

**DEPARTMENT OF THE INTERIOR****National Park Service****Standard Concession Contract;  
Revision**

**ACTION:** Final Revision of the National Park Service Standard Concession Contract.

**SUMMARY:** The National Park Service (NPS) authorizes certain business entities to operate concessions in areas of the national park system. The agreements embodying these authorizations are concession contracts (and, previously, concession permits) that incorporate NPS terms and conditions established by law and prudent contract administration. In 1998, Public Law 105-391 (the 1998 Act) was enacted which in many significant ways affects the content of concession contracts to be entered into after its effective date. Accordingly, NPS amends its existing standard concession contract to conform to the requirements of the 1998 Act and to otherwise make improvements to the standard form.

NPS, although not required to do so by law, sought by publication in the **Federal Register** on September 3, 1999, public comments on the proposed standard concession contract to assist it in the development of a final version as a matter of public policy. Similarly, NPS sought public comment on the proposed exhibits to the contract and amended environmental language by publication in the **Federal Register** on February 23, 2000. NPS, after consideration of public comments, adopts a new standard concession contract. NPS points out that the new standard concession contract is only an internal guideline for the form of concession contracts. The form may be changed by the Director in his discretion to accommodate the circumstances of any particular contracting situation or otherwise as long as the contract form used is consistent with the 1998 Act and 36 CFR part 51.

**EFFECTIVE DATE:** June 5, 2000.

**FOR FURTHER INFORMATION CONTACT:** Cindy Orlando, Concession Program Manager, National Park Service, 1849 "C" Street, NW., Washington, DC 20240 (202/565-1219).

**SUPPLEMENTARY INFORMATION:** The 1998 Act, among other matters, amended the statutory policies and procedures under which NPS operates its concession program. The new law requires adoption of new regulations governing the award, content and management of concession contracts. On June 30, 1999, NPS published for public comment

proposed regulations implementing the new law. The final new regulations were published in the **Federal Register** on April 17, 2000. The final standard concession contract set forth in this notice reflects the requirements of the 1998 Act and the requirements of the amended 36 CFR part 51. It also reflects a variety of improvements NPS wishes to make to its standard concession contract, including a new organizational structure for the sake of clarity.

**Public Comments**

Fifteen public comments were received in response to the public notice, all but one from existing concessioners or their attorneys. For the most part, the comments were negative, some going so far as to state that "no one" will submit proposals under the terms of the new concession contract. NPS disagrees. It believes that the new contract form is appropriate in light of the 1998 Act and proper administration of the NPS concessions program. NPS also believes that it will have no difficulty attracting qualified business to submit proposals for new concession contracts. NPS concession businesses are profitable and enjoyable. NPS considers that many qualified companies will seek to become concessioners under the terms of the 1998 Act, the amended 36 CFR Part 51 and the new standard concession contract.

Several commenters philosophically objected to the special terms that NPS concession contracts contain, terms that are required in order to give NPS the ability to properly preserve and protect the resources of areas of the national park system and their visitors. These include the ability to describe and modify the nature of concessioners' operations from time to time and the ability to terminate the contract when necessary for resource and visitor protection. NPS appreciates that these types of authorities are not typical in commercial leasing or contracting arrangements. However, they are essential to achieving the NPS mission of protecting and preserving park areas and their visitors.

NPS points out that the provisions objected to for the most part are not new provisions but have been successfully implemented over many years in a cooperative relationship with concessioners that share the goals of preservation and protection of park areas and visitors. A concession contract is a special form of government contract that requires the contractor to accept terms and conditions necessary to achieve these goals. NPS does not expect every businessperson to be

willing to accept these terms and conditions. However, NPS considers that, as in the past, it will be able to attract qualified businesspersons, committed to the objectives of park area protection, to become NPS concessioners.

Another general comment was to the effect that the NPS standard contract is a "contract of adhesion," i.e., a prospective concessioner is not given an opportunity to negotiate the terms of a contract. NPS disagrees. If a prospective concessioner seeks authorization to operate within the park, he must agree to the conditions placed on such operation by the federal agency charged with protecting and preserving the national park resources.

