to provide for limited waivers.[313] Region 1 has since adopted specific provisions dealing with the subject.[314] Currently, liability insurance is generally available, though at considerably greater cost. Since high cost of insurance is not to be a basis for waiver, many outfitters and guides have reduced levels of coverage.[315]

4. Supervision of Permits

District rangers are charged with making periodic inspection of all special use permits and preparing a written inspection report.[316] Outfitters must be inspected at least once a year.[317] Annual performance reviews are designed to determine whether an outfitter has satisfactorily complied with the terms of a permit, protected natural resources, and served the interests of the outfitted and non-outfitted public.[318] If performance is rated unacceptable, the permit is subject to termination.[319] If performance is rated probationary, a permittee will be issued a temporary permit for up to one year after which the permit will be terminated unless performance is rated acceptable.[320]

Permittees must also submit annual use reports and file annual itineraries for approval according to schedules established by forest supervisors. Permits are subject to amendment at any time in order to protect the public interest.[321] However, because major reevaluation of use levels occurs only periodically in long-term plans, more frequent

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312. FSM 2713.32a (1981) provides that waivers are not available in "high risk" situations which include "use of boats, aircraft, or pack and saddle livestock . . . , activity which is physically strenuous . . . , on or near fast-moving water or steep and precipitous terrain," or "involves the use of firearms . . . ."

313. *E.g.*, Letter from J. B. Hilmon, Deputy Chief to Region Four (Dec. 24, 1985), authorizing a one-month waiver of insurance for three snowmobile outfitters on the Targee National Forest.

314. FSM 2713.32a (R-1 Supp. 1987). Forest Supervisors are authorized to grant waivers if an applicant demonstrates "inability to obtain insurance" and satisfactory assurance that clients will be able to "make an informed decision on partaking of services where liability insurance coverage may be limited or unavailable" through effective disclosure in advertising brochures and written client waivers.

315. *See* Elder Interview, *supra* note 27.

316. FSM 2716.52 (1972).

317. *Id.* 2716.53.

318. *E.g.*, FSM 2721.53h-3 to -5 (R-1 Supp. 1986) (evaluation form).

319. FSM 2721.53h(2)(d) (Int. Dir. 58, 1987).

320. *Id.* at 2721.53h(2)(e).

321. *Id.* at 2711.1 (1986) & 2714 (1972).

reevaluation of use levels in permits is confined to unforeseen circumstances. Supervisors are broadly authorized to withhold all or part of the assigned use in order to protect resources, public safety, or prevent serious conflict with other users, and may authorize nonuse, assign additional temporary use, or make other requested amendments to operating plans.[322]

Permits may also be revoked for failure of a permittee to comply with law or the terms and conditions of a permit, for failure of a permittee to use privileges granted, or for reasons of public interest.[323] The latter is a broad term encompassing need of an area for "more important public purposes" as well as judgments that a use has become "unsatisfactory or undesirable."[324] However, as with modification of permits, major use determinations are the subject of broader periodic planning decisions. Thus, in practice, the ability to terminate for reasons of public interest is limited to rather narrow emergency situations. Unless immediate action is necessary, a permittee is entitled to written notice of the grounds for termination and a reasonable time to cure any noncompliance.[325] Internal appeal of adverse decisions is available in accordance with published regulations,[326] and the rationality of agency decisions are subject to scrutiny by federal courts under established standards of judicial review.[327]

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322. *Id.* at 2721.53d(3) (Int. Dir. 58, 1987).

323. 36 C.F.R. §251.60(a) & (b) (1988).

324. FSM 2716.3 (1972).

325. 36 C.F.R. §251.61(e) & (f) (1988).

326. 36 C.F.R. §251.60(g) (1988).

327. In federal courts in the Ninth Circuit, the doctrine of unreviewability may be a barrier. Under the Administrative Procedures Act, 5 U.S.C. §701(a)(2) (1982), judicial review is unavailable if a decision is "committed by law to agency discretion." According to Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971), this is a narrow exception which applies only where statutes are drawn so broadly as to provide courts with "no law to apply." *But see* 5 K.C. Davis, ADMINISTRATIVE LAW TREATISE, 288 (2d ed. 1979) (test unsupported by historic practice or legislative intent). In the Ninth Circuit, this is said to occur when, in a given case, a plaintiff cannot "raise a legal issue which can be reviewed by the court by reference to statutory standards and legislative intent," Strickland v. Morton, 519 F.2d 467, 470 (9th Cir. 1975). Unfortunately, the broad discretion to regulate occupancy and use contained in 16 U.S.C. §551 (1982), invites invocation of this doctrine.

Unreviewability has had considerable vitality in the Ninth Circuit which has applied it to a number of allegedly arbitrary agency decisions under broadly drawn public land statutes, including decisions to reject timber sale bids, Hi Ridge Lumber Co. v. United States, 443 F.2d 452 (9th Cir. 1971), decisions on whether to reclassify public land for disposal, Strickland v. Morton, *supra*; Nelson v. Andrus, 591 F.2d 1265 (9th Cir. 1978), and, most pertinently, decisions on whether to reissue special use permits, Ness Investment Corp. v. United States Dept. of Agriculture, 512 F.2d 706 (9th Cir. 1975). Other circuits have refused to apply the doctrine in substantially identical circumstances, in-

5. "Transfer" of Permits

All permits are considered personal and may not be sublet or otherwise transferred without Forest Service approval.[328] Although transfers may be approved, it is Forest Service policy not to do so. If a permittee is unable or unwilling to conduct authorized activities, use will be redistributed to others.[329]

In cases where a permittee sells a business, and the Forest Service is satisfied with the continuation of the use and the qualifications of the buyer, the outstanding permit will be retired and a new permit issued.[330] Although the Forest Service disclaims any obligation to reissue a permit to a qualified buyer, it has been a long-standing practice to do so:

> Granting of a new permit to the purchaser of the assets of a current permittee is at the discretion of the Forest Service. On the other hand, it has been common practice for the Forest Service to issue a new permit to the buyer if they are otherwise

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cluding decisions to reject oil leasing bids, Kerr-McGee Corp. v. Morton, 527 F.2d 838 (D.C. Cir. 1975); Chevron Oil Co. v. Andrus, 588 F.2d 1383 (5th Cir. 1979), and decisions to reject special use applications, Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975).

Recent decisions in the Ninth Circuit appear to have undermined the doctrine substantially. In Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987), rev'd on other grounds, 109 S.Ct. 1835 (1989), the court held that agency regulations provided the necessary "law to apply" and reviewed a decision to issue a term permit for a ski area. In Perkins v. Bergland, 608 F.2d 803 (9th Cir. 1979), the court reviewed the reasonableness of a decision to reduce authorized grazing, apparently holding that the policy of judicial review in FLPMA, 43 U.S.C. §1701(a)(6) (1982) repeals the APA exception for land management decisions. Nonetheless, the *Ness* decision may prove troublesome for counsel in the Ninth Circuit seeking review of agency outfitter decisions on grounds that they are not reasonably justified or fail to comply with applicable standards and procedures.

