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**BY ELECTRONIC MAIL: SM.FS.WO\_LandStaff@usda.gov**

**RE: Coalition for Outdoor Access Comments on U.S. Forest Service Notice of Proposed Rulemaking: Land Uses; Special Uses; Cost Recovery, Strict Liability Limit, and Insurance (#RIN 0596-AD35)**

Forest Service Lands and Realty Management Staff:

The Coalition for Outdoor Access (COA) welcomes this opportunity to submit comments on the USDA Forest Service (Forest Service) Notice of Proposed Rulemaking (NPRM) on Land Uses; Special Uses; Cost Recovery, Strict Liability Limit, and Insurance (RIN 0596-AD35), published at 88 FR 14517 (March 9, 2023).

## **I. INTRODUCTION**

### **A. Comment Overview**

For the reasons stated in detail below, we oppose the proposed rule. We believe the proposed rule is built on troubling contradictory assumptions. The rule assumes that the agency can provide better access to National Forest System lands by charging outdoor leaders more money for that access. This assumption ignores the fact that, for many recreational users, fees serve as a major barrier to access, and the way fees will be charged under the proposed rule will sometimes make this barrier insurmountable. As we will illustrate below, the barriers erected by the proposed rule do not always bear a simple linear relationship to the dollar amount of fees charged.

By subjecting recreation permits to the same cost recovery fee system as non-recreational special uses, the proposed rule equates recreation with those other uses. In this respect, the proposed rule ignores the significant and unique programmatic benefits that outdoor recreation provides to the agency and the public. The NPRM also fails to recognize that the increase in fees for outdoor recreation leaders will hit certain leaders in a way that will undermine the agency's efforts to achieve the goals laid out in its Equity Action Plan. Rather than support those goals, the rule will make National Forest System visitation less inclusive.

For these reasons and others that we set forth below, we urge the Forest Service to withdraw the proposed rule and reconsider its plan to increase cost recovery fees for recreation special use permits.

## **B. Interest of Commenters**

The Coalition for Outdoor Access (COA) is an alliance of organizations with a shared interest in improving the recreational permitting systems of the Federal land and water management agencies. COA was founded in 2014 to advocate for system changes that would enable outdoor leaders to provide more opportunities to the public to recreate on Federal public lands. COA's Steering Committee consists of a cross-section of the community of individuals and organizations that provide guided and facilitated recreation and educational services to the public. The services provided by our organizations and other organizations like us make it possible for people to experience public lands in a safe and enjoyable way. The organizations currently represented on the COA Steering Committee are:

- [American Mountain Guides Association](#)
- [Association of Outdoor Recreation and Education](#)
- [National Outdoor Leadership School](#)
- [The Wilderness Society](#)
- [Angler's Covey](#)
- [The Mountaineers](#)
- [REI Coop](#)
- [YMCA of Greater Seattle](#)

Because COA has a representative membership of outdoor leaders working in the recreation space, we are uniquely positioned to comment on this rulemaking. We can offer insights and perspectives on the NPRM from organizations and businesses that provide a wide range of recreation services.

COA also has a Policy Committee that provides additional organizations and outdoor leaders with an opportunity to add their voices and experiences to the work of the Coalition. Three Policy Committee members have signed onto this comment letter: [American Alpine Institute](#), [American Hiking Society](#) and [Human Potential LLC](#). Seven other allied organizations have joined us in submitting this comment: [American Camp Association](#), [Bus for Outdoor Access and Teaching](#), Choose Outdoors, [Latino Outdoors](#), [Northwest Outward Bound School](#), [Outward Bound USA](#) and [Runners for Public Lands](#).

## **II. EXECUTIVE SUMMARY**

### **A. Core Principles**

Our comments articulate four significant concerns with the NPRM. Because of these concerns, we doubt that implementation of the proposed rule will produce an affordable and equitable cost recovery system. The concerns we articulate flow from two core principles that we believe were overlooked when the proposed rule was drafted. These principles provide crucial background and framing to fully understand and analyze the impact of the proposed rule on entities seeking recreation special use and event authorizations. These principles are:

1. Guided outdoor recreation and recreation events provide benefits to the public and to the Forest Service that differentiate them from non-recreational special uses. By inviting people to visit public lands in a safer, lower impact way, recreation permit holders help the Forest Service achieve its visitation land management goals in ways that non-recreational special uses do not. Cost recovery policy should be formulated with these agency benefits in mind.
2. The NPRM assumes that the burdens of cost recovery bear a direct and linear relationship to the dollar amount of a permit applicant's cost recovery fees, and that all recreation permit holders have an equal ability to pay these fees. This assumption overlooks certain financial and institutional realities in the outdoor programming space that make outdoor recreation different from non-recreational special uses. These realities will have the effect of amplifying the burden imposed by the proposed rule when compared to non-recreational uses. As we will explain below, the rule will have a particularly outsized impact on certain types of recreation permit holders. This outsized impact will make the effects of the proposed rule inequitable. We believe this outcome conflicts with the goals articulated in the Forest Service's Equity Action Plan.

We summarize our four core concerns with the proposed rule below. We provide a more in-depth explanation of each of these four concerns and our two core principles in the next section.