Several comments objected to including contract provisions by reference to 36 CFR part 51. The leasehold surrender interest provisions of 36 CFR part 51 were cited by reference to protect against inadvertent changes to the rules by individual contracts, to shorten the contract, and to make the contract easier to understand. However, in response to this comment, and to ensure clarity, NPS has included as Exhibit A to the final contract relevant leasehold surrender provisions contained in 36 CFR part 51 as express terms of the contract rather than incorporating these terms by reference to 36 CFR part 51.

A number of comments expressly incorporated by reference objections the commenters had made on the proposed amendment to 36 CFR part 51. Those comments are not addressed here unless necessary in relation to the new standard contract. The preamble to the final 36 CFR part 51 addresses public comments on the proposed regulatory amendment.

A concessioner organization with some 150 existing concessioner members made extensive comments on the proposed concession contract. Reference in the analysis to comments from the "general concessioner organization" refers to this incumbent concessioner organization and to any individual concessioners that endorsed the comments of the general concessioner organization.

An environmental consulting firm suggested inclusion of references to environmental management matters in a number of places in the contract. NPS considers these suggested changes to be redundant for the most part, as the environmental protection provisions of the contract are comprehensive. A further discussion of these issues is contained in section 6.

NPS has made several editorial and conforming changes to the proposed

contract form in addition to the changes discussed below. It has also re-labeled the exhibits to the contract to reflect their final sequence in the contract and defined "days" as used in the contract as calendar days. Two new general provisions have been added to section 19, a standard non-waiver clause and a reference to 28 U.S.C. 2514 with respect to claims arising from the contract. In addition, for the sake of clarity, the final contract includes the definition of "subconcessioner" as set forth in 36 CFR part 51.

### Section-by-Section Analysis of Comments and Changes

The following discusses significant comments made on the several sections of the proposed standard contract. Where no discussion is included, no significant comments were received or comments received primarily were concerned with related provisions of the proposed concession regulations.

#### *Opening Paragraph*

A commenter objected to the description of the parties to the contract on the grounds that it suggests that all partners of a partnership must execute the contract. This is not the case. However, a clarifying change has been made in the final contract.

#### *Purpose and Authorities*

##### *Section 1. Term of Contract*

A commenter objected to the use of the word approximately in this provision. It has been deleted from the final contract. It also objected to the fact that the contract term may be shortened if the concessioner does not complete required improvements under the terms of the contract for reasons beyond its control. This provision has been retained as a necessary and prudent contract term. However, a sentence has been added expressly referencing the authority of NPS to extend the completion date for reasons beyond the control of the concessioner.

##### *Section 2. Definitions*

###### 2(a). Applicable Laws

Several commenters objected to this definition as being overly broad because of possible changes in law. NPS considers this concern to be unfounded. Changes in law frequently have applicability to existing government contracts. Furthermore, this concept is not new and has been standard in NPS concession contracts for many years.

###### Section 2(b). Areas

###### Section 2(c). Capital Improvement

###### Section 2(d). Concession Facilities

Several commenters suggested that the contract should spell out in more detail the concessioner's responsibility for maintenance of Concession Facilities. The Maintenance Plan that is attached to each NPS concession contract describes in detail the maintenance responsibilities of the concessioner.

###### Section 2(e). Director

###### Section 2(f). Exhibit or Exhibits

###### Section 2(g). Gross Receipts

The general concessioner organization objected to the definition of gross receipts on several grounds, stating, among other matters, that NPS should have no "right" to receive a franchise fee on the activities of the concessioner outside of park areas. However, the definition of gross receipts refers to receipts generated "pursuant to the rights granted by this contract." It is entirely appropriate that NPS seek a franchise fee in the form of a percentage of the concessioner's gross receipts for all receipts generated pursuant to the rights granted by the concession contract.

The commenter requested a change to exclusion (ix), renumbered (9), to clarify that payments from leasehold surrender interest are excluded from gross receipts. No change has been made because the definition, as proposed, does not include the concept that payments of leasehold surrender interest are included in gross receipts.

Item (x), renumbered (10), has not been changed as requested by the commenter. The commenter misunderstands it. The provision applies to taxes that are added to approved sale prices that are collected by the concessioner and remitted to the taxing authority.

Most of the other technical suggestions made by the commenter have been considered and rejected as inappropriate. Particularly, the terms of the definition preclude the concern that gross receipts include payments to the concessioner for work the concessioner may perform for NPS. Any such payments would necessarily be under the terms of a procurement contract and not a concession contract.