Although broad, Section 551 does supply some standards. Congress clearly sought to accommodate a wide range of citizen use consistent with forest protection. Beyond this, the most convincing argument for review is that agency regulations and manual directives provide the necessary law to apply. As related to published regulations having the force of law, this proposition seems obvious. However, recognition of informal manual directives as providing the standards for judicial review is less well established. *Cf.* Lumber Prod. and Indus. Worker Log Scalers v. United States, 580 F. Supp. 279, 282-84 (D. Or. 1984) (FSM lacks force and effect of law and thus unenforceable against agency). Thus, it may also be useful to frame rights of review in constitutional terms - i.e., that unjustified departure from general standards in particular cases would offend due process and equal protection. *Cf.* Wilderness Society v. Tyrrell, 701 F. Supp. 1473, 1480-82 (E.D. Cal. 1988); 2 Davis, *supra* note 327, §7:21 at 102.

328. 36 C.F.R. §§251.55(a) & 251.59 (1988).

329. FSM 2716.1 (1972) & 2721.53h(1) (Int. Dir. 58, 1987).

330. FSM 2716.1 (1972).

> fully qualified. Preference has been routinely given to the buyer in the award of permits even if there are other fully qualified applicants actively seeking the permit privilege.[331]

Current outfitting directives express this as agency policy.[332]

An application for reissuance must be accompanied with proof of a bona fide sale of the assets of a business.[333] Although assets of a business may be sold without Forest Service consent, parties to an anticipated sale of an outfitting business are advised to meet with local officials to discuss past operation and potential future use before a sale is concluded.[334] Because change of ownership is an occasion for reassessment of the need for continued service or other adjustments,[335] it is imprudent to conclude a sale without first determining the terms and conditions on which the Forest Service will continue to authorize outfitting activity. A buyer can succeed only to the level of priority use which his seller has effectively used.[336] If a buyer lacks two years of acceptable performance as a permittee, a seller's priority use will be assigned to the buyer under temporary permit for two successive years and thereafter converted to priority use if the Forest Service is satisfied with the new outfitter's performance.[337]

VI. COMMENTS ON POLICY ISSUES

A. Allocation of Outfitting Opportunities: The Property System

Although the federal and state regulatory systems have decided differences in emphasis, they share common purposes and characteristics. Both seek to assure minimum standards of safety and adequacy of service, both are concerned with protection of natural resources, and both must consider demands of competing users for finite resources. The means of accomplishing these goals include certification of minimum standards of competence, adoption and enforcement of standards of performance, and a limitation on the number of outfitters permitted

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331. *See* ISSUE ANALYSIS, *supra* note 38.

332. FSM 2721.53f(2)(b) (Int. Dir. 58, 1987) ("normally the Forest Service will reissue permits to qualified purchasers of currently permitted businesses with assigned priority use").

333. *Id. See* In re Arnold Empie, No. 01111067 (Nov. 7, 1984) (transfer policy is based on the assumption that improvements purchased are necessary to conduct outfitting services).

334. FSM 2721.53f(2)(a) (Int. Dir. 58, 1987).

335. *Id.* at 2716.12 (1972).

336. *Id.* at 2721.53d(2)(d); 2721.53f(2)(c) & (d) (Int. Dir. 58, 1987).

337. *Id.* at 2721.53g(4).

to offer services. The latter, which inevitably involves the agencies in the rationing of available opportunities, is the most controversial.

At some level of use, limitations on outfitting activities are necessary to prevent resource deterioration, maintain the quality of recreational experience, assure public safety, or address competition between outfitted and non-outfitted publics. Physical limitations, including campsite degradation and congestion at launch sites were principal reasons for limiting float boating on the Middle Fork. By contrast, the much stricter limits on the Selway represent a conscious effort to maintain relatively pristine natural conditions and quality wilderness experience. State delineation of hunting territories is reputedly an effort to maintain quality hunting in the face of conflicts among outfitters and between outfitters and the general public.

A common suspicion is that the IOGB, as a comparatively narrow and self-interested entity, will seek lower than optimal numbers in order to protect established outfitters, resulting in fewer opportunities and/or higher prices for the outfitted public. It seems likely there are or will be instances in which IOGB regulation will provide higher than optimal protection for incumbents. However, it is not at all apparent that this is a general problem with regard to numerical limits on outfitters. Limits are frequently a product of federal, not state, initiative, and there seems to be no general enthusiasm on the part of federal land managers or state game officials to significantly increase outfitter numbers or outfitters' share. Resource scarcity make caps on the number of outfitters inevitable and no objective determination of optimum numbers is possible. Caps have resulted when experience has suggested need for limits and are subject to adjustment over time. While some are suspicious of IOGB motives, others point with satisfaction to the quality of experience which IOGB regulation has produced. Without further information, however, it is difficult to broadly assault the Idaho approach.

More controversial than restricted entry are the means federal and state agencies have employed to allocate limited outfitting opportunities. Both have adopted what is essentially a property system. Outfitters established at the time caps were imposed each received a share of the available resource in accordance with historic use. Thereafter, an outfitter is permitted to maintain traditional use so long as performance is satisfactory. In addition, this preference can be sold with an outfitter's business at a price which reflects the relative scarcity of outfitting opportunities. Thus, although licenses and permits are subject to uncompensated reduction or termination by state and federal agencies, as between customary users and potential entrants, licenses and permits are private property.

There are, of course, alternatives. Licenses and permits could be distributed by lottery, auctioned, or assigned based on official assessment of comparative merit. These alternative means of rationing could occur at either the point of renewal or the point of transfer, or both. All alternatives would allow entry by those without historic use. Auctioning outfitting opportunities would maximize government revenues, and both auction and comparative merit approaches arguably lead to greater numbers of more capable and competitive operators.

Weighed against these potential benefits are notions of "equity" and concerns for assuring safe and adequate service. "First in time" is an honored social value, especially where individual, as opposed to industrial activities are involved. Moreover, many existing outfitters entered by purchase and the wipeout of such investments appear inequitable to many. Both federal and state officials have traditionally been concerned with providing minimum conditions of stability and opportunity under which good operators can successfully conduct business. Thus, the degree to which the potential for sudden re-allocation of licenses and permits might discourage investment and initiative, and, in turn, the possibility that safety and quality of service would diminish, seems relevant. Comparative merit evaluation provides a theoretically attractive approach which allows both the consideration of the value of an existing outfitter's performance as well as the potential improvement in public service from a competing applicant. However, comparative evaluations tend to be relatively expensive and legally and administratively complex.

