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on S.1969, the Outfitter Policy Act

Committee on Energy and Natural Resources

United States Senate

March 29, 2000

Thank you for the opportunity to testify regarding S.1969, the Outfitter Policy Act. The Department of the Interior recognizes the important contributions outfitters and guides can make toward visitors' enjoyment of the public lands. In partnership with the Department, outfitters and guides offer tours that make back-country areas more accessible. Outfitters may provide interpreters who can inform and educate visitors about the history of the public lands, explain how multiple-use management is implemented, and foster greater appreciation for the conservation efforts of past generations that allow today's visitors to use and enjoy the abundant resources on our Nation's public lands.

The approach represented by S.1969 is unacceptable. The effect of S.1969, though it may be unintended, is to grant an apparent right to authorized commercial outfitters to use specific allocations of public land or water resources. This apparent "right" does not square with the bill's disclaimer in Sec.16 that "*. . . Nothing in this Act limits or restricts any right, title, or interest of the United States in or to any land or resource . . . .*" Until this inconsistency is resolved to make explicit that an outfitter and guide permit, like all other permits to use the resources of our nation's public lands, is a privilege and not a right, the Department strongly opposes the bill as written.

Specifically, we are concerned that S.1969:

- grants an apparent monopoly right to authorized commercial outfitters to use public land or water resources;
- endangers the safety of visitors to public lands;
- endangers the protection of fish, wildlife, and other natural resources on public lands; and
- improperly inserts the government into business decisions affecting outfitter profitability.

Background

S.1969 affects three bureaus within the Department of the Interior: the Bureau of Land Management (BLM); the Fish and Wildlife Service (Service); and the Bureau of Reclamation (Reclamation). Each bureau's mission is unique, as are the resources under its administration and public expectations of recreation opportunities.

Bureau of Land Management

The BLM is the Nation's leading steward of open space. Its multiple-use mandate is to administer 264 million acres of America's public lands, located primarily in 12 western states, in a way that sustains the health, diversity, and productivity of the public lands for the use and enjoyment of today's and future generations. In the past, the agency was focused primarily on a handful of programs: range, cadastral surveying, minerals, and lands. Today, BLM also has recreation specialists, wildlife biologists, archaeologists, and others who help the BLM meet the public's evolving needs and desires for use of the public lands.

The BLM-managed lands offer visitors a vast array of recreational opportunities. These include hunting, fishing, camping, hiking, boating, hang gliding, off-highway vehicle driving, mountain biking, birding, and visiting natural and cultural heritage sites. The BLM administers 205,498 miles of fishable streams, 2.2 million acres of lakes and reservoirs, 6,600 miles of floatable rivers, over 500 boating access points, 69 National Back Country Byways, and 300 Watchable Wildlife sites. The BLM also manages 4,500 miles of National Scenic, Historic, and Recreational Trails, as well as thousands of miles of trails used by motorcyclists, hikers, equestrians, and mountain bikers. With over 20 million people now living within 25 miles of BLM-managed lands, access to outdoor recreational opportunities on public lands enhances the quality of life in areas facing increasing urbanization.

Fish and Wildlife Service

The Fish and Wildlife Service is the principal Federal agency responsible for conserving, protecting and enhancing fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The Service manages the 93-million acre National Wildlife Refuge System of more than 520 national wildlife refuges and thousands of small wetlands and other special management areas. It also operates 66 national fish hatcheries, 64 fishery resource offices and 78 ecological services field stations.

Refuges are a place where all wildlife species can be observed in natural settings. More than 30 million visitors come to national wildlife refuges each year. To enhance their experience, a variety of wildlife-oriented recreational activities are offered. Recreational activities vary with each refuge and the season and may include hiking, auto tours, bicycling, photography, wildlife observation, hunting, and fishing. The National Wildlife Refuge System Act of 1966, other laws, and the Service's policy permit hunting on a national wildlife refuge when it is compatible with the purposes for which the refuge was established and acquired. The decision to permit hunting, trapping, and fishing on national wildlife refuges is made on a case-by-case basis that considers biological soundness, economic feasibility, effects on other refuge programs, and public demand.

Bureau of Reclamation

The Bureau of Reclamation was created to help develop and sustain the economy, improve the environment, and improve the quality of life in the 17 western states by providing reliable supplies of water and energy. Since 1902, Reclamation has been developing an infrastructure of dams, hydroelectric powerplants, and water conveyance facilities to help accomplish this task. This infrastructure also provides flood protection, fish and wildlife habitat, river regulation, water quality protection and improvement, and recreation.

More than 300 recreation areas have been created at Reclamation projects, including popular areas such as Lake Mead. Of these, nearly 200 are managed by non-federal agencies such as state and county parks departments. The recreation areas include almost 2 million acres of water surface and about 13,000 miles of shoreline. Commercial recreation is handled through about 225 commercial concessions operations, offering public marinas, campgrounds, and swimming beaches. More than 90 million visits occur each year to these developed recreation areas. In addition, Reclamation projects have created new recreation opportunities for fishing on the rivers downstream of the dams.

