

NPS Wilderness Extent Necessary Determination Guidance Appendix A: Commercial Services

The Wilderness Act does not define the term “commercial service.” When Congress has failed to include definitions of important terms in a statute, agencies may rely on commonly accepted definitions. The word “commercial” is commonly defined as (1) “[o]f or relating to commerce,” *i.e.*, “[t]he buying and selling of goods, esp. on a large scale: business,” (2) “[e]ngaged in commerce,” (3) “[i]nvolved in work designed or planned for the mass market,” or (4) [h]aving profit as a primary aim.”¹ The word “service” is commonly defined as, “the organized system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public” or “the performance of any duties or work for another; helpful or professional activity.”² Activities that are necessary and proper for realizing wilderness purposes will be evaluated to determine whether they reflect consistent, commonly understood usage of the terms “commercial” and “services.”

For the purposes of this document, a commercial service is one that relates to or is connected with commerce wherein work is performed for another person or entity, when the primary purpose is the experience of wilderness through support provided for a fee or charge and when the primary effect is that the wilderness experience is guided and shaped through the use of support services provided for a fee or charge.

The form of the organization providing the service is also not dispositive of whether the organization is offering a commercial service, for example whether it is a non-profit or not-for-profit. Rather, the definitions above, including an analysis of the activity’s purpose and effect, will guide a determination of whether a service is commercial or not.

Commercial services may be authorized under a number of different legal authorities, using a number of different instruments. These include concession contracts, commercial use authorizations, and special use permits.

1. Authorization Mechanisms for Commercial Services

a. *Concessions Contracts and Commercial Use Authorizations:*

Services authorized under concessions contracts and commercial use authorizations are considered commercial services because the entities holding these authorizations are businesses engaged in commerce, they provide a service to the public, members of the public who use these services experience wilderness directly as a result of this commercial support, and employees of the concessioner and CUA holder direct and guide the wilderness experience of the trip participants.

¹ Webster’s II New College Dictionary 225 (1995); *accord* Merriam-Webster’s Collegiate Dictionary 230 (2000). See *Wilderness Society v. U.S. Fish and Wildlife Service*, 353 F.3d. 1051, 1061 (9th Cir. 2003)

² www.dictionary.com.

b. *Special Use Permits:*

Special Use Permits are used to authorize a wide range of activities, many of which are not commercial. Because Special Use Permits are issued on a case by case basis, it is not possible to evaluate all of the different activities that might be requested in a special use permit in advance; however, commercial filming permits (one type of Special Use Permit) are discussed below. When a request for another type of Special Use Permit in wilderness is received, it will be evaluated in accordance with the criteria above to determine whether the activity constitutes a commercial service.

2. Special Situations

For the majority of traditional wilderness outfitting and guide services the determination of commerciality is straightforward. The commerciality of some uses is not as clear, however, and those uses are analyzed here.

a. *Scientific Research:*

Scientific research performed by faculty, postdoctoral fellows, or students enrolled in degree-granting programs in accredited colleges and universities or holding appointments with governmental agencies or scientific research institutions, even when accompanied by pack stock support, will typically not be considered commercial. Research trips using pack stock support would normally not be classified as a commercial service trip because the primary purpose and effect of the trip is the enhancement of scientific understanding of park resources, not commercial interests. The NPS will review requests for scientific research permits that involve the support of commercial outfitters to determine whether the trip is commercial. In the event that a research trip is categorized as a commercial service, it should only be authorized if it comports with the park's extent necessary determination.³

b. *Commercial Filming and Photography:*

The NPS allows commercial filming and still photography in national parks provided that there would not be a likelihood of resource damage, an unreasonable disruption of the public's use and enjoyment of the site, or a health or safety risk to the public.⁴ Filming involves movement or motion of the subject whereas still photography does not. *NPS Management Policies 8.6.6* define "commercial filming" as "filming that involves the digital or film recording of a visual image or sound recording by a person, business, or other entity for a market audience."

All commercial filming in wilderness areas is subject to permitting requirements, and is limited to projects that are necessary and proper for providing educational information about wilderness

³ Some scientific research could involve a commercial component if it contained an element of "bioprospecting." Any such proposals will be reviewed for legality under the Wilderness Act and commerciality under the guidelines noted above.

⁴ U.S.C. §4601-6d

uses, resources or values, or necessary for other wilderness purposes. Still photography is only subject to permitting requirements if it takes place in areas not open to the public, involves the use of models or props that are not part of the location's existing setting, or requires NPS oversight. Based on the law, regulations, and NPS policy cited above, all commercial filming will be treated as a commercial service, but still photography is not considered a commercial service.

c. *Trips by Educational Institutions:*

Each year, parks receive requests for wilderness trips by student groups from accredited educational institutions conducting classes for course credit. These institutions range from elementary, middle and high schools to colleges and universities. The goal of these trips is to provide environmental education to students and to foster self-reliance and other qualities. In some cases, employees of the educational institution guide the trip. In others, the school retains the services of an institution with expertise in environmental education. Trips by accredited academic institutions that provide course credit for completion, even if accompanied by a hired guide or instructor, are not considered commercial services for the purposes of an Extent Necessary Determination. The primary purpose and effect of these trips is fulfilling academic goals for the students involved. The students' experience is guided and shaped by the institution's academic goals. Support services from guides or environmental education organizations do not change the essential character of the trip, which is academic not commercial.