## **B. Data Limitations**

Before laying out our core concerns with the proposed rule, we would like to highlight one challenging aspect of the NPRM that has limited our ability to evaluate the rule and envision a remedy that might meet the needs of both the agency and the stakeholder community.

Although the NPRM analyzes the impact of the proposed rule on recreation special use permit applications in great detail, it does so without providing information on how long it typically takes the agency to process these applications. We regard this as a significant oversight, because without this information it is nearly impossible to know the amount of the additional fees a typical permit applicant will be expected to pay under the proposed rule. If we do not know the amount of these additional fees, it is difficult to definitively gauge the impact of the proposed rule. It is also difficult to make an informed judgment about the need for the 50-hour exemption and the degree of impact from new cost recovery requirements related to permit proposals.

The need for additional information is particularly acute regarding permit monitoring. The NPRM explains that the agency can charge a cost recovery fee for monitoring to ensure compliance with a recreation permit. However, it provides no information on how much time is typically spent monitoring a recreation authorization. As we discuss further below in the section on recreation events, our members have seen significant variability in the amount of time spent on monitoring. This variability makes cost recovery fees unpredictable. This suggests that some event sponsors will see sudden and unexpectedly large increases in cost recovery fees under the proposed rule. Unfortunately, without more data on monitoring, it is difficult to know how significant these increases will be.

## C. Core Concerns

Even with this data gap, we still see significant cause for alarm in the proposed rule. Our core concerns with the proposed rule are as follows:

1. **The proposed rule would impose significant costs that will burden a wide range of recreation service providers**, including small nonprofit outdoor program providers and similar affinity groups, college and university recreation programs, small outfitters, larger outfitters, independent guides, and recreation event sponsors. The NPRM acknowledges that this rulemaking will have a high impact on entities holding recreation special use authorizations.<sup>1</sup> As noted above, guided and sponsored outdoor recreation activities provide benefits to the Forest Service and the general public. Imposing financial barriers that will hamper—and in some cases effectively bar—recreation service providers from accessing National Forest System (NFS) lands is counterproductive.
2. **The proposed rule directly contradicts equity goals and promises of both the Forest Service and the Biden administration**, as outlined in the Forest Service’s Equity Action Plan and the administration’s America the Beautiful Campaign. By removing the 50-hour cost recovery exemption from recreation special use authorizations, increasing cost recovery fees, and charging and billing for cost recovery prior to the screening and processing of proposals, the proposed rule would create significant financial barriers for many organizations that provide recreation services. These barriers will likely dissuade or inhibit many of these groups from applying for Forest Service permits, and will disproportionately impact smaller and newer organizations, many of which serve historically underserved or excluded communities.
3. **The Forest Service has not adequately demonstrated how the proposed rule will improve customer service such that the benefits will outweigh the costs.** The proposed rule claims the Forest Service will be able to improve access and customer service by charging applicants more fees to process their permit applications. However, it provides no real explanation of how the additional revenue will be used to achieve that goal. In particular, it makes no showing of how the additional revenue will be used to end the troubling practice, disclosed in the NPRM, of assigning lower priority to and deferring the processing of recreation special use applications. Without a clearer showing of how the additional revenue generated by the proposed rule will be used to improve customer service, we remain unconvinced that the benefits of the proposed rule will outweigh the burdens imposed.
4. **The proposed rule does not increase consistency between the Forest Service and the Bureau of Land Management (BLM) on cost recovery.** The NPRM states that one purpose of the proposed rule is to align Forest Service policy regarding cost recovery for pre-application proposals with the policy of the Bureau of Land Management. However, the proposed rule would actually increase inconsistency in other ways. BLM provides a 50-hour exemption for recreation permit applications and applies that exemption to processing time “in any one year.” The Forest Service proposed rule would eliminate the

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<sup>1</sup> 88 Fed. Reg. 14523.

50-hour exemption and could lead to multiple cost recovery charges in a single year. If the Forest Service seeks to achieve consistency with the BLM, these policies should not be adopted.

5. **The NPRM creates uncertainty regarding “high-risk” activities.** The NPRM proposes revisions to the liability provisions in the Forest Service’s special use regulations to raise the strict liability limit in tort for “high-risk” special uses. However, the NPRM is unclear on whether any recreational special use activities would be considered high-risk. The examples listed suggest that recreation uses would not fall into the high risk category. However, this should be clarified in the final rule.

#### **D. Recommendations**

In response to the concerns that we have identified, COA recommends the following:

- We recommend that the Forest Service **maintain the 50-hour cost recovery exemption for recreation special use authorizations** as it applies to entities that connect members of the public to NFS lands. Doing so would uphold the equity goals and values of the agency and the administration by ensuring NFS lands are more accessible to broader and more diverse populations. Maintaining the 50-hour exemption will also reduce the financial burden of permitting for a range of organizations which would be heavily impacted by the proposed rule. Finally, maintaining the 50-hour exemption will help maintain consistency between the Forest Service and BLM cost recovery policies.
- We recommend that the final **rule eliminate the charging of cost recovery as a separate occurrence for the screening and processing of proposals**. Charging cost recovery for both proposals and applications is duplicative and costly to both applicants and the Forest Service in both time and resources. Likewise, billing prior to meeting with an applicant disincentivizes information sharing and relationship building, decreases the likelihood for win-win outcomes between the Agency and applicants, and adds an additional barrier to promoting equitable and diverse access to NFS lands.
- Finally, we recommend that the agency **implement requirements for authorized officers to prioritize recreation special use authorizations** and applications on par with non-recreation special use authorizations and applications. This prioritization should occur regardless of whether an exemption to cost recovery is provided because of the unique and inherent benefits that guided outdoor recreation and education services deliver to natural resources, the general public, land management agencies, and local economies.

