



**FOREST SERVICE HANDBOOK
SHAWNEE NATIONAL FOREST (REGION 9)
HARRISBURG, IL**

FSH 2709.11 - SPECIAL USES HANDBOOK

CHAPTER 40 - SPECIAL USES ADMINISTRATION

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New Document	R9 Shawnee 2709.11_40	8 Pages
Superseded Document(s) (Supplement Number and Effective Date)	R9 Shawnee 2709.11_40 (Supplement 2709.11-2004-2, 11/15/2004)	8 Pages

Digest: Initiates policy and procedures pursuant to the February 22, 2000, Order in Glisson v. United States Forest Service, 99-4189-JPG (S.D. Ill.), regarding regulation of equestrian campgrounds within the vicinity of the Forest as outfitters and guides under the Forest Service national outfitting and guiding policy. This supplement reissues the November 15, 2004, supplement based upon the regulations Land Uses; Requiring Special Use Authorization, published in the Federal Register in July 2004 with an effective date of August 12, 2004.

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41.50 AUTHORITY

U.S. Const., art. IV, ' 3, cl. 2; 16 U.S.C. 472, 528-531, 551; 36 CFR part 251, subpart B; FSH 2709.11, chapter 41; Glisson v. Forest Service, 99-4189 (S.D. Ill. February 22, 2000).

41.53C - DEFINITIONS

Outfitting- renting on or delivering to National Forest System lands for pecuniary remuneration or other gain any saddle or pack animal, vehicle, boat, camping gear, or similar supplies or equipment.

Delivery - transporting a saddle or pack animal or riding equipment to the Shawnee National Forest oneself or through customers who ride the animal or use the equipment on the Shawnee National Forest. Delivery through customers is shown by:

(1) Proximity - customers transport saddle or pack animals or riding equipment from an equestrian campground adjacent to or near the Shawnee National Forest for use on the Shawnee National Forest;

(2) Advertising - the operator relies upon the Shawnee National Forest or its natural features to attract potential customers, *e.g.*, by specifically mentioning equestrian use of the Forest in advertising for the campground; or

(3) Corridors - customers access the Shawnee National Forest using private, county, or State lands or lands administered by another Federal agency, or by riding or leading saddle or pack animals from the equestrian campground to the Shawnee National Forest on public roads.

41.53D - WHEN PERMITS ARE REQUIRED

Equestrian campgrounds that rent or deliver saddle or pack animals or riding equipment for use on the Shawnee National Forest are engaged in outfitting and must apply for and obtain a special use permit from the Forest Service.

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[Order in Glisson v. United States Forest Service No. 99-41890JPG \(S.D. Ill\)](#)

Exhibit 02

Background Information for this Supplement

Authority

The authority to regulate equestrian campgrounds under special use permit regulation and policy is derived from the Property Clause of the United States Constitution (art. IV, ' 3, cl. 2). The Supreme Court has ruled that the Property Clause Agives Congress the power to determine what are the needful rules respecting public land. Moreover, the power over the public land thus entrusted to Congress is without limitations. Under the Property Clause, the Federal government's power is broad enough to reach beyond territorial limits of its property. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

It is well established that the Property Clause of the United States Constitution grants power to the United States to regulate conduct on non-Federal land when reasonably necessary to protect adjacent Federal property or navigable waters. *United States v. Alford*, 274 U.S. 264, 267 (1927); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979). Congress's power under the Property Clause includes regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *United States v. Richard*, 636 F.2d 236, 240 (8th Cir. 1980), *cert. denied*, 450 U.S. 1033 (1981).

Congress gave the Forest Service broad authority to protect and manage National Forest System lands. *See, e.g.*, 16 U.S.C. 472, 528-531, 551. Pursuant to that authority, the Forest Service promulgated regulations governing special uses conducted on National Forest System lands, 36 CFR part 251, subpart B. The special use permit regulations at issue in Glisson, 36 C.F.R. 251.50(a), provided, in pertinent part:

All uses of National Forest System lands, improvements, and resources, except those provided for in the regulations governing the disposal of timber (part 223) and minerals (part 228) and the grazing of livestock (part 222), are designated Aspecial uses. Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special use authorization from the authorized officer. . . .

These regulations require a special use permit for commercial activities such as outfitting and guiding on National Forest System lands. Forest Service Manual 2721.53 states that outfitting

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includes provision of equipment, supplies, and materials. Forest Service Handbook 2709.11, chapter 41, provides direction on issuance of outfitting and guiding permits.