Objections:

A general note: numerous internal inconsistencies in S.1969 lead to confusion about what the bill would actually do. Key sections appear to be mutually exclusive. For example, Sec. 5 states:

"Nothing in this Act enlarges or diminishes the right or privilege of occupancy and use of Federal land under any applicable law (including planning process rules and any administrative allocation), by a commercial or non-commercial individual or entity that is not an authorized outfitter or outfitted visitor."

Sec.6(a)(1) states:

"PROHIBITION: No person or entity, except an authorized outfitter, shall conduct a commercial outfitted activity on Federal land."

So does a commercial outfitter who wants to continue doing business using public lands need to get an authorization permit under this Act? Sec. 5 seems to say, you can continue your business even if you don't receive an authorization permit. Sec. 6 seems to say, no, you can't.

Specifically, the Department has four main objections to S.1969:

S.1969 grants an apparent monopoly right to selected commercial outfitters to use public land or water resources.

S.1969 advances the notion of a commercial outfitter's indefinite right to use the allocated amount of the resource. The bill appears to require an agency to grant an authorized commercial outfitter an allocation of public land or water resources to conduct its business for an indefinite number of renewable 10-year terms. Once outfitted use is allocated, it is largely controlled by the outfitter rather than by the managing agency. An authorized commercial outfitter would have the right to exclude other commercial outfitters from use of the allocated amount of the public land

or water resource, to renew its allocation indefinitely, and to control the transfer or sale of the allocation. These effects of S.1969 are fundamentally inconsistent with existing law governing the BLM's management of public lands (the Federal Land Policy and Management Act of 1976, P.L.94-579)(FLPMA) and with BLM's implementing policies and practices.

Recreation, like all other public land uses, is subject to land use planning under FLPMA. As of December 1998, all BLM lands in the contiguous United States are covered by land use plans. The process of developing land use plans includes many opportunities for public review and input. "Carrying capacity" is a determination made through the land use planning process that to permit more than a certain amount of resource use during a specified time period -- irrespective of who the permittee is -- would cause damage to the resource.

In implementing the recreation component of land use plans, BLM generally does not make allocations of resource use unless the resource's carrying capacity is exceeded. If there is no competing use or ceiling on the amount of use in a particular geographic area, the BLM allows the outfitter to use as much of the resource as it needs to operate its business. This is the case for over 90 percent of the BLM's outfitter and guide special use permits.

The bill grants an apparent right to outfitters and guides to force the agencies to allocate use to them, regardless of the resource condition or carrying capacity. S.1969 would require an agency to allocate a specific amount of resource use to a specific commercial outfitter for the purpose of making that outfitter's business profitable, rather than for the purpose of protecting the resource from overuse.

S.1969 endangers the safety of visitors to public lands.

With any permit, FLPMA authorizes an agency to order an immediate temporary suspension prior to a hearing if the agency determines that such a suspension is necessary to protect health or safety or the environment. S.1969 would prevent an agency from revoking an outfitter's permit while allegations of wrongdoing are investigated. The bill would not allow an agency to revoke an outfitter's permits during the course of a law enforcement investigation, nor give the agency the right to revoke a permit for the cumulative impact of numerous violation of the regulations, until the end of the permit period.

The burden of proof that must be met before a commercial outfitter's permit can be revoked is higher than the burden for many crimes committed on the public lands, and must be proven in a court of law. Currently, most public lands crimes are misdemeanors -- more likely to result in a ticket and a small fine than a full-blown jury trial. Under S.1969, the agencies could not respond to such misdemeanors by suspending or revoking the permit. As a result, liability may be imposed on the government under this provision, either for failure to remove a bad actor from the public land or for his loss of business if the government does so. Compounding this problem, no bonding requirements are imposed on the outfitter itself by this bill.

The bill sets an extreme standard. An agency may revoke an outfitter's permit only after a court finds that the outfitter's conduct demonstrates "***repeated and willful disregard***" for the health and welfare of the outfitter's customers or the conservation of the resources on which the

commercial outfitted activities are conducted. "***Willful disregard***" requires proof of conduct far worse than negligent or reckless behavior. If an outfitter were found guilty of negligent or even reckless disregard for human safety, an agency could not revoke the permit.

In addition, the bill's sections limiting outfitter liability place public safety further at risk. Many types of activities offered by commercial outfitters on public lands, such as rock-climbing, river rafting, or cave exploration, are challenging physical events which pose unique hazards and risks. Insurance premiums for such outfitting activities may be high, or the outfitter may be unable to secure insurance for the riskiest activities, reflecting the insurance industry's determination of risk. High insurance premiums may constrict some outfitters' economic opportunity. S.1969 absolves an outfitter from liability for injuries or damage related to *"... the inherent risks of the commercial outfitted activity . . . or the inherent risks present on Federal land.*" The bill would shift much of the potential liability from the commercial outfitter onto the Federal government, thereby reducing the outfitter's insurance premium -- and eroding a powerful incentive to conduct operations safely.