### III. DETAILED COMMENTS

#### A. CORE PRINCIPLES

##### 1. Guided Outdoor Recreation Provides Many Inherent Benefits

Guided and sponsored recreational activities provide inherent benefits to the Forest Service and to the general public that make them different from non-recreational special uses. These benefits include:

- Guided and sponsored recreational activities help the Forest Service achieve its goal of providing high quality outdoor recreation experiences that connect more people to NFS lands.
- Guided and sponsored recreational activities help the Forest Service make forest visitation more inclusive. This is a stated goal of the agency's Equity Action Plan.<sup>2</sup>
- Recreation permit holders often serve as eyes and ears in the field for the agency, reporting on land and water management issues before understaffed forest units are able to identify those issues themselves. This is a significant benefit to NFS management.
- Guided recreation groups generally adopt user ethics that result in lower impacts than an equivalent number of unguided users. For instance, the seven Leave No Trace principles resulted from a public private partnership in the 1990s between the National Outdoor Leadership School and the Forest Service. These principles have been adopted as a resource management practice worldwide.<sup>3</sup> The economic impact of preventing widespread degradation to natural resources that has resulted from industry-wide adoption of these practices and training should not be understated.

We strongly encourage the Forest Service to study the economic and social benefits that guided and sponsored outdoor recreation provides and take those benefits into account in developing final cost recovery rules. We believe this is essential to ensure that recreation special use authorizations are not disproportionately impacted by cost recovery and that outdoor leaders have reasonable and affordable access to Forest Service lands.

##### 2. The NPRM Mistakenly Assumes That All Service Providers have an Equal Ability to Pay Cost Recovery

The NPRM incorrectly assumes all recreation service providers have an equal ability to pay new cost recovery fees. This is made clear by the NPRM's review of the economic impacts of the proposed rule, which analyzes these impacts from a purely monetary standpoint. In doing so, the NPRM assumes a simple linear relationship between the dollar amount of cost recovery fees and the ability of a permit applicant to pay them. This is an oversimplification of the way that the fees will impact certain types of service providers. Universities, nonprofit organizations, small guiding businesses and recreation events with razor-thin revenue margins all face unique

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<sup>2</sup> See <https://www.fs.usda.gov/sites/default/files/Forest-Service-Equity-Action-Plan.pdf>.

<sup>3</sup> See "Development of the U.S. Leave No Trace Program: An Historical Perspective," Marion and Reid (2001). [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev2\\_038125.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev2_038125.pdf).

financial challenges that would make paying cost recovery under the NPRM difficult if not impossible.

For example, under the proposed rule, university outdoor program staff would be required to convince their academic institutions to pay significantly higher upfront costs in order to determine whether a permit can be obtained for a student trip. In the tight funding environment of higher education, securing the funding necessary to pay these higher upfront costs will be very difficult. Rather than take on this additional burden, university outdoor program staff will likely take their students somewhere other than the national forests. We see this as an undesirable outcome for both universities and the Forest Service.

Similarly, many nonprofit experiential education programs and similarly situated affinity groups charge participants minimal fees to participate in their programs. They do so because they recognize that some participants do not have the ability to pay large participation fees. This strategy enables them to introduce new participants to the National Forests.

By eliminating the 50-hour exemption and charging proposal processing fees, the proposed rule would significantly increase the amount these programs are required to pay to the Forest Service. Unfortunately, nonprofit programs cannot pass these costs on to their participants because their participants do not have the ability to pay them. This will force many of these programs to go elsewhere.

The challenge is not limited to universities and small nonprofit organizations. Large nonprofit organizations and independent guides operate under business models with very small revenue margins. Increasing proposal, application, and monitoring costs will impose a much more significant burden on these entities than it would on an industrial applicant with larger margins and significant financial resources. As noted above, these additional costs will trickle down to members of the recreating public seeking to hire a guide or outfitter. These additional costs will price some participants out of the market, further exacerbating the disparity between underserved communities and those that can afford a more expensive guided or sponsored recreation experience.

## **B. COMMENTS ON THE CHANGES TO COST RECOVERY**

### **1. The Proposed Rule will Significantly Impact a Range of Organizations and Businesses That Facilitate Outdoor Recreation and Education**

The economic impacts of the proposed rule on small businesses, organizations, non-profits, recreation event sponsors and other entities that COA represents will be significant. As an industry, our organizations function on low margins in pursuit of connecting people to the environment and their public lands. This becomes much more difficult under the proposed rule because it will significantly raise costs for our organizations.

We surveyed COA members to get a better sense of how the proposed rule will impact their programs and activities on the ground. We received fifteen responses, and overwhelmingly found that COA members' outdoor programming would be negatively impacted by the proposed rule.