Context of this Supplement

In 1992 the Shawnee National Forest amended its forest plan to establish new management direction for the next 10 to 15 years. Equestrian recreation was an integral part of the multiple use framework: existing cross-country equestrian use was allowed except in Natural Areas.

As equestrian use increased, impacts associated with saddle and pack animals on the Forest intensified. Monitoring documented the impact on soils, plants, and wildlife. Demand for equestrian recreation increased. In 1999 a lawsuit was filed alleging that equestrian campgrounds close to the Forest were operating without a Forest Service special use permit, in violation of the National Environmental Policy Act and the Forest Service's special use permit regulations and national outfitting and guiding policy, Glisson v. United States Forest Service, No. 99-4189-JPG (S.D. Ill. Feb. 22, 2000).

The February 2000 Court Order

In February 2000 the district court in Glisson ruled for the plaintiffs, finding that the Forest Service violated its regulations and policy:

The Court declares that the failure by the Forest Service to require special use permits for individuals and entities providing outfitting and guiding services on the Shawnee National Forest does violate 36 CFR 251.50, and is arbitrary and capricious. It is clear that the Forest Service must issue special use permits for horse campgrounds that provide the type of services Glisson enumerates throughout these pleadings. The decision as to whether or not individuals or entities operating or attempting to operate in this manner on the Shawnee National Forest meet the definition of outfitter or guide service will be left to the Forest Service's discretion. The Court mandates full compliance, however, by both defendants in this case with all applicable federal regulations and statutes. The Court will look with great disfavor upon any party that fails to fully comply with and exactly follow established regulations and policy.

The Court cautions the Forest Service that it may not and must not allow non-Forest Service individuals or entities to define and circumscribe which activities meet the statutory and case law definitions of outfitting and guiding. The Forest Service must follow and implement its own guidelines using a reasonable interpretation consistent with those regulations and definitions. If it does not, the Court may find that it has abused its discretion in these matters and may find that its future actions amount to arbitrary and

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capricious conduct. The Court expects that the Forest Service will monitor for and consistently cite unauthorized providers of these types of services, as provided for in federal and Forest Service regulations.

Glisson, slip op. at 12.

The heart of the Court's decision (pages 13-19) dealt with delivery of saddle or pack animals from equestrian campgrounds to the Forest. The Court faulted the agency for relying upon a narrow definition of outfitting which exempted equestrian campgrounds from permits because customers transported horses to the Forest:

The FS argues that this last sentence [of FSH 2709.11, 4153(d)(2)] means that if affected SNF campground operators do not 'transport' their rented horses to and from FS land, then those operators do not need a SUP. The Court does not read the statute in that way, nor does it believe that the statute should be so narrowly construed in such a way as to provide such a convenient way for outfitters to circumvent federal SUP regulations. See 36 C.F.R. Sec. 251.50. * * * The very narrow, technical definition urged on the Court by the defendant flies in the face of common sense, and likely in the intent of the regulation to control the occupancy and use of FS land. . . . [T]he Court believes that the argument may not turn on such a narrow interpretation. * * * In addition, at least one of the entities mentioned in the litigation and defended by the FS in both its response and in Court, the Bear Branch Campground, specifically identifies itself in advertisements as located within the SNF, specifically, 'in the heart of the Shawnee National Forest,' etc., as well as describing itself as an 'outfitter.' While the Court will not concern itself with issues of false advertising or misrepresentation, the Court also believes that an entity that so closely aligns and identifies itself with providing these types of service within the SNF may not assume that the Court will ignore those representations.

Id. at 15-17.

The Court was greatly concerned that a narrow view of delivery allowed entities or individual[s] . . . to circumvent the reasons for and the requirements of [special use permits] simply by operating what is in all other aspects an outfitter business just feet from FS land boundaries as long as none of his employees went onto [Forest Service] land. Id. at 16. The Court also noted that advertisement references about the Shawnee National Forest provided evidence of delivery by equestrian campground customers to the Forest. Id. at 17.

The closing paragraphs of the Court's decision described the role of the Shawnee National Forest in permit decisions:

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It is not the Court's duty, and the Court does not intend to make an individual finding on each and every individual or business that seeks to operate within the Shawnee National Forest. In addition, the Court was not asked to make a particularized finding regarding any individual or entity. The Court will, however, make a finding that activities such as those delineated and described above [pages 13-19] do rise to the level of guide and outfitting services, and individuals and businesses who provide these types of service operate without special use permits do so at their peril. Certainly, as ordered above, the parties in this case must fully and completely comply with all existing and applicable regulations in this regard. Other individuals and entities operating as unauthorized are subject to citations and other Forest Service sanctions. The Court will address specifically the Forest Service's obligations in a later section of this Order.