Probably the most controversial aspect of the current property system is its operation at the point of transfer. For an outfitter to capture the market value of his priority access, a value which the outfitter has no hand in creating, strikes many as an unjustified windfall. Although considerations of administrative convenience, stability, and equity can be argued in support of a property system at this juncture, their persuasive force is more attenuated. After all, at the point of sale, a permittee has had an extended opportunity to use and profit from his preferred access. Consistently, where tenure is stable up to the point of transfer, the public interest in assuring safety and adequacy of service seems largely to have been served. Comparative evaluation at this point would still be analytically complex, but there would be far fewer cases and the task of selecting among a group of new aspirants is likely to be more manageable than a situation where an incumbent is fighting to survive in face of rosy promises and harsh criticisms.

Probably the most favorable features of the current system are its administrative simplicity and its workability, not inconsiderable merits. Whether the public interest requires the full extent of tenure offered by the current system will continue to be questioned. The

greatest reservations are likely to focus on property protection at the point of transfer, the juncture at which private and public interests appear least coincident. However, property is a traditional means of rationing public land resources, and if change is to occur, it seems likely it will be in a larger context of apportioning public and private values in public lands.

B. Allocation Between Recreation Publics: The Planning System

Given resource scarcity and continued growth of outfitted and non-outfitted demand, regulation of outfitters frequently allocates use between these two segments of the public. Effective allocation occurs in different forums and for different purposes. In some cases the allocation is direct and explicit. Other allocations may occur indirectly from restrictions aimed at other ends. Allocations may be effected by highly visible general rules or less visible incremental decisions.

Numerous examples can be cited. Dramatic increases in wilderness whitewater use during the 1960s resulted in limits on recreational use of many streams. Use limits were generally a product of federal managers' efforts to protect the environment and wilderness quality and were accompanied by explicit allocation of use between these two groups. Similar but less explicit allocations have been effected by IOGB resistance to issuing new boating and fishing licenses on readily accessible streams. This policy is justified on various grounds, some aimed directly at effecting user allocations, such as protecting general public use, and others, such as minimizing riparian impacts or fishing pressure, which do so indirectly. Allocations between outfitted and non-outfitted big game hunters are indirectly and more loosely accomplished through various federal or state decisions. These include: IOGB delineation of outfitter territories, a system designed to prevent conflict in operations; IOGB restrictions on outfitter activities in response to Fish & Game Commission recommendations; limitation of outfitter activities by federal land managers in order to minimize impacts on land or wildlife resources; and limits on numbers of out-of-state hunting licenses established by the state Fish & Game Commission.

Because of greater relative scarcity, the issue of allocating access to whitewater recreation between the outfitted and non-outfitted public has been most controversial and has received greatest attention. However, the problems and principles here have general application and are likely to be faced more directly in other areas over time.

Whitewater boating grew explosively during the late 1960s and early 1970s.[338] As crowding and resource impacts became apparent, federal land agencies typically imposed caps on total recreation use on most popular whitewater rivers, and pending further study, apportioned use between outfitters and non-outfitters based on historic use levels. The outfitter's share was apportioned among outfitters according to established individual levels of use, and individual outfitters, in turn, marketed their respective quotas to people seeking guided trips. Recreationists seeking to run rivers on their own were required to apply for permits and these opportunities were apportioned on a first come first serve basis, or by lottery. As numbers of non-outfitted applications have continued to mount, annual lotteries for non-outfitted applications on each limited river have become widespread.[339]

Following initial imposition of limits on rivers, managing agencies have typically prepared plans for each river which rationalize use limits and the allocations between the outfitted and non-outfitted public, and otherwise established standards for future management. As a result, total use and relative share have been subject to adjustment. Also, federal agencies have generally committed themselves to a policy of adjusting the outfitted and non-outfitted shares according to changes in the relative demand.[340] However, non-outfitted recreationists continue to question both the legality and fairness of the current approach.

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338. A graphic and oft-cited example is the Grand Canyon. In 1950 fewer than 100 people had run this river and by 1959 fewer than 100 made the trip annually. By 1965 annual use had increased to 547 and by 1972 had reached 16,428, resulting in a moratorium on boat use during peak periods, SHELBY & NIELSEN, RIVER CONTACT STUDY-PART IV 5 (NPS 1976).

339. *See* Leaper, *Rationing Recreational River Use: A Question of Equality and Freedom of Choice*, 12 WESTERN WILDLANDS 10 (Winter 1987).

340. Limits and allocation for the Middle Fork were initially imposed in 1972 based on existing use levels and have been adjusted according to observed relative demand. The current allocation of launches during the peak season is 44% for outfitters and 56% for non-outfitted. These allocations are subject to adjustment "according to periodic determinations of relative demand, in conjunction with Forest planning." UNITED STATES FOREST SERVICE, MANAGEMENT PLAN FOR THE FRANK CHURCH-RIVER OF NO RETURN WILDERNESS 20, 26 (Dec. 1984) (hereafter cited FRANK CHURCH PLAN). SHELBY & DANLEY, ALLOCATING RIVER USE 37 (USFS 1979), report a similar experience and policy on the Snake. A similar pattern occurred in the Grand Canyon, where, based on existing use levels, the original allocation in 1972 was 92% of user days to outfitters and 8% of user days to non-outfitted; by 1979 the Park Service proposed to alter the allocation to 70% and 30% respectively, Wilderness Pub. Rts. Fnd. v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1979), and is currently proposing further enlarging the non-outfitted share, *See* PUBLIC LAND NEWS 8 (Dec. 15, 1988).

A frequent legal argument is that statutes which guarantee public access,[341] or the larger notion of public trust, entitle the general public to preference over commercial occupancy and use by outfitters. This argument was squarely rejected by the Ninth Circuit in *Wilderness Public Rights Fund v. Kleppe*,[342] which recognized the conflict in terms of competing segments of the public:

> Throughout these proceedings Wilderness Public Rights Fund has persisted in viewing the dispute as one between the recreational users of the river and the commercial operators, whose use is for profit . . . . The Fund ignores the fact that the commercial operators, as concessioners of the Service, undertake a public function to provide services that the NPS deems desirable for those visiting the area . . . . The basic face-off is not between the commercial operators and the noncommercial users, but between those who can make the run without professional assistance and those who cannot.[343]

Whatever the merits of managing any given area for a particular quality of experience, the Ninth Circuit's recognition that the public consists of different classes of recreationists with different means of access is sound.

Some also argue that non-outfitted users should be preferred in wilderness areas.[344] However, the Wilderness Act makes express provision for outfitting and recent congressional guidance appears decidedly against such purist concepts.[345] It seems unlikely, therefore, that the competing demands of outfitted and non-outfitted recreationists will be determined by a legal principle of priority. On the other hand, non-outfitted recreationists persistently point to the relative ease with which an individual is able to book a trip with an outfitter compared to the difficulty in obtaining a permit for a nonoutfitted trip.[346] These

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341. *See, e.g.* statutes cited notes 21 and 24 *supra*.

