

OUTFITTER POLICY ACT OF 2001

OCTOBER 15, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HANSEN, from the Committee on Resources,
submitted the following

R E P O R T

[To accompany H.R. 2386]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 2386) to establish terms and conditions for use of certain Federal lands by outfitters and to facilitate public opportunities for the recreational use and enjoyment of such lands, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 2386 is to establish terms and conditions for use of certain Federal lands by outfitters and to facilitate public opportunities for the recreational use and enjoyment of such lands.

BACKGROUND AND NEED FOR LEGISLATION

Outfitters and guides provide opportunities for outdoor recreation for many families and groups who would otherwise find the backcountry inaccessible. The primary purpose of the Outfitter Policy Act is to ensure accessibility to Federal lands by all segments of the population and to ensure quality recreation services for the public.

Outfitters must comply with inconsistent policies across the federal land management agencies. Present inconsistent rules and policies often hinder outfitters from providing quality services, and these inconsistent rules inadequately provide for evaluation of guide/outfitter operations to assure quality services to the public. Congress has established standards for administering guides/outfitter permits on National Park Service lands. H.R. 2386 sets simi-

lar standards for the Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and Bureau of Reclamation.

This bill sets out the criteria for the grant of an outfitter permit. Criteria for grant of an outfitter permit include skill, experience, knowledge of the resource area, and financial capability. Safety, quality recreational experiences, educational opportunities, and conservation of resources are also considered.

The Secretary may grant an outfitter permit if the outfitted activity is not inconsistent or incompatible with land and resource management plans for the area and meets the criteria established by this Act. The grant of an outfitter permit will be determined competitively if the authorization is a new opportunity, or if the permittee fails to adhere to the terms and conditions of the permit.

The bill requires that an outfitter permit provide for the health and welfare of the public; conservation of resource values; a return to the United States through an authorization fee; the obligation of an authorized outfitter to defend and indemnify the United States; and an appropriate allocation of an amount of use (such use being subject to adjustment to reflect the changes in land and resource management plans); and other terms and conditions. This Act authorizes a term of 10 years unless foreseeable changes in land and resource management plans or conditions necessitate a term of less than 10 years, or unless the outfitter seeks or agrees to a permit term of less than 10 years. Permit terms and conditions may be adjusted by the granting agency during the term of the permit. A new authorized outfitter will be given a probationary status during the first two years of a permit. These permits do not create any property rights.

The bill has been carefully drafted not to prescribe specific allocations or use levels for outfitters and guides. Decisions about appropriate levels of outfitted or guided use in a given unit or area remain within the purview of the agencies, using other statutory and regulatory principles. This bill does not alter or change those principles. Instead, it is directed at the matter of outfitter permit administration after the agency has decided that outfitted use is appropriate.

To determine the authorization fee, the Secretary will consider the obligations of the outfitter, a fee amount that makes it possible to engage in a successful business venture, and the fair value of the use granted by the outfitter authorization.

The fee may be modified to reflect changes to the terms and conditions of the outfitter permit; to account for extraordinary unanticipated changes affecting operating conditions (e.g., natural disasters or economic conditions); to reflect changes resulting from actions of other government entities (e.g., availability of State fish and game licenses); to deal with the imposition of fees assessed under other laws; or adjustments to an allocation of outfitter use.

This bill makes the outfitter liable to the United States for all injury, loss, damage, and costs incurred by the United States arising from an outfitter's negligence, gross negligence, or willful and wanton disregard for persons or property associated with the outfitter's conduct of an outfitted activity under an outfitter authorization. An outfitter shall defend and indemnify the United States similarly for all injury, loss, damage, and costs the United States may incur as a result of judgments, claims, or losses arising from

the outfitter's negligence, gross negligence, or willful and wanton disregard for persons or property associated with the outfitter's conduct of an outfitted activity under an outfitter authorization, except when the United States is solely responsible for such events. The liability and indemnification provisions in the bill do not limit any liability or indemnification obligation an authorized outfitter may have for environmental contamination, injury to natural resources, or any other cause of action that arises under other law.