In total, twelve of fifteen respondents stated that increased fees would increase barriers for participants, particularly low-income participants, thereby limiting access to these outdoor programs. In some cases, the increased fees may completely prevent a program from operating on NFS lands. Below we share some additional details and concerns raised by several of the survey respondents.

Interestingly, the NPRM acknowledges that this rulemaking will disproportionately impact recreation special use authorizations:

Recreation and industry are the only use series in which the number or percentage of businesses as well as potential economic impacts are relatively high compared to those in other use series... The proposed rule could affect a substantial number of small businesses with a recreation special use authorization (6,473) concentrated in local areas influenced by NFS lands, particularly in the case of small businesses conducting outfitting and guiding.<sup>24</sup>

We urge the Forest Service to work to ensure that recreation special use authorizations will not be disproportionately impacted by the NPRM. This can be done by maintaining the 50-hour cost recovery exemption for recreation special use authorizations and implementing requirements for authorized officers to prioritize recreation special use authorizations and applications on par with non-recreation special use authorizations and applications.

Ensuring that recreation special use authorizations are not disproportionately impacted by cost recovery is particularly important given the numerous benefits that facilitators of outdoor recreation provide to the public, natural resources, and land management agencies. Ensuring that these organizations continue to have equitable access to Forest Service lands is essential.

Below, we describe—with examples—the impact that this NPRM will have on the different types of organizations we represent. We ask the Forest Service to consider the following impacts before adopting the final rule:

a. Small nonprofit outdoor programs

As explained above, some nonprofit experiential education programs and similar affinity groups that seek permits to operate on National Forest System lands charge participants minimal fees to participate in their programs. Some programs waive their fees altogether. These programs provide free or discounted access because they know that some participants do not have the ability to pay participation fees. They do this in order to introduce new participants to the outdoor learning environment and to America's public lands. For these organizations, the changes to cost recovery fees in the proposed rule will be very significant. Charging for proposal processing and eliminating the 50-hour exemption will dramatically increase the amount these potential permittees are required to pay to access NFS lands.

Because many of their participants have limited ability to pay participation fees, these programs do not have the same ability to pass on additional costs to end users. They will be left with only

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<sup>4</sup> 88 Fed. Reg. 14523.



two options: 1) reduce the amount of programming they provide and divert some of their resources to paying cost recovery fees; or 2) if available, use other public lands that do not charge as much for permits. Neither of these is a very appealing option.

In response to our survey of COA member organizations, a camping director at a regional YMCA reported that a rise in cost recovery fees would create barriers for their low-income participants. This YMCA provides “significant financial assistance” to many families so that they can access premium programs, which include backcountry backpacking and rock climbing. The increased fees would force the organization to reassess the financial sustainability of their special use permits and “could dramatically affect how we take youth into the outdoors.”

It is important to emphasize that these small nonprofit outdoor programs often exist for the specific purpose of providing historically excluded and underserved people with opportunities to visit and learn on public lands. By forcing them to reduce programming or go elsewhere, the proposed rule will undermine the Forest Service’s efforts to diversify visitation to the National Forests and make that visitation more inclusive.

b. College and university recreation programs

There are over 400 outdoor recreation programs at colleges and universities across the U.S., serving tens of thousands of students.<sup>5</sup> Even more students interact with NFS lands through academic field work opportunities. National Forest System lands provide critical recreational infrastructure for many of the wilderness activities these students enjoy, such as whitewater boating, camping and hiking, mountaineering, caving, rock climbing and more.

Charging for proposal processing will make it much more difficult for many college and university outdoor recreation programs to use NFS lands. Universities are unlikely to provide upfront funding for recreation program staff to pay to have a meeting with Forest Service personnel to discuss whether permit opportunities might be available. Likewise, universities are unlikely to be willing to pay in advance for the costs of screening with no way of knowing whether a permit will be issued. In the tight funding environment of higher education, expecting universities to do so is unrealistic. Even if upfront funding could be obtained, university recreation programs do not generate significant revenue from the student activities they provide on NFS lands. Imposing dramatically increased cost recovery fees will often lead university programs to take their students elsewhere.

Take the example of a university outdoor program that charges ten students \$50 each to participate in a backpacking trip. Under Forest Service rules, the university outdoor program would be required to obtain a permit. If the university is charged 3% of its gross revenue of \$500 for its permit, its calculated permit fee would be \$15, although it would more likely be asked to pay a minimum use fee of \$130. However, under the NPRM, if the university was newly operating in an area, then the cost recovery bill would be at least another \$255, which would more than double the amount of the fees the university would pay to access NFS lands. The

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<sup>5</sup> Marchand, G., Rabinowitz, E., Schwartz, F. & Szolosi, A. (2022). Demographic and Compensation Trends of Collegiate Outdoor Program Professional Staff. Cal Poly Humboldt. <https://scholarworks.calstate.edu/concern/publications/s7526k709>.

university would be forced to significantly increase fees charged to student participants, which will likely price many students out of the market and force the university to cancel the program.