342. 609 F.2d 1250 (9th Cir. 1979).

343. *Id.* at 1254.

344. Nash, "*The Wildness in Wilderness*," *in Recreational Use Allocation, Proc. of the Nat'l Conf. on Allocation of Recreation Opportunities on Public Land* 22-26 (Buist ed., UNLV 1981) argues for such a preference because the "essence" of wilderness experience is self reliance.

345. *See* Section VI(C), *infra*.

346. Critics of the system assert that vast inequality is demonstrated by the fact that an individual seeking a guided trip can successfully book a space with an outfitter on a limited river late in the spring, while an individual seeking a non-outfitted trip must typically wait several years before his name comes up on a long reservation list or is drawn in a lottery, *see* Leaper *supra* note 339 at 12-13; Mason, "The Non-commercial

continued allegations of relative inequality between different classes of the public are potentially significant to both agencies and courts.

Most knowledgeable participants concede that it is difficult for agencies to accurately gauge relative demand. For one thing, the apportionment at any given time is based on history; thus, allocations will always lag behind recent shifts in demand. Moreover, determining unmet demand is complex and controversial.

Currently the central limitation on river use is launches of parties over time. Launches are central because the number of parties most directly relates to scarce whitewater resources — *i.e.*, available campsites, launch space, and perceived crowding. Total numbers are relevant, however, and party size is also limited. On most rivers, these limits are not generally met. Consequently, agencies have often relied on growth in size of parties as a means of gauging relative demand. When party size becomes more generally limiting, agencies will be forced to compare numbers of unsuccessful bookings against numbers of unsuccessful lottery applicants.

Information on unsuccessful bookings must rely on industry self-reporting and must sort out multiple unsuccessful attempts. Although such a system is subject to manipulation, presumably this can be minimized by spot checks and the threat of a loss of license and other stiff penalties. Although applications for the non-outfitted lottery are filed individually, permits are issued for parties of unidentified individuals, each of whom have also typically filed applications. Thus, the number of unsuccessful lottery applications is not a reliable measure of unsuccessful applicants. Even if all individual applicants are identified and cross-checked, the numbers of applications and more fleeting nature of lottery participants makes detection and deterrence of lottery manipulation difficult.

As a consequence of perceived unfairness and administrative complexity in the current system, non-outfitted recreationists frequently propose various forms of a universal lottery, invariably labeled "free choice." This system has been adopted for the Flathead Wild and Scenic River System in Montana, if and when it becomes necessary to limit non-outfitted access.[347] In general terms, "free choice" is a system where all competing users apply in the same manner for limited space

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Viewpoint," in Recreational Use Allocation, *supra* note 344 at 174; Hinchman, *The Fight for Rowing Room in the Grand Canyon*, HIGH COUNTRY NEWS 7 (May 23, 1988).

347. FLATHEAD NATIONAL FOREST, FLATHEAD WILD AND SCENIC RIVER MANAGEMENT DIRECTION (undated). Adoption of this policy in 1986 was unsuccessfully appealed by various outfitters and outfitting interests, *see* Decision of James Overbay, Regional Forester, (Sept. 17, 1986).

on a particular river. Those who are successful are free to arrange a trip through an outfitter, or to conduct a trip on their own. In theory, this gives all recreationists an equal chance to run a river, simplifies administration, and would assure that actual use in any given season reflects actual demand.

"Free choice" is subject to a number of objections.[348] A common one is that the inability of outfitters to plan for and market a reasonably predictable quota would make it impractical to conduct business. Another is that "free choice" unfairly disadvantages those seeking outfitted opportunities. Each of these objections is premised on an understanding of important differences in characteristics of these separate publics.

The outfitted recreationist is typically a person unfamiliar with floating rivers or the administrative process governing them. A booking with an outfitter is typically made individually, or on behalf of a couple or a family group, who then make the trip with a larger group of unacquainted individuals assembled by the outfitter. The fee paid the outfitter not only secures space on the river but purchases services of guides, use of equipment, and all of the planning associated with a whitewater trip.

The non-outfitted recreationist, by comparison, is not only relatively skilled at boating, but also relatively sophisticated about the process of acquiring permits. Applications are typically filed individually by a group of acquaintances with the understanding that all will accompany any one of the group who is successful. This has been refined in some urban areas by formation of whitewater clubs whose members widely apply for several lotteries with the knowledge that parties can be assembled from among the larger membership for any permit application which is successful. The non-outfitted recreationists must not only acquire space on the river, and rely upon individual skill to run it, but must also acquire equipment, work out sharing of expenses, and participate in planning the details of a trip. This greater individual participation and responsibility makes it important for a non-outfitted recreationist to associate with friends and acquaintances whose temperament and skills are known, and makes assembling non-outfitted parties comparatively difficult.[349]

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348. *See* Linford, "A River Outfitter's Perspective on the Allocation Issue," in Recreation Use Allocation, *supra* note 344 at 112.

349. This, and the practice of filing multiple lottery applications, probably accounts for the lower actual use levels among successful non-outfitted recreationists. Shelby & Danley, *supra* note 340 at 36, reported that in 1978, outfitters on the Snake used 57% of allocated launches while non-outfitters used 44%. By developing a common

Under the present system, non-outfitted parties of knowledgeable individuals are effectively pooled in advance of achieving access, while outfitted parties of inexperienced individuals are pooled after access is allocated. "Free choice" would seriously complicate outfitting. In order to provide a pool of prospective clients, outfitters would have to reach potential customers much earlier and provide them with the knowledge and means to participate in annual lotteries. Even then, the group nature of non-outfitted lottery applications, where the chance of success for each applicant is effectively a product of the total number of individuals within a group who also file applications, would give individuals of this class an inherent advantage over individual and small group applications filed by geographically dispersed and unacquainted recreationists seeking an outfitted trip.

Perhaps there are ways of structuring universal lotteries which occur late enough for the uninitiated to participate, early enough for outfitters to effectively market opportunities, and which would accord equal opportunity for all participants. However, it is not apparent, given the fundamental differences in the groups involved, that "free choice" necessarily guarantees "equal opportunity." Nor is it clear that the comparative ease of booking a trip with an outfitter is necessarily a product of unequal allocation of use. The comparative difficulty of obtaining a non-outfitted trip is at least partly a function of multiple applications by non-outfitted groups and the unwillingness of such individuals to be indiscriminately pooled. Perhaps this indicates that agency allocation based on relative demand is the best which can be achieved in practice. In any event, recent adoption of "free choice" on the Flathead and similar experiments elsewhere will undoubtedly be watched with considerable interest.

C. Outfitting and Wilderness Management

A large amount of outfitting has traditionally occurred in undeveloped areas on national forests. With the continued classification of many such areas as de jure wilderness, a growing part of the federal regulation of outfitters is a product of wilderness management.