The act requires the Secretary to develop a process for annual evaluation of the performance of an authorized outfitter which defines three levels of performance: good, marginal, and unsatisfactory. An evaluation shall account for factors beyond the control of the outfitter and ensure that the effect of any performance deficiency reflected by the performance rating is proportionate to the severity of the deficiency. An outfitter shall receive written notice of any conduct or condition that, if not corrected, might lead to a marginal or unsatisfactory performance rating. Failure to correct any marginal or unsatisfactory conduct or condition will result in an unsatisfactory rating for that year.

This bill also provides for a performance-based renewal. If an outfitter has more than one annual unsatisfactory rating, the outfitter cannot qualify for earned renewal. An outfitter permit may be suspended or revoked if the outfitter has failed to correct a condition considered by the Secretary to be significant, if the outfitter's permit fees are overdue, or if the outfitter has demonstrated willful disregard for the health and welfare of the public or the conservation of resources.

Outfitter permits can be transferred only with the approval of the Secretary, and the Secretary will approve the transfer unless she determines that the transferee is not a qualified outfitter. The bill retains the current administrative appeals process at each agency and it confirms the right of an outfitter affected by a final decision to commence a civil action in United States district court.

Outfitters operating under current permits will be granted a new permit under this bill if the outfitter's aggregate performance has been good or the equivalent of good, satisfactory, or acceptable under the current rating system.

COMMITTEE ACTION

H.R. 2386 was introduced on June 28, 2001, by Congressman James V. Hansen (R-UT). The bill was referred to the Committee on Resources and in addition to the Committee on Agriculture. Within the Committee on Resources, H.R. 2386 was referred to the Subcommittees on National Parks, Recreation and Public Lands; Forests and Forest Health; and Fisheries Conservation, Wildlife and Oceans. On July 25, 2002, the Subcommittees held a joint hearing on the bill. On September 12, 2002, the Full Resources Committee met to consider the bill and the Subcommittees were discharged from further consideration of H.R. 2386. The bill was then ordered favorably reported to the House of Representatives by voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This Act may be cited as the “Outfitter Policy Act.”

Section 2. Findings

The Committee finds that many members of the public need or desire commercial outfitted activities on Federal land to facilitate the public use and enjoyment of Federal lands. The Committee recognizes that authorized outfitters need a stable regulatory climate in order to operate successfully, that the United State should receive a return through fees, and that a performance-based permit renewal system is a strong incentive to provide quality services to the public.

The Committee does not intend that paragraph (3)(A)(ii) of section 2 require federal agencies to ensure that an outfitter granted a permit under this bill will have a successful business. Instead, the Committee intends to strongly encourage the agencies to be supportive of outfitting and guiding, as outfitters further agency missions of public service, and to be cognizant of agency actions that may create unintended burdens that would unduly affect an outfitter’s ability to provide quality services to the public. The Committee also wants to assure that authorized outfitters operate reasonably and in accordance with permit terms and conditions. The Committee encourages sound business planning by outfitters and guides.

Section 3. Purposes

This section establishes the terms and conditions for outfitting. It establishes a stable regulatory climate for outfitters, and it facilitates recreational opportunities on Federal lands for the outfitted public.

Section 4. Definitions

This section defines the terms used in this bill. One term defined in this bill is “commercial outfitted activity.” Many non-profit entities conduct educational programs on Federal lands. These programs are very similar to those conducted by for-profit entities and in most circumstances are competing for the same resources and customers. It is the intent of this Act to place these non-profit, but clearly commercial, entities under the authority of this Act.

Programs or activities directly related to academic activities, courses, or programs provided or offered by accredited educational institutions are intended to be exempt from the requirements for a section 6 permit. In cases, however, where educational entities are offering de facto commercial services not tied directly to courses for academic credit, a section 6 permit will be necessary. The Committee intends to accommodate genuine academic programs, but expects that when educational institutions effectively go into the outfitter business by offering quasi-commercial eco-tourism services, such institutions will be subject to the same requirements the bill imposes on commercial outfitted activities.