Id. at 19.

The Court ruled that under Forest Service special use regulations and the national policy equestrian campgrounds are outfitters based upon provision of equipment, supplies or materials that are used by [equestrian campground] customers during their [Shawnee National Forest] rides. Id. at 17. The Court found that provision of tack, feed and supplies for . . . [horse] rides . . . onto the Shawnee National Forest by equestrian campgrounds provided evidence of outfitting. Id. at 17. The Court specifically rejected the Forest Service's interpretation of the national policy to require delivery directly by the outfitter. Id. at 14-16. Moreover, the Court ruled that it believe[d] that it is clear that outfitting may involve a much wider range of services than that claimed by the defendants in this case. Id. at 18. Accordingly, the Shawnee National Forest has developed this Supplement to effectuate the Court's ruling on the delivery of saddle and pack animals from equestrian campgrounds to the Shawnee National Forest.

Revised Supplement to Forest Service Handbook 2709.11, Sections 41.53c and 41.53d

In preparation for processing permit applications for equestrian campgrounds, the Shawnee National Forest surveyed local businesses and soon discovered that the nature of the equestrian campground business had evolved. Many campgrounds no longer rent horses as they did in 2000. Nearly all pending applicants provide livery. It became evident that a common understanding of the terms livery and delivery was key to processing permit applications in accordance with the 2000 Court Order. The April 29, 2004, Handbook supplement provided clarification of these terms as they applied to equestrian campgrounds in the vicinity of the Shawnee National Forest.

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In July 2004, the agency published a final rule containing a revised definition of outfitting. The newly revised regulatory definition of outfitting at 36 CFR 251.51 does not include the term livery. The definition of outfitting is now based upon rental or delivery:

Outfitting – renting on or delivery to National Forest System lands for pecuniary remuneration or other gain any saddle or pack animal, vehicle, boat, camping gear, or similar supplies or equipment.

Under this definition, equestrian campgrounds that rent or deliver saddle or pack animals or riding equipment for use on the Shawnee National Forest are engaged in outfitting and must obtain a special use permit from the Forest Service.

Delivery of saddle or pack animals or riding equipment in this context is governed by the February 2000 Court Order in Glisson v. Forest Service. This Supplement effectuates the February 2000 Court Order by providing that an equestrian campground operator delivers saddle or pack animals or riding equipment to the Shawnee National Forest if the operator (1) itself takes the animals or equipment to the Forest, or (2) takes the animals or equipment to the Forest through customers who ride the animals or use the equipment on the Forest. Based upon the 2000 Court Order, an equestrian campground operator's delivery of saddle or pack animals or riding equipment to the Forest through its customers is shown by:

1. Proximity - customers transport saddle or pack animals or riding equipment from an equestrian campground adjacent to or near the Forest for use on the Forest;
2. Advertising - the operator relies upon the Shawnee National Forest or its natural features to attract potential customers, *e.g.*, by specifically mentioning equestrian use of the Forest in advertising for the campground; or
3. Corridors - customers access the Shawnee National Forest using private, county, or State lands or lands administered by another Federal agency, or by riding or leading saddle or pack animals from the equestrian campground to the Forest on public roads.

These factors provide evidence that an equestrian campground operation has a commercial nexus with the Shawnee National Forest. Examples of interpreting this policy are as follows:

- A. Feed, supply, and tack shops are not outfitters because they are not equestrian campgrounds that deliver riding equipment as contemplated in the definition of delivery.
- B. An equestrian campground that is located outside the southern 12 counties of the State of Illinois is an outfitter if it transports customers to the Shawnee National Forest or if it meets criteria 2 or 3 above.

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- C. An equestrian campground is an outfitter if it is adjacent to or near the Shawnee National Forest and its customers transport saddle or pack animals or riding equipment to the Shawnee National Forest.
- D. An equestrian campground is an outfitter if its customers access the Shawnee National Forest from public roads or public land managed by another agency under criterion 3 above.

Land use fees for permits issued under the Supplement will conform to national Forest Service policy governing land use fees for outfitting and guiding permits in Forest Service Handbook 2709.11, section 37.21c. Once permits are issued under the Supplement, the Forest will collect data pertinent to calculation of land use fees for the permits and may adopt a different option for land use fee calculation, if appropriate, when new permits are issued.