Classification of an area as wilderness results in a general prohibition of commercial activities as well as mechanization and permanent structures and facilities.[350] However, public use and recreation figure

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pool, outfitters on the Grand were able to achieve 95% of allocated river days in 1987 while non-outfitted use was 79%, *see* "*The Fight for Rowing Room*," *supra* note 346.

350. "Except as specifically provided for in this Act . . . there shall be no commercial enterprise and no permanent road within any wilderness . . . and, except as necessary to meet minimum requirements for the administration of the area . . . there shall be no

prominently in the statutory definition of wilderness.[351] Consistently, Congress explicitly recognized outfitting as a legitimate activity in wilderness: "Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas."[352] Forest Service regulations provide for "temporary structures and commercial services . . . to the extent necessary for realizing . . . recreational or other wilderness purposes" including "services generally offered by packers, outfitters, and guides."[353] Outfitting is also recognized in management plans for particular areas.[354] Recent litigation over outfitting practices in the Frank Church Wilderness raises issues with potentially important implications for agency wilderness policy.

1. The Camp and Cache Controversy

The Frank Church-River of No Return Wilderness, is a large area in central Idaho typified by steep, rocky, and timbered ridges and ravines. Many packers operating in this area are based solely or primarily on national forest land. Traditionally, these outfitters have maintained base facilities, consisting of pole corrals and floored tents equipped with wood stoves, portable bunks, and primitive tables and stools, and a number of smaller and somewhat less elaborately equipped outlying

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temporary road, no use of motor vehicles, motorized equipment or motorboats . . . and no structure or installation . . . ." 16 U.S.C. §1133(c) (1982).

351. Following a general definition of wilderness as an area where "earth and its community of life are untrammeled by man" and which retains "its primeval character and influence," Congress specifically defines wilderness as federal land which:

> (1) generally appears to have been affected primarily by the forces of nature . . . ; (2) *has outstanding opportunities for solitude or a primitive and unconfined type of recreation*; (3) . . . is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. §1131(c) (1982) (emphasis added).

352. 16 U.S.C. §1133(d)(5) (1982). Sec. 1133(d) contains a number of other "special provisions" authorizing agencies to permit continued use of aircraft and motorboats where already "established" (1133(d)(1)), undertaking actions "necessary" to control fire, insects, and disease, *id.*, providing for mineral development (1133(d)(2) & (3)), "needed" water and power development (1133(d)(4)), and continued livestock grazing where "established," *id.*

353. 36 C.F.R. §293.8 (1988).

354. FSM 2323.13g (1986) requires forest plans to address the need and role of outfitters in particular areas. THE FRANK CHURCH PLAN, *supra* note 340 at 10 recognizes the service and interpretative role provided by outfitters and describes outfitting as "needed and appropriate."

camps throughout the fall, winter, and spring hunts, with actual use and occupancy determined by weather and client demand. At the end of spring hunting season, tenting and other equipment at most camps is typically stored in caches for re-use the following season.[355]

In 1984, the Forest Service adopted a management plan for the Frank Church area which placed a number of important restrictions on these traditional practices.[356] Outfitters were limited to a base camp and a total of three spike camps. They were required to dismantle camps when not in active use[357] and, except for reusable tent poles, caches were to be gradually discontinued.[358] Permanent corrals and hitchracks were also limited to situations necessary to protect resources, with temporary rope corrals and hitchlines generally favored. The Plan identified a number of concerns which provided the impetus for these restrictions, including deteriorating campgrounds, monopolization of limited camp sites, and the philosophic and aesthetic objections of other users,[359] but did not relate specific restrictions to particular concerns.

Numerical limits on camps promised to drastically reduce the operation of several larger outfitters. Further, the combined effect of the limits on occupancy of sites and the prohibition on caches was to require outfitters to transport large amounts of equipment in and out of an area not only at the end, but during, normal seasons of use. The economic and physical impracticality of accomplishing this effectively forced outfitters to acquire modern light-weight equipment and establish less elaborate camps. A subsequent appeal of the Plan by the Idaho Outfitters and Guides Association makes it clear that this was a central agency purpose.

The appeal resulted in some important changes. Uniform numerical limits on camps were eliminated with instructions to specify numbers and locations of base camps in operating plans in light of operational requirements of individual outfitters and needs of the non-outfitted public. Also the outfitters use of spike camps was placed on the same terms and conditions as members of the general public.[360] Boxing in springs and piping water to base camps, a practice objected to by intervening non-outfitted users, was prohibited, but the use of

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355. *See* IOGA, Statement of Reasons 6-10 (Apr. 25, 1985).

356. *See* FRANK CHURCH PLAN, *supra* note 340 at 60-63.

357. *Id.* at 60 (fifteen days prior and ten days after use).

358. *Id.* (existing caches were to be phased out at the rate of one per outfitter per year).

359. *Id.* at 19-20; 56-58.

360. Letter from Chief of the Forest Service to Richard Linville at 4-5 (Aug. 6, 1986).

corrals was authorized when required for humane treatment of pack stock as well as to prevent resource damage.[361] However, the central requirements of dismantling base camps when not in use and the prohibition on caches were upheld. The Chief's Decision reasoned that Wilderness Act provisions for outfitting services were entirely permissive, and, in any event, extended only to "temporary" facilities "necessary" to serve the public.[362] The Chief concluded that existence of alternative means of camping rendered traditional methods unnecessary:

> You argue that many outfitters use their base camps intermittently year long, including winter, and that it is not possible or desirable to dismantle a base camp between seasons or during any particular season of use. To do so would jeopardize safety of outfitters and their clients during severe weather, and would significantly increase the impact on the wilderness by causing unnecessary transportation of heavy, bulky equipment.
>
> Your argument is not convincing. Outfitters in other areas have clearly demonstrated that by using newly developed lightweight stoves, tents, and other items of equipment, they can provide a safe and comfortable experience for their clients, while at the same time causing minimum impact on the wilderness resource . . . . As more outfitters move from heavy impact methodologies to more lightweight equipment, we believe that the large base facilities currently in use will gradually be phased out.[363]

Thereafter, the IOGA sought judicial review in federal district court, seeking a judgment that permanent camp improvements, caches, and spring developments were protected by outfitting and grazing provisions of the 1964 Wilderness Act and the 1980 Central Idaho Act.[364] Subsequently, the Forest Service agreed to suspend the phasing out of existing caches pending a task force study of this issue, and in January, 1988, the case was dismissed without prejudice.[365]

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361. *Id.* at 5.
362. *Id.* at 2-3.
363. *Id.* at 4.
364. Complaint in IOGA v. Ling, No. 87-1221 (D. Idaho 1987).
365. Settlement Agreement and Stipulation to Dismiss, IOGA v. Ling, No. 87-1221 (D. Idaho 1988).