Section 5. Nonoutfitter use and enjoyment

This Act is not intended to enlarge or diminish the rights or privileges of non-outfitted individuals or user groups to use or occupy Federal lands.

Section 6. Outfitter authorizations

This section sets out the requirements for the grant of outfitter permits. One of the selection criterion for grant of a permit is the financial capability the permit applicant. The purpose of this criterion is to assure that prospective permittees have the financial resources and capabilities to provide quality services to the public. The Committee wants to encourage good business planning by permittees as a means of facilitating good services to the public. This criterion is not to be used by the agencies to encourage fee bidding or to stand for the proposition that financial capability means the ability to pay substantial fees to the federal government.

The Committee expects that permit terms and conditions, as well as permit administration procedures, will not be unduly burdensome or onerous to such a degree that these primarily small businesses cannot succeed. The Committee wants to ensure that the agencies do not erect barriers that make it effectively impossible to engage in a successful business venture. There is no intention, however, to guarantee profits or to ensure success by permittees.

The reference to "approved resource management plans" in section 6(d)(1)(A) is intended to encompass land resource plans, area resource plans, forest land and resource management plans, wilderness plans, wild and scenic river plans, and comprehensive conservation plans, among others. All these plans apply to a specific geographic area, make programmatic decisions, and are developed using agency National Environmental Policy Act procedures.

In addition to these broad scale plans, agencies routinely prepare more specific or subsidiary plans, including public use management plans, wilderness plans, and transportation plans. These types of specific plans that are adopted pursuant to public processes are to be encompassed within the reference to an approved land and resource management plan.

The fact that land and resource management plans are pending should not automatically preclude issuance of permits for ten-year terms. In fact, permit administrators should generally issue permits for ten-year terms to reduce administrative overhead and to provide improved financial planning for permittees. Since the permits are subject to adjustment to make them consistent with agency land and resource management plans, the ten-year term should not preclude adjustments necessary to match land and resource management plans. If, however, a land and resource management plan is within a year of being approved and changes in the permit or amount of outfitted use are anticipated, a shorter term might be justified.

Issuance of authorizations for a term of less than ten years should be limited. Such cases should be foreseeable and clearly warrant a reduced term. For example, a land and resource management plan has set a date to close an area to public access. If that date is less than ten years in the future, the term of outfitter authorizations for that area may be limited to that date, unless other locations are available for outfitting and guiding.

Section 7. Authorization fees

In determining the amount of an authorization fee, the Secretary should consider the obligations of the outfitter under the permit, the provision of a reasonable opportunity to engage in a successful business venture, and the fair value of the use and occupancy granted by the outfitter authorization.

When determining the fee, the Committee does not intend for the agencies to layer fees on an outfitter and its customers when agencies have the authority to charge a fee at multiple locations or for multiple activities. The Committee does not want the agencies to charge outfitters twice for the same service or facility, for example, by charging the outfitter's customers a facility use fee and counting that fee as revenue collected by the outfitter for purposes of calculation of the outfitter's permit fee. However, the Committee intends the agencies to charge outfitters for their use and occupancy of Federal lands, as well as for their customers' use of facilities that are made available to the public for a fee under other authorities. When determining fees pursuant to subsection (a)(2) of this section, agencies should take into consideration costs to the government in providing such facilities for outfitter use.

The reasonable schedule required in section 6(c)(2)(C) may consist of a payment prior to issuance of an outfitter authorization or commencement of annual operations and at a minimum should consider business cash flow, seasonality of the use, and cost to the federal government to process bills.

Section 8. Liability and indemnification

This section establishes the principles governing liability and indemnification. It also provides for the outfitted public to acknowledge the risks associated with outfitted activities, and, subject to certain conditions, to waive negligence claims arising out of outfitted activities.

Section 9. Allocation of use

Terms and conditions of an outfitter permit shall provide for a principal allocation of outfitter use. Upon renewal, transfer, or extension of an outfitter permit, the same principal allocation of use shall be included unless an adjustment is required in accordance with this bill.