Another commenter requested that the definition of gross receipts be changed so as to state that the franchise fee for outfitters and guides is calculated only on activities conducted within park area boundaries pursuant to the rights granted by the contract. NPS has

not made this change as it considers that it has a right and an obligation to collect franchise fees on all revenues of a concessioner derived from the rights granted by the contract regardless of where the activities occur. The commenter, however, argues that some NPS field managers attempt to calculate franchise fees based on all receipts of a concessioner, no matter how derived. If this is true, it is a management error, not a matter that requires changes to the standard contract.

###### Section 2(h). Gross Receipts of Subconcessioners

The general concessioner organization states that the gross receipts of subcontractors should have the same exclusions as concessioner gross receipts. NPS has changed this section in the final contract to make clear that the gross receipts of subcontractors reported to the concessioner are not subject to exclusions but that the general exclusions applicable to the concessioners' gross receipts extend to its gross receipts generated by the subcontractor.

###### Section 2(i). Leasehold Surrender Interest

###### Section 2(j.) Leasehold Surrender Interest Value

###### Section 2(k). Major Rehabilitation

###### Section 2(l). Possessory Interest

###### Section 2(m). Real Property Improvements

###### Section 2(n). Superintendent

###### Section 2(o). Visitor Services

A commenter states that the words "Section 3(a)" should be removed so as to include services provided by the concessioner no matter where referenced in the contract. However, Section 3(a) is the only place in the standard contract that describes visitor services.

NPS has also added a new definition, (f), to this section to clarify that the term "days" used throughout the contract refers to calendar days. This section has been re-lettered accordingly.

##### *Section 3. Services and Operations*

###### Section 3(a). Required and Authorized Visitor Services

A commenter suggested that the inclusion of the instruction under this section to the effect that a concessioner may only provide unspecified visitor services "incidental" to the specified visitor services will stifle innovative concession programs and the concessioner's ability to meet the expectations of the public. NPS

disagrees, and notes that this instruction has been standard in NPS concession contracts for many years. In addition, concession contracts may be amended by agreement of the parties to add additional services in certain circumstances. NPS, in the amendment to 36 CFR part 51, has addressed the scope of additional services that may be added to a concession contract by contract amendment in response to public comments. In light of 36 CFR part 51, the sentence regarding incidental services has been deleted in the final contract.

#### Section 3(b). Operation and Quality of Operation

Several commenters objected to this section on the grounds that it is too vague, i.e., operations must be conducted to the satisfaction of NPS. NPS disagrees. In the first instance, it notes that all existing NPS concession contracts contain this provision in one form or another, including the contracts of all of the members of the general concessioner organization. NPS is unaware of any litigation at least since 1965 based on the alleged vagueness of this term. A comment also suggests that the phrase "except as may be provided by the Director" be added to the second sentence of this provision. NPS has made a change to reflect this comment.

#### Section 3(c). Operating Plan

Several commenters objected to this provision as it gives the Director authority to amend the terms and conditions of a contract's Operating Plan. However, NPS notes that this circumstance is required by the obligations of NPS under law to ensure that a concessioner's operations are not detrimental to the resources of the area or to park visitors.

The concept that NPS and the concessioner could agree ten or twenty years in advance as to the details of the concessioner's operations in the future is untenable. For example, circumstances may occur where, in an effort to protect the safety of park visitors, NPS needs to limit the hours that a hotel or restaurant may be open. If NPS had agreed in an Operating Plan that a hotel or restaurant would be open certain hours, and any change in the Operating Plan was subject to agreement by the concessioner, NPS could be effectively precluded from adequately and appropriately protecting park visitors to reflect the changed circumstances.

Accordingly, the Operating Plan is necessarily subject to change by NPS so that it may carry out its responsibilities under law for the proper management of

park areas. However, the provision expressly states that changes may not be inconsistent with the terms and conditions of the main body of the contract. NPS notes that this concept is contained in the prior NPS standard concession contract. It is not a new provision. NPS has modified this provision in the final contract, in response to comments, to make clear that any changes to an operating plan must not only be consistent with the terms of the main body of the contract but must also be reasonable and in furtherance of the purposes of the contract.

#### Section 3(d). Merchandise and Services

##### Section 3(d)(1)

The general concessioner organization states that this provision is too broad. However, this same (or similar) provision is contained in all existing concession contracts, including the contracts of all of the members of the organization. NPS does not consider it to be too broad; rather, it provides the NPS the ability to carry out its responsibilities under law for the proper management of park areas.