In December 1988, the task force submitted a report endorsing the elimination of caches.[366] The report finds that most caches inspected were unsightly and obtrusive, that caches were objectionable to other users, and that the existence of light-weight equipment made caches unnecessary.[367] The report concludes that caches are inconsistent with general Wilderness Act prohibitions against human occupancy and agency efforts to promote "no trace" camping.[368] There is little in the report to suggest that caches result in resource damage or that inconspicuous caches would monopolize available camp space. Rather, its recommendations appear largely philosophic: wilderness character is promoted by minimizing human intrusion and, because outfitting can be successfully conducted with less intrusion, it should be.

Four months later, the Chief issued an interim decision on caches and related issues.[369] Permanent facilities are to be phased out. Although the long-term policy is to promote use of portable equipment which can be transported "in and out . . . at the beginning and end of each season," temporary facilities of native materials and, where previously used, heavy camping equipment, may be cached during periods of non-use if "stored in an unobtrusive way so as not to interfere with enjoyment of wilderness by other users."[370]

2. Implications for Wilderness Management

Wilderness management involves dual objects of preservation and use which are potentially conflicting and may be interpreted in markedly different ways. Preservation obviously requires a high degree of ecologic integrity, but the extent to which active management is appropriate is subject to dispute,[371] particularly when it involves highly visible environmental alteration.[372] Appropriate use of wilderness must

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366. Task Force Report: Frank Church-River of No Return Wilderness Caches (Dec. 19, 1988).

367. *Id.* at 1-2.

368. *Id.*

369. Frank Church-River of No Return Wilderness Settlement Agreement (Apr. 20, 1989). The decision, encouraging flexibility and cooperation, is to be re-evaluated at the end of the 1989 season.

370. *Id.*

371. This is explored in A. CHASE, PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA'S FIRST NATIONAL PARK (1986); Rohlf & Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 ECOL. L. Q. 249, 271-77 (1988); Spurr, *Wilderness Concepts*, 16 IDAHO L. REV. 439 (1980). Because nature is not static and few areas are free from outside influence, there is also frequently disagreement about what conditions are natural.

372. Clearcutting diseased trees in order to maintain habitat for an endangered species is one example, *see* Rohlf & Honnold, *supra* note 371; Shurts, *Wilderness Man-*

obviously minimize the trappings of modern civilization, but primitive use ranges from solitary wilderness survival to relatively comfortable outfitted camping, and the degree to which wilderness should be "user-friendly" is the subject of disagreement, particularly when accommodating use involves visible structures and facilities such as shelters, outhouses, and the like.[373] A philosophy which emphasizes natural processes, pristine conditions, and low amenity use is frequently labeled biocentric; a philosophy which encourages diverse visitor use, is more tolerant of human impacts, and permits greater intervention in ecological processes is frequently labeled anthropocentric.[374]

The definition of wilderness adopted by Congress in 1964 can reasonably be read in either fashion depending on whether emphasis is placed on such words as "untrammeled," "primeval," "unimpaired," and "outstanding," or upon such words as "primarily," "generally," and "substantially." Likewise, it is possible to understand the numerous special provisions in the Wilderness Act as special exceptions to an otherwise nature-centered approach or as a consistent part of a flexible, human-centered philosophy.

Management standards in the Wilderness Act also speak to the issue of "purity" ambiguously. Managing agencies are charged with both preserving the "wilderness character" of areas as well as devoting them to "public purposes of recreational" and other "use."[375] Agencies are further authorized to employ modern tools when "necessary to meet minimum requirements . . . for the purpose of" wilderness.[376] On one hand, the terms "necessary" and "minimum" may indicate narrow discretion concerning means; on the other, the potentially disparate purposes of wilderness may give agencies broad leeway concerning ends. The Act also makes special provision for a number of other, largely private, activities, some explicitly circumscribed by standards of necessity and others, perhaps, impliedly so.[377] In particular, the pro-

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agement and the Southern Pine Beetle, 17 ENVTL. L. 671 (1987). Prescribed burning and fisheries enhancement are others.

373. Nash, *supra* note 344, argues that a primary object should be providing high skill, self reliant use. Worf, *The Two Faces of Wilderness A Time For Choice*, 16 IDAHO L. REV. 423 (1980), similarly argues that management should maintain relatively pristine appearances and promote intimate contact with nature.

374. *See* J. HENDEE, G. STANKEY, AND R. LUCAS, WILDERNESS MANAGEMENT 16-21 (U.S.D.A. 1978); Strack, *Wilderness and the Search for Congressional Intent: Is it Nature's Haven or Man's Playground?* 1-4 (Research paper, November 1987). Apart from appearances, it seems possible to manage the biological and social components of wilderness with a different emphasis.

375. 16 U.S.C. §1133(b) (1982).

376. *Id.* §1133(c).

377. *Id.* §1133(d). *See* note 352 *supra*.

vision for commercial services in wilderness to the extent "necessary" for "proper" realization of "recreation and other purposes" of wilderness is ambiguous on the question of purity.[378]

The Forest Service has traditionally sought relatively high standards of protection for both biological and social aspects of wilderness.[379] Since Congress has not been explicit, the Forest Service appears on the surface to have considerable discretion in formulating wilderness policy. Likewise, the broad and permissive nature of Wilderness Act provisions concerning commercial support services appear to leave outfitting policy largely to agency decision. However, a consistent course of congressional guidance and legislation over the past decade may have narrowed this apparent discretion.[380]

The question of "purity" was addressed by Congress in two important pieces of legislation during the 1970s. The first, was a statute adding numerous areas of forests in eastern states to the wilderness system in 1974.[381] All of these areas had been formerly settled or otherwise developed, but had returned to a relatively primitive condition over time. However, because these areas typically reflected evidence of past human use and many were not large enough or sufficiently removed from settlement to provide escape from the "sights and sounds" of civilization, the Forest Service proposed to create a separate "Wild Area" system which would leave it free to insist on higher standards for areas in the west. In pointedly rejecting this approach, Congress clearly sought to establish a more flexible standard for wilderness.[382]

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378. Judicial challenges to wilderness management are only beginning. The recent pine beetle litigation has interpreted administrative authority to alter the environment. *See* Sierra Club v. Block, 614 F. Supp. 488 (D. D.C. 1985); Sierra Club v. Lyng, 662 F. Supp. 40 (D. D.C. 1987); Sierra Club v. Lyng, 663 F. Supp. 556 (D. D.C. 1987). The camp and cache controversy tests administrative authority to restrict primitive use. Rohlf & Honnold, *supra* note 371, suggest that the pine beetle decisions support a "minimum disruption" standard for any management activity which disturbs wilderness character or restricts primitive use.

379. It is general policy to allow "natural ecological succession" to "operate freely to the extent feasible" and to permit "human use to the optimum extent consistent with . . . primitive conditions" but to resolve resource conflicts in favor of "wilderness values wherever legally permissible, 36 C.F.R. §293.2 (1988). Manual directives also provide a general goal of achieving "the highest level of purity . . . within legal constraints," FSM 2320.6 (1986).

