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**Written Testimony**

**Full Committee Hearing to Receive Testimony on Pending Legislation:**

- S. 1665, the Simplifying Outdoor Access for Recreation Act**  
**S. 1723, the Ski Area Fee Retention Act**  
**S. 1967, the Recreation Not Red Tape Act**

**Committee on Energy and Natural Resources**  
**U.S. Senate**

**October 31, 2019**

NOLS, the National Outdoor Leadership School, would like to thank the Senate Energy and Natural Resources Committee for holding a legislative hearing to address the Simplifying Outdoor Access for Recreation Act, the Ski Area Fee Retention Act, and the Recreation Not Red Tape Act. All three of these bills seek to improve the interface between agencies and operators, and between agencies and facilitated public experiences. By addressing persistent challenges in the permit renewal process that hamstringing outdoor experience facilitators, this body has a unique opportunity to make a powerful statement about the significance of the outdoor recreation industry to Americans everywhere.

While NOLS supports all three bills, the Secure Outdoor Access for Recreation (SOAR) Act and Recreation Not Red Tape are the most relevant to operations. And of those bills, NOLS will focus on the SOAR Act in its written testimony.

NOLS is a non-profit, outdoor educational institution, utilizing the wilderness classroom typically through month-long, expedition-style courses to educate approximately 29,000 students last year. NOLS boasts over 280,000 graduates that include high school and college students, Naval Academy Cadets, Corporate CEOs, returning veterans, and NASA astronauts. NOLS was founded in 1965 in Lander, Wyoming, and has since grown to be one of the largest commercial outfitters in the country, offering courses in fifteen states, ten countries, and six continents.

As such, NOLS operates under the full spectrum of permits, across the country and around the world. Permitting for access to public lands is complex. In too many cases a cumbersome permit administration process, and the lack of resources available to implement it, has hobbled federal land management agencies' ability to keep up with America's growing recreation economy. Personnel are caught in a vicious cycle of struggling to meet demands with reduced resources, shifting the resource constraints onto permitted operators by overcharging fees and demanding cost recovery for processes that exceed the economies of scale of most non-profits and small

businesses. As a result the overburden of regulatory processes disincentivizes the activities the agencies would otherwise want to encourage by making outdoor programs more expensive to run. Outdoor recreation permittees and public land management agencies alike seek solutions to the onerous processes that are a distraction from our shared, primary goal: facilitating opportunities to connect more people with America’s incredible outdoor treasures.

The SOAR Act meets this goal. It relieves agencies’ administrative burden by streamlining and simplifying permit review and renewal processes, allowing the reduced recreation-tasked work force to better manage their portfolio. It equips outfitters with provisions that give them more freedom to expand their offerings and grow their programs. It directs funds raised by agencies through their Special Recreation Permit programs directly to the sites where they were collected. Administrated appropriately, the SOAR act will increase permitted activities on public landscapes and simplify the administration of those activities. Sites will see growing revenues from this increase in facilitated activities, and streamlined processes will enable sites to put those revenues to their best possible use.

NOLS will address some of the most significant provisions in detail in the testimony that follows.

*Section 3. Special Recreation Permit and Fee*

Among other actions, Section 3 clarifies the appropriate fee to be charged to operators is three percent of gross revenues. It clarifies those activities and items that are appropriate to be included in the fee, and it expands the use of those fees to not only maintain those activities which were being permitted, but to also include management of special recreation permitting programs.

It is currently policy of the Forest Service, the Bureau of Land Management (BLM), and other federal agencies to assess a fee of three percent of gross revenues to commercial special recreation permit holders. Permittees accept three percent of revenues for guided trips on BLM and Forest Service Lands as a reasonable fee to pay.

When an operator’s activity extends beyond a particular jurisdiction for the BLM or the Forest Service, the agencies use the following discount fee table to estimate what portion of the three-percent fee should be allocated to them:

<u>Time spent on agency</u>	<u>Amount of discount of final fee</u>
0 to 5% of total program	80%
5 to 60% of program	40%
Above 60%	No discount

In practice, however, the discount table is poorly designed for calculating payments on multi-element courses. As an example, NOLS runs programs such as semester and year-long courses that travel across district boundaries within one agency and/or across several agency boundaries within a single course. Even if a section spends only 20 percent of its time on a site,

NOLS is expected to spend 60 percent of its three-percent fee on that site. Application of the standard formula in this case results in significant overpayment for use. Applying this formula to each section of a NOLS semester, and NOLS would end up paying closer to 15 percent of our gross revenues to the federal government, rather than the stated three percent. Many outfitters are similarly burdened, and are paying amenity fees on top of the permit fee.