##### Section 3(d)(2)

A commenter objected to this provision on the grounds that it is too broad, suggesting that it applies to confirmation of reservations and other day-to-day activities of a concessioner. In response, NPS has included the word "promotional" to modify "material" in the final contract. As requested by the general concessioner organization, the phrase "in connection with the services provided under the Contract" has been included in the final contract.

##### Section 3(d)(3)

The general concessioner organization objected to the term "all" as contained in this section. NPS has deleted the word in the final contract.

#### Section 3(e). Rates

The general concessioner organization requests that the standard contract contain provisions that allow the concessioner pricing flexibility without gaining the approval of NPS. NPS does not generally include in concession contracts rate approval provisions except by way of reference to NPS rate approval guidelines. However, the NPS rate approval guidelines do provide for pricing flexibility without NPS approval in certain circumstances.

#### Section 3(f). Impartiality as to Rates and Services

NPS has added the phrase "subject to Section (f)(2) and (f)(3) below" to this

provision as requested by the general concessioner organization. It also notes that Exhibit C was published for public comment on February 23, 2000. It has also changed Section 3(e)(2) to make clear that any modification of a pricing policy by NPS will be in the course of the general rate approval program.

#### Section 4. Concessioner Personnel

##### Section 4(a)(1)

##### Section 4(a)(2)

The general concessioner organization and others objected to this section on the grounds that Exhibit C may be unlawful as a result of a judicial decision. The Exhibit C included in the standard concession contract meets all legal requirements.

##### Section 4(a)(3)

##### Section 4(a)(4)

Several commenters objected to this section as being too burdensome. NPS has limited its application in the final contract to persons to whom a job has been offered. It has not deleted the word "appropriate" as requested by one commenter. The word indicates that the level of effort regarding background checks is to be commensurate with the circumstances.

##### Section 4(a)(5)

Several commenters objected to this section on the grounds that it is impracticable to achieve. It has been deleted from the final contract.

##### Section 4(a)(6)

##### Section 4(a)(7)

The general concessioner organization objected to this section on the grounds that it may require a concessioner to fire an employee. That is correct. It may be necessary to for a concessioner to fire an employee, e.g., an employee that is stealing from guestrooms, in order to correct the situation. However, the word "fully" has been deleted in the final contract as unnecessary.

##### Section 4(a)(8)

Several commenters objected to the requirement that concessioners maintain a drug free workplace to the "greatest extent possible." NPS, however, considers that most concessioners and the American public share this goal.

##### Section 4(a)(9)

##### Section 4(a)(10)

In response to a comment by the general concessioner organization, NPS has changed this section in the final contract to make clear that it is

operative only when an employee is found to be in violation of controlled substance laws.

#### Section 4(b). Employee Housing

NPS has changed this section, in response to comments, to limit it to the reasonableness of rates a concessioner charges employees for housing. It has also changed the requirements for employee recreational activities in response to comments.

#### Section 5. Legal, Regulatory and Policy Compliance

##### Section 5(a)

The general concessioner organization objected to this section "if it purports to give the government the right to renege on vested contract rights." NPS considers that the section is appropriate and in accordance with existing law regarding the rights of the Congress or an executive agency to amend statutes or regulations promulgated under statutes. NPS does not consider that this section gives NPS the ability to alter vested contract rights.

##### Section 5(b)

The existing concessioner organization suggested that this section be changed to make clear that it applies to violations of law by the concessioner. NPS has made a change in the final contract in response to this comment.

#### Section 6. Environmental and Cultural Protection

On February 23, 2000, NPS published a revised proposed version of this section (and minor modifications to related sections) for public comment. Thirteen public comments were received and are responded to as follows (except for comments that were repetitive of comments received earlier on the proposed concession contract and regulations).

##### 1. Addition of a New "Whereas Clause"

One comment suggested that this introductory clause is superfluous. NPS disagrees. The clause sets forth an understanding of the environmental objectives of the contract. It is included in the final contract.

##### 2. Modification of the Definition of "Applicable Laws"

No comments discussed this definition except as a reiteration of earlier comments.