380. The following discussion of congressional action on wilderness draws heavily on Strack, *supra* note 374, and BROWNING, HENDEE, & ROGGENBUCK, 103 WILDERNESS LAWS: MILESTONES AND MANAGEMENT DIRECTION IN WILDERNESS LEGISLATION (Univ. of Idaho Forest, Wildlife and Range Experiment Station, Bulletin 51 1988).

381. National Wilderness Preservation System, Pub. L. No. 93-622, 88 Stat. 2096 (1975).

382. *See* S. REP. No. 803, 93d Cong., 2d Sess. 8 (1974).

However, because the bill dealt exclusively with land east of the 100th meridian and because it dealt solely with the initial decision to classify areas, the impact of this legislation on agency management discretion remained ambiguous. Congressional intent behind the second major piece of legislation, the Endangered American Wilderness Act of 1978,[383] is much less equivocal.

The Endangered Wilderness Act was omnibus legislation classifying over sixteen areas in western states as wilderness. The act resulted from dissatisfaction with the first Roadless Area Review Evaluation (RARE I), a process initiated by the Forest Service in 1971 to determine which roadless areas, beyond those addressed in the 1964 Wilderness Act, warranted immediate protection. In extensive hearings on areas omitted by RARE I, environmentalists and others sharply criticized the stringency of agency biological and use standards as disqualifying attractive areas and rendering wilderness classification unattractive to customary users.[384] Both House and Senate Reports comment favorably on the Carter administration decision to abandon the "sights and sounds" doctrine, discuss the purity issue at length, and lay down specific guidelines calling for flexible wilderness management. Concerning user facilities, the House Report provides:

> Trails, trail signs, and necessary bridges are all permissible . . . . [M]aintenance can include the use of mechanical equipment where appropriate and/or necessary.
>
> Cabins exist . . . and are entirely appropriate where they are necessary for the proper administration of the area, for the protection of the public, or as a management tool . . . .
>
> Sanitary facilities (such as pit toilets) are permissible . . . and . . . may be vital to the protection of water quality and the health of the public. Servicing of sanitary facilities may be accomplished by mechanical means (such as helicopters) where practical alternatives . . . do not exist.
>
> Trailside shelters or lean-tos should not be provided in wilderness areas except where necessary . . . for the protection of the wilderness, or for the health and safety of the user. In general, fire rings, hitching posts, non-permanent tent platforms or pads, and other temporary structures used by outfitters may be

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383. Pub. L. No. 95-237, 92 Stat. 40 (1978).

384. *See* H.R. REP. No. 540, 95th Cong., 1st Sess. 5-6 (1977); S. REP. No. 490, 95th Cong., 1st Sess. 7 (1977).

> allowed at the discretion of the Secretary, and . . . these should not have to be removed each winter if they can be stored in an unobtrusive fashion.[385]

Although less detailed, the Senate Report also addressed the purity issue, affirming that the Wilderness Act "provides considerable flexibility" for agency management, and provided particular guidance concerning facilities and structures:

> Senator Church . . . clearly enunciated the fundamental thrust of the Act's provisions governing the management of facilities and installations:
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> The issue is not whether necessary management facilities and activities are prohibited; they are not - the test is whether they are in fact necessary . . . .
>
> . . . To assure clarity on these issues, the committee wishes to reemphasize that hand water pumps, rustic fire rings, and sanitary facilities (including privies, pit or vault toilets) may be provided and maintained in wilderness areas . . . . The test simply rests on the question of whether such installations are "necessary" and "minimum" for the proper administration of the area, for the protection of the public, or as a management tool for the protection of the wilderness area.[386]

Two years later Congress passed Central Idaho Wilderness Act[387] which created what was later named the Frank Church-River of No Return Wilderness.[388] Maintenance of airstrips, cabins, grazing and

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385. H.R. REP. No. 540, *supra* note 384 at 6-7. This report also comments on appropriate biological management:

> [T]he Wilderness Act permits any measures necessary to control fire, insect outbreaks or disease . . . . This includes the use of mechanized equipment, the building of fire roads, fire towers, fire breaks or fire presuppression facilities . . . . [A]nything necessary for the protection of the public health or safety is clearly permissible . . . .
>
> Fisheries enhancement activities and facilities are permissible and often highly desirable . . . . Such activities and facilities include fish traps, stream barriers, aerial stocking, and the protection and propagation of rare species . . . .
>
> Snow gauges, water quantity and quality measuring instruments, and other scientific devices . . . are entirely appropriate . . . . Weather modification activities should also be permissible, if they do not impair the ecological balance and wilderness qualities of an area.

386. S. REP. No. 490, *supra* note 384 at 8.

387. Pub. L. No. 96-312, 94 Stat. 948 (1980).

388. Pub. L. No. 98-231, 98 Stat. 60 (1984).

grazing improvements, and outfitting practices and facilities were all the subject of extended discussion in hearings on this legislation. As with the omnibus legislation in 1974 and 1978, congressional reports provide guidance on management policy and call for considerable flexibility: the appropriateness of outfitting and guiding is affirmed;[389] Forest Service "wilderness buffer" policy is specifically discouraged;[390] the policy of destroying old cabins and structures "as a means of 'restoring' these wilderness lands to a 'natural condition' " is criticized,[391] and the continuation and expansion of grazing, maintenance of support facilities, and the use of modern equipment to service these improvements, are declared consistent with wilderness.[392] The final legislation reiterates the provisions of the original Wilderness Act on grazing and commercial services,[393] severely restricts closing of established airstrips,[394] and bars destruction of cabins until study of their historical significance is submitted to Congress.[395]

During the 1980s, wilderness legislation has largely focused on individual state proposals originating from the second roadless area review (RARE II). Although outfitting and guiding has not been a particular focus, Congress has continued its oversight of management

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389. S. REP. No. 414, 96th Cong., 1st Sess. 21-22 (1979).

390. "Buffer management" is the converse of the defunct "sights and sounds" doctrine. The latter resists classification of areas as wilderness if existing development on adjacent lands makes escape from civilization difficult, while the former seeks to protect classified areas from the impacts of future development on adjoining land. The Central Idaho Wilderness Act was expressly intended to make a "comprehensive land allocation decision for the national forest roadless areas of the central Idaho region," Pub. L. No. 96-312, §2(b)(3) 94 Stat. 948 (1980), both securing protection for particular areas and assuring that, in accordance with appropriate land planning, other areas would be open to nonwilderness activities, S. REP. No. 414, *supra* note 389 at 8, thus making Forest Service buffer management "unnecessary," *id.*

391. S. REP. No. 414, *supra* note 389 at 23.

392. H.R. REP. No. 838, 96 Cong., 2d Sess., pt. 1, 7-25 (1980) incorporated the guidelines in the Senate Report and added extended discussion of, and guidelines for, grazing, *id.* at 11-13. These guidelines were also included in the conference report, H.R. REP. No. 96-1126, 96 Cong., 2d Sess. 21-24 (1980).