- ***S.1969 endangers the protection of fish, wildlife, and other natural resources on public lands***.

Sec.16(a) of the bill states: *"Each program of outfitted activities carried out on Federal land shall be consistent with the mission of the administering federal agency and <u>all laws</u> (including regulations) <u>applicable to the outfitted activities</u>."* Under this provision, it appears that an authorized outfitter need comply <u>only</u> with those laws "*applicable to the outfitted activities."* This provision would greatly reduce an authorized outfitter's obligations, and stands in sharp contrast to FLPMA. Existing law requires that BLM's land use plans "provide for compliance with applicable pollution control laws, including state and federal air, water, noise, or other pollution standards or implementation plans." FLPMA Sec.202(c)(8). Similarly, BLM is authorized to revoke or suspend any permit for violation of laws or regulations applicable to the public lands or "applicable State or Federal air or water quality standard or implementation plan." FLPMA Sec. 302(c).

Under S.1969, an outfitter could be held liable only for personal injuries or resource damage resulting from improper performance of activities authorized by the permit. An authorized outfitter could not be held liable for harm resulting from conduct that violated other laws, such as air or water pollution control. Consider an example: an outfitter receives a permit for rock-climbing in a remote location. The site is inaccessible, however, except by motorized boat. A major fuel spill or waste expelled from the motorized boat may pollute the stream, resulting in harmful consequences downstream. So long as the outfitter complied with the terms of the permit for rock climbing, the bill would shield the outfitter from liability for the water pollution resulting from the use of a motorized boat to bring outfitted visitors into the remote location.

Protection of fish, wildlife, wilderness, and other resource values is placed at further risk because the outfitter's apparent right of allocation under S.1969 applies to areas such as wilderness study areas, or Areas of Critical Environmental Concern, where an allocation for commercial recreational use may be inappropriate, even if not expressly restricted under a Resource

Management Plan (RMP). The BLM currently has over 622 wilderness study areas (17 million acres) under interim management.

Finally, the bill undercuts existing protection of resources in an emergency. Under FLPMA Sec.204(e), an agency must make an immediate withdrawal of public land if "an emergency situation exists and [that] extraordinary measures must be taken to preserve values that would otherwise be lost . . . ." S.1969 allows an agency to change the terms of a permit subsequent to a change in the agency's Resource Management Plan, but is silent as to the impact of an agency's immediate withdrawal of public land in an emergency.

S.1969 improperly inserts the government into decisions affecting profitability of outfitter businesses.

S.1969 requires a federal agency to calculate fees for an authorized outfitter in such a way that the outfitter is assured of a "reasonable opportunity for net profit." Fees for most other public land activities that require permits are based on fair market value, and are not tailored by statute, as this bill would direct, to assure a net profit for a commercial user of a public land resource. The Department opposes exempting commercial outfitters from fees based on fair market value.

In addition, the bill's limitation on outfitter liability means an agency has to give an outfitter the right to conduct hazardous activity on public land, and also has to assume the risk of injury to the outfitters' customers or damage to the resource from the outfitters' activities. This shift of liability means that every taxpayer-- whether he or she ever visits the public lands - is paying to keep an individual outfitter's insurance premium down. Such a subsidy does not serve the public good.

Finally, while the theme of S.1969 is competition in the awarding of authorized outfitter permits, the bill strictly limits the occasions on which a federal agency can require commercial outfitters to compete. At key points in the permit process, existing commercial outfitters are insulated from competition:

- outfitters holding permits on the date S.1969 is enacted would be "grandfathered-in" during the two years following enactment in which agencies must develop regulations;
- the statute "deems" the outfitter's performance to be good, if the agency for whatever reason has not formally evaluated the outfitter's performance within 60 days after the end of the outfitter's season;
- an outfitter with good performance is assured of an allocation for 10 years with a right of renewal for an indefinite number of subsequent 10-year terms;
- and, unless the outfitter is found guilty of willful disregard for the health and safety of its customers or the resource on which the outfitted activities are conducted,

the permit - the outfitters' right to use an allocated amount of public land or water resources -- will remain the property of the outfitter, to use or to sell at its discretion.

Conclusion

Mr. Chairman, if there are specific problems involving federal agencies and the commercial outfitting industry that need to be addressed, we would be happy to work with the industry to address them. The agencies have already undertaken steps to improve customer service and make the permitting process more efficient. In the past year, BLM has trained over 250 of its recreation staff in order to provide more consistent administration of the BLM's Special Recreation Permit (SRP) program. This summer, the BLM and the Forest Service will introduce a joint "BLM/Forest Service Outfitter and Guide Application" form. We remain strongly opposed to S.1969.