In response to our survey, an outdoor program coordinator at a public university expressed concern about the equity of the increasing cost recovery fees on recreation permitting. The coordinator highlighted that their school subsidizes outdoor programs so that students – many from low-income families – are able to participate at an affordable price. The coordinator stated that these increased fees carry over to participants. They reported that “if prices go up on the front end for us, they end up going up on students as well.” This raises concerns about equitable access to the outdoors for lower income individuals and families.

An outdoor program director at a different public university expressed concern that the increased permit fees, coupled with the financial resources required for professional staff to put together permit renewal information, would pose such a significant financial barrier that they may be unable to continue operating their programs on USFS lands. A third public university outdoor program that operates primarily on USFS lands reported that its program could face elimination as a result of the proposed rule’s increased fees. This program was almost eliminated by the university due to the high cost of operating an outdoor program. Although the program survived, its budget was severely cut and it now has no room for the additional costs that the proposed rule would impose. The fee increases in the NPRM “could be the final straw to end our trips program and perhaps the entire outdoor program.” With many university outdoor recreation programs facing increasing costs and decreasing enrollment, this story is probably not unique.

#### c. Small Outfitters

If adopted, this proposed rule will significantly impact small outfitters. The business of outfitting and guiding has very thin margins. Market rates for program participation have not kept up with field staff wages and other direct program expenses. It is common for the direct expenses of a guided program (which includes guide wages, permit fees, payroll tax, worker’s compensation, lodging and transportation) to exceed 70 percent of a program’s gross revenue. The remaining 30-percent is spent on indirect expenses such as administrative staff, liability insurance, rent, utilities, equipment, and other common business expenditures.

A good example is the American Alpine Institute, a signatory to this letter. Over the last several years, the Institute’s net profit margin has often been in the 2-percent to 5-percent range. The average for most healthy businesses is 10-percent. This low net profit margin is not uncommon for mountain-oriented guide services. Direct expenses such as permit fees and indirect expenses such as liability insurance create a circumstance where it is hard for an outfitter/guide company to operate sustainably, even if they increase their income with more programs. Increasing the amount small outfitters would be required to pay in cost recovery will have significant financial and social impacts on businesses that already have a difficult time keeping their doors open. If forced to raise prices for guided programs due to these increases in cost recovery, these programs will become less and less accessible to the public.

d. Larger Outfitters

Even the more established outdoor leadership organizations will see significant fee increases under the proposed rule. These larger organizations, which are still small businesses under the Regulatory Flexibility Act, face challenges that may be unique amongst the potential outcomes of the proposed rule.

For example, larger or more established entities are more likely to hold several long standing permits that may have expired or been the subject of deferred action by the Forest Service. As the Forest Service works to reduce this backlog, it is possible that larger outfitters and guides will be subject to cost recovery fees for several permits concurrently. Further, we anticipate that the cost of processing and renewing these permits will be relatively high, due to the complexity and volume of permits that some larger or more well established permittees maintain. This would result in a dramatic increase in fees and would also significantly increase the staff time needed to work with the Forest Service to update outstanding permits.

The Regulatory Flexibility Analysis also highlights another concern for larger organizations. The National Outdoor Leadership School (NOLS) is one of the largest and most established non-profits engaged in outdoor education and recreation. If NOLS falls into the 90th percentile of fees, then it will pay approximately 4%-9% of actual gross receipts to the Forest Service each year. This is significantly higher than what other land management agencies charge on average. Under this scenario, the NPRM would increase the land use fees that NOLS pays *across all land management agencies and jurisdictions* from a current rate of 3.3% to 3.9%-6.7% of actual gross receipts every year.

If NOLS were to experience an increase in fees at the upper end of what outfitters and guides are expected to be charged on average (2.1%), then they would pay 5.1% of actual gross revenue to the Forest Service. Under this scenario, the proposed rule would increase the land use fees that NOLS pays for access to our wilderness classrooms *across all land management agencies and jurisdictions* from 3.3%, to 4.5% of actual gross receipts. Either scenario increases the financial burden significantly above their current contributions *across all land management agencies and jurisdictions*. As a tuition-dependent nonprofit organization, any increase in fees will subsequently result in less dollars being available to support NOLS' programming, staff development and retention, or other expenses necessary for our school to function. It could also lead to higher tuition or dollars currently dedicated to scholarships and access being diverted to cover land use fees.

e. Independent guides

Independent guides typically operate as a sole proprietor "business of one" when providing guiding services on public lands. The outings led by an independent guide most commonly serve a single individual or a very small group. Independent guides are, without exception, small businesses under the Regulatory Flexibility Act.

Independent guides provide a high degree of specialized education and service for the public because they execute all aspects of a guided trip. The independent guide speaks with potential

clients before a trip to gauge their ability and goals, develops an outing that will meet those goals, and then guides the trip in the field. These types of guided experiences are particularly well suited to small groups that are seeking to learn highly specialized skills, visit a unique or remote area, or partake in an activity that can only be conducted in a very small group such as technical alpine climbing, fly fishing on small creeks, and other specific activities that often depend on individualized attention from an expert outfitter.