393. Pub. L. No. 96-312, §§7(a)(2) & (a)(3), 94 stat. 951 (1980).

394. Pub. L. No. 96-312, §7(a)(1), 94 stat. 950 (1980) provides that the Secretary "shall not permanently close or render unserviceable" any airstrip except for "extreme danger to aircraft" and then, only with "express written concurrence" of the Idaho agency "charged with evaluating the safety of backcountry airstrips." In In re Seventh Heaven Associates, No. 05040702 (June 2, 1982) the Chief indicated the general policy was to discourage continuation of air access except for "compelling reasons."

395. Pub. L. No. 96-312, §8(b)(1), 94 stat. 951-52 (1980).

policy and, increasingly, adopted specific statutory provisions. Collectively, they represent continued rejection of a purist approach.[396]

Current Forest Service directives, though not inflexible, do not wholly embrace congressional guidance. Although the grazing provisions have been adopted as national policy,[397] and standards established by statute are to be followed in particular areas,[398] management policy does not reflect the degree of flexibility suggested by the 1978 congressional reports nor the general thrust of congressional policy over the past decade. In particular, directives on structures and facilities are more narrow than the guidelines provided by the 1978 House report[399] and the national policy on removal of outfitter caches appears contrary to these guidelines.[400]

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396. Restrictions on buffer management were first explicitly included in the New Mexico legislation. Pub. L. No. 96-550, §105, 94 Stat. 3225 (1980) (wilderness designation is not intended to create "protective perimeters or buffer zones" on adjoining land and the fact nonwilderness activities can be "seen or heard . . . shall not, of itself, preclude such activities or uses up to" wilderness boundaries). The Colorado legislation included the buffer provision, (Pub. L. No. 96-560, §110, 94 Stat. 3271 (1980), as well as making the authorization to carry out fire and insect suppression in wilderness more explicit, (*id.* §109). Also, the House Report on the Colorado bill included the extensive guidance on grazing and grazing improvements which had been formulated in passage of the Central Idaho Act and, for the first time, these provisions were expressly incorporated in legislation, (*id.* at Sec. 108 ("without amending the Wilderness Act of 1964, with respect to livestock grazing . . . the provisions of the Wilderness Act relating to grazing shall be interpreted and administered in accordance with the guidelines contained . . . in H. Report 96-617 accompanying this Act.")). Provisions on buffer management and, in western states, grazing, have since become common in wilderness legislation, (The buffer provision has been included in legislation for Oregon, Washington, Arizona, Utah, Arkansas, Wyoming, Pennsylvania, Virginia, and Michigan, while the grazing provision has been included in legislation for Arizona, Utah, Wyoming, Nebraska, and New Mexico, Browning et al, *supra* note 380 at 57-73.), and the California legislation contains numerous specific provisions for cabins, facilities, and visitor use levels. (*Id.* at 61-62).

397. FSM 2323.22 (1986).

398. Although FSM 2360.6-2 (1986) acknowledges that management of each area must vary according to the uses and values in each, primary emphasis is on achieving maximum wilderness purity. Similarly, FSM 2320.3 (3) & (4) (1986) recognize that particular legislation provides for "nonconforming exceptions" but directs minimizing their effect on wilderness and the elimination of uses and structure "not essential" to administration or provided for in establishing legislation.

399. *Compare* FSM 2323.13 (1986) (facilities and improvements are to be provided only to protect resources and only as a last resort), *id.* 2323.13a(3) (outhouses are last resort measures and are to be serviced by non-mechanized means), *id.* 2323.13b (no new shelters are to be provided outside of Alaska, and unless required by law, are to be allowed to deteriorate), with text accompanying note 385, *supra*.

400. Compare text accompanying notes 299-300 *supra*, with text accompanying notes 385-86 *supra*.

The legal effect of congressional guidance on wilderness management policy in general and outfitting activities in particular is not easy to predict. As a general proposition, courts have eschewed use of congressional intent formulated subsequent to passage of legislation. Moreover, the fact Congress has been unwilling to amend the original act, but has done so in specific instances concerning particular areas, could be interpreted to indicate general congressional support for agency policy, or at least support for agency discretion, apart from special local exceptions. Finally, although the thrust of congressional guidance is distinctly anti-purity, it has been expressed largely in terms of what may, rather than must, be permitted.

On the other hand, use of post hoc legislative intent has some notable examples,[401] and the special constitutional responsibilities of Congress concerning public lands and the pervasiveness and consistency of congressional guidance may also have some bearing on the weight courts might give to such extra-statutory expressions of intent.[402] Congressional insistence that the original act provided a flexible, human-centered direction, and it's reluctance to amend the Act generally, can be understood as a coherent congressional appreciation for the tremendous diversity of areas in the system.[403] Courts could give effect to such an interpretation by restricting the discretion of agencies to adopt inflexible requirements at the national level and insisting that lower level policy be formulated in light of the values and conditions which each area offered at the time of its protection. Thus, where conditions are pristine, a bicentric approach would be readily defensible. However, where primitive use is established, a strict policy would compromise the values which Congress sought to protect; consequently, justification of restrictions should be confined to resource protection or providing for visitor use.

As applied to the outfitter controversy in the Frank Church, the Forest Service appears on firm legal ground to insist that permanent

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401. Montana Wilderness Assn. v. United States Forest Service, 655 F.2d 951 (9th Cir. 1981), which relied upon a committee report to Colorado legislation to interpret access provisions of the Alaska Land Act, is a particularly vivid example.

402. U.S. CONST. art. IV, Sec. 3 "commits the management and control of the lands of the United States to Congress" and " 'that power is subject to no limitations,' " Sabin v. Berglund, 585 F.2d 955, 957 (10th Cir. 1978).

403. The Wilderness Act was written with three of the four public land agencies in mind (Forest Service, Park Service, and Fish and Wildlife Service), and has since been extended to the fourth (BLM). Diversity of conditions accounted for congressional reluctance to amend the original act concerning grazing use and, instead, formulate guidelines which could be applied in a "creative and realistic site specific fashion," H.R. REP. No. 1126, *supra* note 391 at 22.

facilities should be exceptional. In addition, restrictions on occupancy of sites and monopolization of water sources have an apparently rational connection to maintaining opportunities for the non-outfitted public, and may also be rationally related to resource protection. However, if the cache requirements and the effort to force outfitters to particular methods of camping are related to these considerations, this is not adequately explained. If, on the other hand, the justification for these requirements lies in purist wilderness philosophy, judicial or congressional override is invited. The balance struck by Chief Robertson in April may have withdrawn this invitation.