##### 3. Addition of a Definition of "Best Management Practices"

The general concessioner organization objected to the concept of "Best Management Practices" to the extent

that implementation of BMPs as defined would not provide the concessioner a financial return. NPS considers that in many instances the implementation of BMP's will provide a specific return on investment. In other circumstances, NPS considers that investment in BMPs is likely to enhance the quality of the concessioner's operations and, therefore, indirectly provide financial return.

Another commenter stated that it considers the definition to be vague. NPS does not consider this to be the case. The concept of BMPs is not new; it is well known in many commercial settings. The commenter also asked several specific questions regarding implementation of BMPs. However, the applicability of the BMP concept to particular circumstances cannot be done in the abstract. NPS does note, however that the BMP implementation is required only to the extent reasonable in light of the particular circumstances of the contract.

Another commenter suggested a change to the definition to the effect that BMPs are practices not required by law or are used in the absence of regulatory requirements. NPS does not consider this definition to be accurate.

The definition of BMPs as proposed by NPS is contained in the final contract.

##### 4. Proposed Change to Section 5

A comment suggested that requiring notice of violation of environmental laws and taking corrective action is ambiguous and burdensome. NPS does not consider either to be the case. The provision is included in the final contract.

##### 5. Proposed Changes to Section 6

*Section 6(a). Environmental Management Objectives.* A comment suggested that NPS adopt a corresponding obligation to incorporate BMPs in its activities. This is being done administratively in the form of new environmental management policies and practices being developed for management of the national park system.

*Section 6(b). Environmental Management Program.* A comment questioned how NPS intends to take into account the costs associated with the development of an Environmental Management Program by NPS. NPS considers that the costs of environmental management activities are costs of doing business by all commercial entities that engage in activities that may affect the environment. NPS does not consider that associated costs for these purposes

require any more consideration by NPS than a concessioner's other costs, e.g., insurance, maintenance, personnel, etc.

A comment suggested that this subsection should be amended to allow for other methods of measuring environmental performance. NPS, however, considers that the identification of specific goals and targets is the best means to achieve the purposes of the Environmental Management Program.

A commenter suggested that the goals for the Environmental Management Program should be established by NPS rather than the concessioner and that they must meet minimums set by NPS. This, however, is not the intention of NPS. The plan is to be developed by the concessioner to meet the objectives set forth in Section 6(a).

Several comments objected to the term "environmental audits" as used in this section as having unintended legal implications. An environmental consulting firm suggested changing the term to environmental "self-assessments." This change has been made in the final provision.

The environmental consulting firm also suggested that the provision require environmental outreach programs to be conducted by the concessioner. NPS considers this to be an appropriate objective but believes that it should be achieved through encouragement rather than by contractual obligations. The same is true with the comment's suggestion for concessioner employee award programs for exceptional environmental performance.

*Section 6(c). Environmental Performance Measures.* A commenter suggested that a new provision be added to this section requiring the concessioner to comply with the NPS environmental audit program. This comment misunderstands the nature of this program.

*Section 6(d). Environmental Data, Reports, Notifications, and Approvals.* A commenter suggested that the responsibility for notifications of discharges should be limited to discharges on lands assigned to the concessioner. NPS disagrees. Discharges anywhere in the vicinity of the park area are of concern to NPS.

The same commenter suggested that a concessioner should not have to submit private communications with counsel to NPS. However, section (d)(5) does not state such a requirement.

A comment suggested that the term "waste stream" is vague. NPS disagrees and notes that the types of waste a concession operation will generate will vary from park to park. No other

comments suggested that the term was vague.

The same comment suggested that section (d)(3) may require notice of any type of waste, not just hazardous substances. However, the section only applies to waste that is subject to regulation under applicable law.

A comment suggested that notifications be protected against public disclosure. Usual public availability rules (under the Freedom of Information Act) will apply to notifications received by NPS.

A comment suggested that the requirement for a concessioner to give NPS notice of violations may be inconsistent with laws that give States environmental enforcement responsibilities in certain areas. The NPS requirement is not inconsistent with these laws. NPS has a right as owner of the property to be made aware of violations of law by a concessioner, irrespective of the law's enforcement authority.

A comment stated that requiring notice of any "threatened" notice of violation is too broad. NPS has changed this section to make clear that it applies only to written communication from appropriate authorities.