The bill does not lock in existing use allocations to outfitters. The bill specifically authorizes the agencies to make changes in allocation levels, and to amend allocations during the term of a permit, when necessary to comply with changes in material facts and conditions or changes in land and resource management plans. Extended periods of underutilization of allocated use, when compared to similar utilization rates of other permittees providing the same or similar service in the area, without extenuating circumstances such as drought, fire, economic recession, and acts of God, may, for example, qualify as a material fact. This ability to amend use allocations applies to permits after renewal or following an approved transfer. Since the provision of quality services and investments needed for those services require some understanding of the capacity available to the permittee, where allocations are provided they should be as stable as possible, notwithstanding the authority to

make changes in allocations cited above. This provision is not a justification to change allocations for superfluous reasons.

Section 10. Evaluation of performance

The Secretary shall develop a process for annual evaluation of performance of an authorized outfitter which defines three levels of performance: good, marginal, and unsatisfactory. An evaluation shall appropriately account for factors beyond the control of the outfitter and ensure that the effect of any performance deficiency reflected by the performance rating is proportionate to the severity of the deficiency.

A performance evaluation system shall assure the public of continued availability of dependable commercial outfitted activities, and shall provide for suspension or revocation of the authorization of an outfitter who fails to meet the required standards.

Section 11. Renewal, revocation, or suspension of outfitter permits

Section 11 provides for a performance-based renewal. An outfitter with more than one annual unsatisfactory rating does not earn a right of renewal. An outfitter permit may be revoked if the outfitter has failed to correct a condition considered by the Secretary to be significant, if the outfitter's permit fees are overdue, or if the outfitter has demonstrated willful disregard for the health and welfare of the public or the conservation of resources. Alternatively, all or part of an outfitter permit may be suspended if such infractions occur, and under this circumstance, an expedited administrative review shall be provided at the request of the outfitter.

Section 12. Transferability of outfitter permits

An outfitter permit shall not be transferred without prior written approval by the Secretary. A transfer to a purchaser, heir, or assignee of an interest in the outfitter's operation shall be approved unless the Secretary determines that the transferee is not qualified to meet the terms and conditions of the outfitter permit. If the Secretary doesn't approve or disapprove a transfer after receipt of a complete application, the transfer shall be considered to be approved, unless the transferee requests a modification of terms and conditions requiring environmental analysis.

Section 13. Recordkeeping requirements

The authorized outfitter shall keep reasonable records under a simplified procedure, as required by the Secretary. The Secretary, for purposes of audit and performance evaluation, shall have access to and the right to examine these records for five years following the effective date of an outfitter authorization.

Section 14. Appeals and judicial review

This section ensures that an agency provide some form of an administrative appeal process. For example, the Forest Service presently has an established appeal procedure largely consistent with this section. The section also provides that an outfitter may seek judicial review of adverse agency action.

Section 15. Lack of effect on existing rights of the United States

Nothing in this bill limits or restricts any right, title, or interest of the United States in or to any land or resource. It is not the Committee's intention for this bill to establish property rights. The permits authorized by this bill confer privileges to outfitters that do not give rise to compensable property rights. It is important, however, to note that outfitter permits impose mutual obligations on the respective parties. Outfitters are expected to adhere to the terms and conditions of any permit granted under this bill. Similarly, the Committee expects the federal agencies to fulfill the obligations they have under outfitter permits, as well as those established in this bill and comply with the letter as well as the spirit of the measure.

Section 16. Regulations

Regulations shall be promulgated within two years of enactment of this bill.

Section 17. Relationship to other law

Provisions of this bill will not supersede or otherwise affect the new National Park Service concession law passed by Congress in 1998, or preempt any outfitter or guide licensing law (including any regulation) of any State or territory.

Section 18. Transition provisions

An outfitter authorized to conduct commercial outfitted activities on the date of promulgation of implementing regulations under the authority of this bill shall be entitled, on expiration of the existing authorization, to the issuance of an outfitter permit if the outfitter's aggregate performance has been good or the equivalent of good, satisfactory, or acceptable under the current rating system. If no recent performance evaluation exists, the outfitter's aggregate performance shall be deemed to be good.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8, and Article IV, section 3, of the Constitution of the United States grant Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. This bill does not authorize funding, and therefore clause 3(c)(4) of rule XIII of the Rules of the House of Representatives does not apply.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 2, 2002.