The Forest Service's Outfitter-Guide Administration Guidebook states that the agency has an obligation to ensure that permit holders are not over-charged for access to national forests. "When use off National Forest System Lands occurs on lands administered by another federal agency and the holder is authorized by that agency, coordinate with the other federal agency to ensure that overcharges of fees do not occur." Establishing in law a clear 3% of gross revenue for time spent on federal land would be a welcome simplification of the current fee formula shortcomings. It would empower permit administrators, many of whom are as frustrated by the current fee regime as outfitters, to levy appropriate fees. And, it would assuage many outfitters who see the overpayment as a clear overreach by agencies.

#### *Section 4. Permitting Process Improvements*

Federal lands agencies, most notably the U.S. Forest Service, tend to err on the side of over-analysis when issuing new permits. No stranger to lawsuits over insufficient National Environmental Policy Act (NEPA) review, the Forest Service has learned that the best defense is a well-defended decision and thorough compliance. Unfortunately, this process-heavy approach, especially in a constrained budget environment, has been a significant governor on response time to permit requests.

To its credit, the Forest Service has acknowledged these barriers and, through its recent proposed rulemaking effort, is attempting to reform its internal culture. In its proposed rule, the agency creates two new Categorical Exclusions for consideration that are directly applicable to special recreation permittees. One allows a permit administrator to renew an existing permit without a requirement to submit the renewal to a public scoping process. Another allows the forest service to permit a new use that is consistent with the current management plan. These are clear steps in the right direction that are in line with the spirit of this provision. SOAR is important to these efforts by providing the agency with statutory authority for this action.

#### *Section 4(b)(A): Programmatic Environmental Review*

In the ongoing effort to streamline permit review processes, programmatic environmental assessments have a clear advantage over assessments done permit-by-permit. When part of the question is whether capacity is sufficient or not, it is difficult to answer for a single permittee without taking into account other activities, both private and commercial. To assess the appropriate need and to analyze the carrying capacity of a site, all activities must be weighed against one another, including guided and private trips, and commercial and non-commercial. A programmatic environmental assessment is the right tool for this job. With the environmental

analysis of all activities complete, a permit administrator is free to renew or expand an existing permit, or to authorize new use.

### *Section 5. Permit Flexibility*

In Section 5, Permit Flexibility, the SOAR Act directs federal agencies to establish a protocol that enables a permittee “to engage in a recreational activity that is substantially similar to the activity authorized under the special recreation permit.” This section seeks to relax a constrained approach to new activities that normally would take years of environmental review to approve, though the significance of the activity is minimal both to the resource and to other visitors.

Section 5 also established Temporary Special Recreation Permits for both the BLM and the Forest Service. These permits fill a critical gap for these agencies in transitioning a new permit into a priority use permit. The temporary permit currently issued by the Forest Service, capped at 200 days, is of insufficient size to establish a viable operation. A more flexible temporary permit, as envisioned in this section, relieves this arbitrary constraint. The temporary permit authorization in SOAR is an additional or expanded temporary permit beyond what is currently available.

### *Section 8. Forest Service Permit Use Reviews*

Section 8 seeks to resolve a complication under existing permitting policy at the U.S. Forest Service. Currently, the Forest Service is to review a priority use holder’s activity every five years, and make adjustments to the permit capacity based on that use. From the Forest Service Handbook, 2709.11, chapter 40, 41.53m(3):

3. When renewing priority use permits, the allocation of use may be maintained, increased, or decreased, provided that the allocation is consistent with section 41.53m, paragraph 1.
  - a. When a priority use permit is about to terminate and the holder has applied for renewal of the permit, review actual use during the last 5 years of the permit, and adjust the allocation of use to match the highest amount of actual use in 1 calendar year during that period.
  - b. For holders with 1,000 service days or less or the equivalent in quotas, add an additional 25 percent of that amount and for holders with more than 1,000 service days or the equivalent in quotas add an additional 15 percent of that amount in consideration of market fluctuations, availability of state hunting licenses, and natural phenomena that may have adversely affected the holder’s ability to utilize the authorized use fully, provided that the combination of the highest amount of actual use in 1 calendar year and the additional 25 or 15 percent of use not exceed the amount of use allocated when the permit was issued.