*Section 6(f). Corrective Action.* A comment, referring to comments on the initial proposed section 6, requested the deletion of the word "clean up" on the grounds that only clean up required by law or specific guidelines incorporated into the contract should be allowed. NPS disagrees. NPS has the right, as the owner of the property, to require concessioners to clean up in the event of environmental accidents. As to guidelines for clean up, they will be dealt with as necessary in operation and maintenance plans and NPS policies. The comment also requested a clarification that this section does not apply to the removal of building materials already incorporated into structures. This may generally be the case, but, if required by Applicable Laws, such removal must be undertaken.

Several comments suggested that it is unclear that this section is intended to be applicable only to violations of Applicable Laws. NPS considers that the section is clear that this is the case. Another comment suggests that the phrase "response actions necessary to remediate the release is vague." NPS disagrees and notes that only two duplicative comments made this point.

This section was incorrectly numbered and is now subsection (e) in the final contract.

*Section 6(g). Indemnification and Cost Recovery for Concession*

*Environmental Activities.* A comment suggested that subsection (g)(2) be amended to clarify that NPS orders for environmental clean up or corrective action may not be inconsistent with requirements of enforcement authorities. NPS agrees and has made a clarification to this effect.

A comment suggested that the indemnification clause of this section should be mutual. NPS, however, even if this were appropriate, does not have legal authority to enter into indemnification provisions. The same comment suggested that the indemnification clause should make clear that the indemnification does not extend to losses caused by the United States. NPS considers that the clause is clear in this respect. The comment also states that costs to be assessed must be reasonable. NPS considers that this is implicit in the provisions. Finally, the comment suggests that the provision should include a clause to the effect that it does not foreclose the concessioner's right to collect costs from a responsible third party. NPS has included such a provision in the final contract.

#### 7. Adding a New Subsection to Section (a)(3)

No express comments were received on this change. It has been included in the final contract.

#### 8. Amendment of Proposed Section 15(b)

No express comments were received on this section. It has been added to the final contract.

#### 9. Amending Section 16 of the Proposed Contract

No express comments were received in response to this proposed change.

#### *Section 7. Interpretation of Area Resources*

##### Section 7(a)

The general concessioner organization objected to this section as being too vague. It has been modified in the final contract to address the concerns of the commenter.

##### Section 7(c)

This section has been deleted as unnecessary in the final contract.

#### *Section 8. Concession Facilities Used in Operations by the Concessioner*

##### Section 8(a). Assignment of Concession Facilities

Several commenters objected to this section on the grounds that it permits NPS to assign additional lands or buildings to the concessioner without

its consent. The section, however, does not say this. Adding additional concession facilities to the concessioner's land assignment would require mutual agreement.

##### Section 8(b). Concession Facilities Withdrawals

The general concessioner organization objected to this section on the same grounds it objected to Section 8(a). However, Section 8(b) is different. It permits NPS to withdraw land assignments without the agreement of the concessioner in limited circumstances, *i.e.*, that withdrawal is necessary for the enhancement or protection of park area resources or visitor protection and enjoyment, the operations utilizing the land have been terminated, or the land is no longer necessary for the concession operation.

NPS notes that this provision is unchanged from the prior standard contract with respect to resource and visitor concerns. The right to withdraw assignment in these circumstances is necessary in order to carry out NPS's responsibilities for management of park areas. However, in response to the comment, NPS has deleted the word "enhancing" in the final contract. NPS has not deleted the right to withdraw land when it is no longer necessary for the purposes of the concessioner's operations.

Commenters objected to this right; however, it is necessary to permit NPS to carry out its statutory responsibility to only permit "necessary and appropriate" concession facilities and activities on parklands. Circumstances change over time so that land assigned to a concessioner as "necessary" may cease to be necessary at a later date.

However, NPS, in response to comments, has included in Section 8(c) the provision that the concessioner may terminate the concession contract in the event of permanent land assignment withdrawals by the Director which the concessioner considers are essential for the concessioner to provide the visitor services required by the contract.

##### Section 8(c). Effect of Withdrawal

The general concessioner organization requested that the word "partial" be included before the word "termination" in the first sentence. However, the commenter apparently misunderstands this section. NPS would be obliged to pay the concessioner for any leasehold surrender interest it may have in any permanently withdrawn capital improvement. The organization also asked that provisions be included in the contract for payment to the concessioner

for any personal property associated with withdrawn Concession Facilities.