Because independent guides serve a relatively small number of individuals, their revenue generating capacity is limited. Under the present Forest Service fee structure (50-hour cost recovery exemption, annual fee of 3% of gross revenue), an independent guide pays a fee that is commensurate with the revenue they generate. This parity allows them to operate their unique business model. The proposals in the NPRM to eliminate the 50-hour fee exemption, charge a fee for proposal review, and charge a fee to add new areas to a permit (or make other operational amendments) would have a serious detrimental impact on the financial viability of independent guide businesses.

For example, the NPRM states, “Potential economic impacts could be high for small subsets of small businesses, ranging up to 6% of annual gross receipts for 63 businesses with outfitting and guiding permits.”<sup>6</sup> Independent guides are most certainly among the “small subset of small businesses” that will experience high economic impacts. Many independent guides will be unable to pay a 6% cost recovery fee on top of a 3% annual permit fee. The change in total fees from 3% of gross revenue to 9% of gross revenue will simply be untenable. Raising prices may not be a viable solution, as independent guides serve a small number of people and losing even a few clients due to increased prices can offset the gains from the price increase.

When accounting for these concerns, it is evident the fee increases proposed in the NPRM will disproportionately impact independent guides and other small outfitting and guiding businesses who have the least ability to absorb the fee increases. As a result, there will be fewer independent guiding operations and by extension fewer offerings for the guided public to experience specialized activities under the leadership of an expert guide.

#### f. Recreation Events

The Forest Service’s cost recovery proposal for recreational special use permits will also significantly impact recreation events such as mountain biking and trail running races. These impacts will have far reaching implications for the businesses and nonprofit organizations that sponsor these events and for event participants. The new rules could significantly reduce the number of recreation events held on Forest Service lands, and would likely reduce the number of people who can afford to participate in them. These implications raise important equity concerns that should be considered by the Forest Service before it adopts the proposed rule.

To put the impacts of the proposed rule in context, most special recreation event organizers currently pay the Forest Service 3-5% of their gross receipts for their permit. However, they generally do not pay cost recovery fees because they rarely exceed the current 50-hour exemption. By eliminating the 50-hour exemption, charging for initial consultations, permit

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<sup>6</sup> 88 Fed. Reg. 14524.

application processing and renewals, and monitoring, the financial impact on these events could be substantial. Many race companies have a series of races on Forest Service lands and all of these fees will add up. This will greatly increase event costs and cause these companies to pass their rising costs onto their clientele via higher race entry fees.

For example, a trail race with approximately 100 registrations may generate gross receipts of around \$8,500, depending on the entry fee level. If the event sponsor holds a multi-year permit, they would typically pay 5% of gross receipts in permit fees. If they hold multiple events on the same ranger district, the permit fee is generally decreased to 3%. Under this multiple event scenario, the calculated permit fees for this race permit would currently be around \$255.

If the proposed rule is adopted, the event sponsor's cost recovery fees would begin to accumulate immediately with initial discussions about obtaining a permit or renewing an existing permit. This would very quickly double or more than double the total fees the event sponsor pays to host the event. These costs will inevitably be passed on to the event participants through increased registration fees. These increased registration fees will lead to races being accessible only to financially privileged racers, forcing out those with less means. This pricing out of race participants is an example of how the proposed rule conflicts with the goals set forth in the Forest Service's Equity Action Plan and the American the Beautiful initiative, which we discuss in the next section.

For races that attract a smaller number of entrants, the increased pass-through costs will be much more impactful. They will incentivize race organizers to close down small races and consolidate their offerings into races with a high number of entrants. This could increase the natural resource impacts of these events. In addition, there are a noteworthy number of small once-a-year "hobby" races sponsored by nonprofit organizations. These events work on very thin margins, sometimes barely breaking even or even losing money. Increasing the cost of a recreation event permit for these small financially under-resourced entities may well cause these events to simply go out of business.

Finally, we note again that many uncertainties remain about how the proposed rule would work in practice and its implications for the recreation event community. The NPRM contained no real information about how much time the screening phase for a recreation event permit typically takes or how many hours are required to process an event application, administer the application, and monitor the event.

In particular, the recreation event community's experience with monitoring is widely variable. At some events, Forest Service staff attend and remain all day. At others, the Forest Service has little or no on-the-ground presence. From this, it seems apparent that considerable discretion is left to each Forest Service permitting official. There may be legitimate reasons for this, but the agency should recognize that this discretion leaves recreation event permit holders with significant uncertainty regarding cost recovery for their event. They will have no way of predicting which cost recovery category they will fall into or how much their cost recovery fees will increase under the proposed rule.

## 2. The NPRM Conflicts with the Administration’s Stated Policies Supporting Equity In Outdoor Access

COA is deeply concerned about the potential impacts that the NPRM could have on equitable and inclusive participation in outdoor activities on NFS lands. Increasing costs will create additional financial barriers to accessing NFS lands that will disproportionately affect smaller, newer, and otherwise disadvantaged organizations and businesses. In this respect, the proposed rule will undermine the Forest Service’s own equitable access goals and similar goals articulated by the Biden Administration.