A permittee should reach 87 percent of their allocation once in five years to maintain their permit at current levels upon renewal. Note that there is no formula for increasing the allocation on a permit. Rather, a permit holder can either expect their permit to be renewed at its existing level, or to lose allocation. As the policy has been implemented, forests across the country find themselves with insufficient resources to conduct a resource capacity analysis. Without that information, they are rarely able to issue additional use.

Section 8 would soften the severity of this policy by allowing the agency to waive use reviews when warranted by unique circumstances, or by a unique permit. In addition, it seeks to normalize the 25 percent increase that small operators receive across operations of all sizes. And finally, it seeks to create a path for increasing the allocation on a permit when capacity is available. In the current permitting regime, it is very challenging for an operator to grow their business.

### *Section 9. Liability.*

Section 9 addresses a significant challenge for organizations such and NOLS who seek to use liability waivers but are constrained by conflicting rules from one jurisdiction to the next. Allowing the use of liability waivers, while not validating them outright, would be a welcome improvement.

Depending upon the jurisdiction and the land manager, the ability of an entity to use its own waiver of liability form can vary. The Bureau of Land Management typically allows permittees to use waivers. The Forest Service has two forms that it approves for use, one a waiver of liability and the other an assumption of risk (AOR) form. Regional offices may choose whether permittees may use a liability waiver or an AOR. The National Park Service sometimes allows only the use of their own Verification of Assumption of Risk (VAR) form, even though NPS rule 48, which governs the use of VAR forms, states that organizations can use their own customized form.

In the Wind River Range outside of NOLS global headquarters, students will spend 30 days on wilderness expeditions, crossing back and forth across the continental divide. On the east side of the continental divide is the Shoshone National Forest, in Region 2. On the west side is the Bridger-Teton National Forest, in Region 4. Region 2 allows waivers of liability; region 4 does not. Such inconsistencies create real problems for outfitters who attempt to encapsulate both standards in a single form for the same course.

Liability waivers are used routinely throughout the United States for recreational activities, from volunteer outings and Boy Scout trips to guided mountaineering. Their intent is to protect the organization from frivolous claims of negligence (but not gross negligence), to establish realistic expectations regarding the inherent risks of the activity about to be undertaken, to establish the choice of venue, to indemnify other parties (like the federal government), and to protect them from lawsuits resulting from the outfitter's activity. The validity of liability waivers varies from state to state. In most states they are explicitly allowed; in other states their validity is limited.

This section does not ask the federal government to validate all liability waivers used by special recreation permit holders. It merely directs agencies to allow states to determine the law for businesses in their state.

#### *Section 11. Extension of Special Recreation Permits.*

Section 11 enables land management agencies to extend a special recreation permit for up to five years beyond its expiration date, to allow for the completion of the renewal process while maintaining the operators' activities. Often, given the permit load of administrators, renewing multiple permits is not feasible in order to complete them all in a timely fashion. Administrators lack clear direction in permitting policy for contingency planning, and operators face an uncertain future for running a reservation-based program. When undertaking the process to renew priority use permittees, administrators routinely exceed the expiration date on those permits. An additional buffer will alleviate the time constraint, and negate concerns that operators running trips past their expiration date are out of compliance. An extension would be beneficial and would provide real relief.

#### *Conclusion*

When a forest proposes no additional permitted activities for a 10-15 year lifespan, as we saw in the Custer-Gallatin National Forest, we know that the planners are prioritizing manageability over the recreation values that their public landscape has to offer. When a National Park opts to de-emphasize guide expertise and establish instead of an arbitrary two-trip, two-guide rule (where a trip must have a minimum of two guides who have done the trip on two previous occasions), shutting down outdoor educational programming in the process as we saw in Grand Canyon National Park, we know that the planners are prioritizing consistency in administration over creating a diversity of rich experiences. When the Bureau of Land Management attempts to charge an operator more than twice the federal fee for off-agency use by applying a poorly-designed formula, we know that the administrators are prioritizing their resource scarcity over the affordability of experiences their permittees provide.

An ever-expanding regulatory regime has made permit issuance, renewal, and expansion for organized outdoor recreation activities unduly burdensome for permit administrators and permit holders alike. In their efforts to connect more people with the outdoors, especially our youth, land management agencies should not obstruct their own efforts through complex and often unworkable processes. Passing the SOAR Act will help NOLS and thousands of other outfitters and outdoor programs who are working to expose a new generation to our public lands. Thank you for considering this bill.