NPS does not consider this to be appropriate. Except in special circumstances, personal property is owned by the concessioner and may be disposed of as the concessioner sees fit.

This section is unchanged in concept from the current standard concession contract.

#### Section 8(d). Right of Entry

The general concessioner organization objects to this section on the grounds that it is overbroad. NPS considers the provision necessary to properly carry out its responsibilities for administration of the park area. It also notes that the United States is the owner of all Concession Facilities within the boundaries of the park area.

#### Section 8(e). Personal Property

The general concessioner organization and others objected to this section on the grounds discussed under 8(c) and also on the grounds that this section gives NPS too much authority to withdraw improvements. However, the section by its terms only applies to personal property, not real property improvements.

#### Section 8(f). Condition of Concession Facilities

The general concessioner organization objects to this section on the grounds that a concessioner should not be responsible for deficiencies in a building assigned to it by the government.

However, the responsibility for maintenance of government assigned property is discussed in Section 10 of the contract. The prospective concessioner should take steps to be aware of the condition of the facilities to be assigned to it prior to submitting a proposal for a contract. As discussed under section 8(a) above, the concessioner cannot be assigned additional lands or buildings under the contract without the concessioner's consent. NPS, in these circumstances, considers this provision to be appropriate.

#### Section 8(g). Utilities Provided by the Director

The general concessioner organization objected to this section, stating that it should be more specific about what utilities may be provided by NPS and at what cost. NPS has not made these changes as it would be difficult to describe all possible types of utilities that may be applicable to the circumstances of particular park areas. NPS also notes that it cannot commit to

make utilities available to a concessioner, as NPS cannot predict to what extent it will have funds available to construct and operate utilities. This section has been changed to provide that rates for utilities shall be established in accordance with applicable laws. NPS is not in a position to establish prospectively by concession contract the rates of utility services that a concessioner may wish to purchase over the term of a concession contract.

#### Section 8(h). Utilities Provided by the Concessioner

The general concessioner organization objected to this section on the grounds that a concessioner should have a right to obtain utilities from a third party without the consent of NPS and to grant utility companies access to park property without the consent of NPS. These suggestions manifestly conflict with the responsibilities of NPS regarding protection of park areas.

##### Section 8(h)(1)

The general concessioner organization objects to this section on the grounds that it requires a concessioner to purchase water rights and turn them over to NPS. The section, however, does not say this. Rather, it states that a concessioner shall acquire necessary water rights through applicable State procedures and assign any rights obtained to NPS. The section does not require purchase of existing water rights by the concessioner. This section has been in NPS concession contracts for many years.

##### Section 8(h)(2)

The general concessioner organization objected to this section on grounds that it is unfair that the concessioner must provide utilities to the Director at cost. NPS does not consider it good business to authorize a concessioner to install utilities in a park area and make a profit on the utilities when provided to the government. This section has been in NPS concession contracts for many years.

##### Section 8(h)(3)

This section refers to appliances and machinery installed in connection with utility systems. NPS does not believe these terms to be ambiguous. However, the general concessioner organization objected to this section on the grounds that it is ambiguous. NPS has not changed this section in the final contract as NPS believes that it is not vague or ambiguous. This section has not been materially altered from previous versions of the standard contract.

#### Section 9. Construction or Installation of Real Property Improvements

##### Section 9(a). Construction of Real Property Improvements

A comment suggested that this section should make clear that it only applies to construction on government property. NPS considers that the text of this section makes this clear.

##### Section 9(b). Removal of Real Property Improvements

The general concessioner organization objected to this section on the grounds that NPS, not the concessioner, owns salvage from demolished Capital Improvements. NPS has changed this section in the final rule in response to this comment.

The organization also objects to being required to restore land it occupies during a concession contract to a natural condition. NPS disagrees. Land disturbed for the purposes of a concession operation should be subject to restoration by the concessioner.

##### Section 9(c). Leasehold Surrender Interest

##### Section 9(d). Concession Facilities Improvement Program

##### Section 9(d)(1)

The general concessioner organization suggests that this section be changed to reference the Department of Labor's CPI-U Index. NPS has made this change in the final contract. The organization also requests that a ceiling on improvement costs be included. NPS has not accepted this suggestion. A concessioner is able to make its own cost estimates in advance of contract award.