In July 2022, the Forest Service published its Equity Action Plan.<sup>7</sup> One of the key elements of the Plan is to “Promote Access to Recreation and Outdoor Experiences within Underserved Communities.” The intended outcome of this equity action is to reduce barriers to access and ensure all people—regardless of race, color, national origin, or income—experience equal access to and equitable benefits from agency programs and services. The Equity Action Plan specifically acknowledges that

[b]arriers to obtaining recreation special use permits (e.g., outfitting and guiding, campground concession, and recreation event permits) are one challenge that can limit valuable economic stimulus in communities of color and socially vulnerable communities.

Moreover,

[w]hen these groups and individuals become aware of permit availability, navigating the application process requires knowledge that socially vulnerable communities have difficulty accessing, putting them at a further disadvantage.<sup>8</sup>

The Plan sets forth various “actions” to address this problem. These actions include promoting social science research on how the Forest Service might increase access to recreation special use permits and outdoor experiences within communities of color and socially vulnerable communities.

Similarly, in January 2021, the Biden Administration issued Executive Order 14008,<sup>9</sup> which led to the launch of the America the Beautiful Initiative.<sup>10</sup> This initiative seeks to “increase[] access to the outdoors and nature-based recreation in historically underrepresented communities while creating jobs that support restoration and resilience.”

The proposed changes to the cost recovery rules would undermine both the Equity Action Plan and efforts to achieve the goals of the America the Beautiful Initiative. As explained above, the increased fees imposed by the proposed rule will impose significant burdens on emerging

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<sup>7</sup> See <https://www.fs.usda.gov/sites/default/files/Forest-Service-Equity-Action-Plan.pdf>.

<sup>8</sup> Id. at 40.

<sup>9</sup> See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>

<sup>10</sup> See <https://www.doi.gov/priorities/america-the-beautiful>.

organizations that provide services to underserved and excluded communities. These organizations may need additional agency assistance in navigating the complexities of the permitting process. This will increase the organization's cost recovery bill.

Furthermore, because these increased costs are very likely to be passed through to members of the public that seek the services provided by these organizations, underserved communities with fewer financial resources are likely to be particularly burdened by the increased costs associated with the proposed rule. This will make it more difficult for the Forest Service and the Biden Administration to achieve the goals set forth in the Equity Action Plan and the America the Beautiful Initiative. Instead of imposing higher fees, the Forest Service should seek ways to reduce barriers for organizations that connect individuals from historically excluded communities to NFS lands.

3. The Forest Service Has Not Adequately Demonstrated How the Proposed Rule Will Improve Customer Service

As stated in the introduction, the NPRM is built on a contradictory assumption. The NPRM claims that the agency will be able to provide better access to National Forest System lands by charging outdoor leaders more money for that access. It makes this claim despite the fact that, as we have demonstrated above, these additional costs will impose a significant burden on recreation permit applicants and permittees, a burden that will lead some applicants to take their programs elsewhere.

Given the significant cost burdens imposed by the proposed rule, we think it is vital for the Forest Service to clearly demonstrate its benefits. To do that, it needs to clearly explain how the proposed rule will improve customer service and increase access. The NPRM fails to provide such an explanation. The NPRM states that “increases in annual cost recovery fees under the proposed rule are projected to be \$2.7 million to \$4.7 million” due to “the large number of authorizations that would be subject to the proposed rule” and “relatively large increases in minor cost recovery category fee rates of 100% to 170%, depending on the cost recovery fee category.”<sup>11</sup> The NPRM goes on to state that

the proposed rule would establish regulatory conditions for charging cost recovery fees and generating funds necessary to modernize the special uses program. A modernized program would enhance the Agency's ability to provide opportunities [sic] more expeditious and equitable opportunities for meeting public demand for goods and services from special use authorizations by:

- Improving customer service and facilitating rural prosperity and economic development (USDA's strategic goals for FY 2018 through FY 2022);
- Enabling the Agency to respond more quickly to requests for new uses;
- Reducing the backlog of expired special use authorizations; and
- Avoiding deferring action on commercial recreation special use applications and authorizations requiring 50 hours or less to process or monitor due to limited availability of appropriated funds and increasing demand for recreational

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<sup>11</sup> 88 Fed. Reg. 14521.

services.<sup>12</sup>

What is not provided is any sort of explanation of how “\$2.7 million to \$4.7 million” in new revenue from these “relatively large increases in minor cost recovery rates” imposed upon “the large number of authorizations that would be subject to the proposed rule” would be actually be used by the Forest Service to improve customer service. There is no explanation of how the system will be modernized, nor is there any indication of whether additional staff will be devoted to processing permit applications. Without that explanation, we are concerned that the promised improvements in customer service will not manifest themselves. This is a legitimate and ongoing concern because the Forest Service has many competing priorities. An observer need only review a short history of the so-called “fire borrow” to know the Forest Service has sometimes been forced to divert funds away from their original purpose.

We are particularly concerned about the absence of any explanation of how the additional funds collected will ensure that authorized Forest Service officers will prioritize recreation special use authorizations and applications on par with non-recreational special use authorizations. The agency’s past failure to provide recreation special use permit applications with equal treatment may be the most troubling disclosure in the NPRM. Because of this failure to provide equal treatment, we think it was particularly important for the agency to describe the safeguards that will be implemented to ensure that this neglect does not continue. The NPRM does not describe those safeguards. In the absence of such a description, we are concerned that the agency does not have a realistic plan for addressing this problem.