Hon. JAMES V. HANSEN,
*Chairman, Committee on Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2386, the Outfitter Policy Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact for this estimate is Deborah Reis.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 2386—Outfitter Policy Act of 2001

H.R. 2386 would establish a uniform policy for issuing permits to outfitters and similar businesses that offer certain recreational services on public lands. CBO estimates that implementing this bill would have no significant effect on the federal budget. H.R. 2386 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no significant effect on the budgets of state, local, or tribal governments. Enacting the bill would have no significant effect on direct spending or revenues.

The legislation would require outfitters to obtain permits to conduct commercial activities on lands under the jurisdictions of the Bureau of Land Management, the Forest Service, the U.S. Fish & Wildlife Service, and the Bureau of Reclamation. Generally outfitters are small businesses that provide recreational equipment and act as guides and escorts to visitors of federal recreational lands. The permits would usually cover 10 years and would be renewable for companies that receive satisfactory performance evaluations. The bill also would provide guidelines for setting fees to be charged to outfitters.

Based on information provided by the four affected agencies, CBO estimates that the bill would have little if any effect on offsetting receipts from outfitter activities. All four agencies already charge fees to outfitters and have authority to spend at least some

of the amounts they collect. The bill would not change the way that the agencies establish such fees or the way they are spent. Currently, offsetting receipts collected from outfitters by the four agencies total around \$5 million annually.

The CBO staff contact for this estimate is Deborah Reis. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL, OR TRIBAL LAW

This bill is not intended to preempt any State, local, or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

COMMITTEE CORRESPONDENCE

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, October 11, 2002.

Hon. LARRY COMBEST,
*Chairman, Committee on Agriculture,
Longworth House Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: On September 12, 2002, the Committee on Resources ordered favorably reported H.R. 2386, the Outfitter Policy Act of 2001. This bill was referred primarily to the Committee on Resources and additionally to the Committee on Agriculture. Because of the short time remaining before 107th Congress adjourns, I ask you to not insist on exercising your referral of the bill and allow the Committee on Agriculture to be discharged from further consideration of H.R. 2386.

I agree that your decision to forego further action on the bill will not prejudice the Committee on Agriculture with respect to its jurisdictional prerogatives on this or similar legislation, and will support your request for conferees on those provisions within the Committee on Agriculture's jurisdiction should they be the subject of a House-Senate conference. Copies of our correspondence will be made part of the committee bill report to memorialize our understanding.

Thank you very much for your cooperation and that of your Chief Counsel, Lance Kotschwar.

Sincerely,

JAMES V. HANSEN,
Chairman.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON AGRICULTURE,
Washington, DC, October 15, 2002.

Hon. JAMES V. HANSEN,
*Chairman, Committee on Resources,
Longworth House Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: Thank you for forwarding a draft copy of H.R. 2386, the Outfitter Policy Act of 2001, as ordered reported by your Committee on September 12, 2002.

Under clause 1(a) of Rule X, the Committee on Agriculture has jurisdiction over bills relating to forestry in general and forest reserves other than those created from the public domain. In exercising this jurisdiction. The Committee on Agriculture has worked cooperatively in the past with your Committee regarding general matters relating to forestry.

Aware of your interest in expediting this legislation, and after conferring with Chairman Goodlatte of the Subcommittee on Department Operations, Oversight, Nutrition, and Forestry, I will be glad to waive further consideration of this measure so as to allow its timely consideration by the entire House of Representatives during the remainder of the 107th Congress.

This action is not intended to waive this Committee's jurisdiction over this matter for all purposes, and in the event a conference with the Senate is requested, I would appreciate your support in the naming of members from the Committee on Agriculture to the conference committee.

Thank you once again for the extraordinary cooperation this Congress in which our respective Committees have worked together and I look forward to working with you in the future on matters of shared jurisdiction.

Sincerely,

LARRY COMBEST,
Chairman.

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