Finally, the NPRM states that eliminating the 50-hour exemption for recreation permit applications would subject these applications to the customer service standard in 36 CFR 251.58(c)(7), thereby improving customer service.<sup>13</sup> However, the customer service standard in section 251.58(c)(7) is, on its face, insufficient to guarantee better service because it imposes only limited requirements upon the agency. Section 251.58(c)(7) states that the Forest Service shall “endeavor” to make decisions on minor permit applications within 60 calendar days of receiving the processing fee. The use of the word “endeavor” makes this an aspiration rather than a mandate. If a decision within 60 days is not possible, section 251.58(c)(7) requires the Forest Service to do nothing more than notify the applicant in writing and provide a projected date for completion. That date can be any time. Similarly, for major applications, section 251.58(c)(7) requires 60-day notice of the steps that will be required to process the application. Section 251.58(c)(7) does not require the agency to process an application within a specified time limit, nor does it require an authorized officer to prioritize recreation permit applications on par with non-recreational special use applications.

Because of the absence of a clear explanation of how the additional revenue generated by the proposed rule will be used to improve customer service, we remain unconvinced that the benefits of the proposed rule will outweigh the costs. We urge the Forest Service to explore other ways to ensure that authorized officers prioritize recreation special use authorizations at the same level as non-recreational special use authorizations regardless of whether the 50-hour cost recovery exemption is maintained.

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<sup>12</sup> 88 Fed. Reg 14521-22.

<sup>13</sup> 88 Fed. Reg. 14520.



4. The Proposed Rule Fails to Increase Consistency Between the Forest Service and BLM on Cost Recovery

The NPRM states that one purpose of the proposed rule is to align Forest Service policy regarding cost recovery for pre-application proposals with the policy of the Bureau of Land Management.<sup>14</sup> To do so, the NPRM states that “the Forest Service is proposing to expand the scope of processing fees under its existing cost recovery regulations to include costs for a special use proposal that are incurred before a special use application is submitted, including but not limited to costs incurred in meeting with the proponent (36 CFR 251.54(a)) and screening the proponent’s proposal (36 CFR 251.54(e)(1) and (e)(5)).”

As we explain above, charging for pre-application processing will impose a significant burden on recreation permit applicants and will drive some applicants off NFS lands. In addition, despite its stated goal of achieving consistency between the agencies, adoption of the proposed rule would actually create further inconsistency and confusion between the Forest Service and the BLM on cost recovery. This misalignment can be seen in two key ways.

First, 43 CFR 2932.31(e)(1) of the BLM’s existing regulations exempts special recreation commercial use permits from cost recovery if they take less than 50 hours of staff time per year to process.<sup>15</sup> In this very significant respect, the NPRM is out of alignment with BLM policy in proposing to charge for the first 50 hours of processing time.

Second, if the proposed rule is adopted, Forest Service and BLM would also be out of sync in determining when cost recovery would be applied and when cost recovery charges would be incurred. Under existing 43 CFR 2932.31(e)(1), the BLM applies the 50-hour exemption to staff time needed to process a permit “in any one year.” Thus, BLM assesses cost recovery fees on an annual basis. In contrast, the Forest Service NPRM would charge proponents once for the screening and processing of a proposal, and once for submitting and processing an application, regardless of hours worked. This could result in charging a proponent twice in one year.

Many organizations that provide outdoor recreation services hold permits from multiple land management agencies. While it is reasonable to expect some differences between the policies of the agencies, we are concerned that a significant variance in policy regarding fees for the first 50 hours of processing time could lead to widespread confusion. Differences in the time scale for which cost recovery would be charged could have the same effect.

If one goal of this rulemaking is to increase consistency with the BLM, then the Forest Service should preserve the 50-hour exemption and apply it to processing costs incurred in any one year. Doing otherwise will increase inconsistency between the Forest Service and BLM.

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<sup>14</sup> 88 Fed. Reg. 14519.

<sup>15</sup> 43 CFR 2932.31(e)(1).

## C. COMMENTS ON HIGH RISK ACTIVITIES

The NPRM proposes revisions to the liability provisions in the Forest Service’s special use regulations to raise the strict liability limit in tort for “high-risk” special uses, “such as powerline facilities, oil and gas pipelines, and dams with a high hazard assessment classification.” COA interprets this aspect of the NPRM to be saying that the “high hazard assessment classification” does not apply to recreation special uses. However, the NPRM is unclear on this point. We request that the Forest Service make this point explicitly when publishing a final rule.

## IV. CONCLUSION

The Coalition for Outdoor Access appreciates the opportunity to comment on the Forest Service's Notice of Proposed Rulemaking. We urge the agency to reconsider this proposed rule and maintain the 50-hour cost recovery exemption for recreation special use authorizations, eliminate the charging of cost recovery as a separate occurrence for the screening and processing of proposals, and ask that any final rule implement requirements for authorized officers to prioritize recreation special use authorizations and applications on par with non-recreation special use authorizations and applications. Doing so will allow COA organizations to continue providing the unique and inherent benefits of facilitated outdoor recreation and education services that we provide to natural resources, the general public, land management agencies, and local economies.

Sincerely,

The Coalition for Outdoor Access Steering Committee:

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