##### Section 9(d)(2)

##### Section 9(d)(3)

The general concessioner organization argues that this section is too vague. NPS disagrees and notes that the substance of most of this section has been contained in NPS concession contracts for many years. The provisions clearly state the obligations of the parties regarding commencement of construction.

#### Section 10. Maintenance

##### Section 10(a). Maintenance Obligation

Several commenters objected to this section on grounds that it is too vague. They suggest that the contract should cover in detail all aspects of maintenance. NPS disagrees with this. Maintenance needs will change from time to time and cannot possibly be fully anticipated over the life of a long-term concession contract.

### Section 10(b). Maintenance Plan

Several commenters objected to this section for the reasons discussed above with respect to Operating Plans, i.e., that it allows NPS to revise Maintenance Plans without the agreement of the concessioner. The NPS response is the same. NPS must have the ability to specify maintenance obligations of a concessioner over the term of a contract in order to carry out its responsibilities to protect and preserve park resources and visitors. Maintenance requirements are not static.

For example, it may be determined during the term of a contract that the use of a certain type of paint is detrimental to a native plant species located in the vicinity of a hotel. Unless the use of the paint was determined to be unlawful under Applicable Laws, NPS would not necessarily be in a position to effectively require that use of the paint be stopped if a change to the Maintenance Plan required the agreement of the concessioner.

Accordingly, no change has been made with respect to the general ability of NPS to modify maintenance plans. However, in response to comments, NPS has changed this section in the final contract to state that changes to a Maintenance Plan must reflect reasonable requirements in furtherance of the purposes of the contract.

### Section 10(c). Repair and Maintenance Reserve

The general concessioner organization argues that this provision is illegal for the reasons discussed in its comments on the proposed NPS concession contracting regulations. These comments are addressed in the preamble to the final regulations.

NPS has made a change in this section in response to comments. This is to permit any funds left in the account at the end of the contract to remain the property of the concessioner upon the expiration or termination of the contract. However, this section has also been changed to expressly state that any failure by the concessioner to expend funds from the reserve in accordance with its purposes will be considered as a material breach of the contract.

The general concessioner organization made a number of other comments regarding this section that were duly considered by NPS. To the extent that they did not repeat legal arguments made in comments on the proposed concession regulations, NPS does not consider them to be of merit.

One commenter suggested that this provision constitutes an illegal taking of property. However, the provision

merely requires a concessioner to maintain government property assigned to it and to escrow sufficient funds for this purpose. This is standard practice in commercial leases.

### Section 11. Fees

#### Section 11(a). Franchise Fees

The general concessioner organization requested deletion of the second sentence of this section on the grounds that a concessioner should have a right to request a waiver of franchise fees under section 407(b) of the 1998 Act. This is not the case. section 407(b) refers to an adjustment of franchise fees, not a waiver. Section 407(b) is reflected in the terms of Subsection 11(d) of this section.

#### Section 11(b). Payments Due

The general concessioner organization suggests that any franchise fee overpayments due a concessioner at the expiration of a concession contract should be remitted to the concessioner by NPS. NPS has made this change in the final contract.

#### Section 11(c). Interest

The general concessioner organization suggests that NPS should have discretion not to charge interest on overdue payments. NPS disagrees. In fact, it has a legal obligation to charge interest on overdue payments to the government. The commenter also objects to the last sentence as vague and overbroad. However, all the sentence states is that the Director may impose penalties for late payments in accordance with applicable law. NPS does not consider this sentence to be vague or overbroad.

#### Section 11(d). Reconsideration of Franchise Fees

NPS has made several changes to this section in response to the comments of the general concessioner organization (and has used the term "adjustment" of franchise fees to track the term used in the 1998 Act).

First, NPS has made all aspects of the adjustment process (except arbitration of an appropriate adjusted fee if the parties agree that extraordinary, unanticipated changes have occurred) subject to mutual agreement so that no advantage is given NPS. This is consistent with changes in the final concession regulations. Second, it has provided for prospective adjustments only, as requested by the general concessioner organization. Third, NPS has amended the time periods in accordance with the suggestions of the commenter. Other conforming changes

have been made to this section in the final contract.

NPS notes that several commenters objected to the arbitration procedures to be followed. The section has been amended to state that the procedures are to be agreed to by the parties or are to be established by the arbitration panel.

### Section 12. Indemnification and Insurance

#### Section 12(a). Indemnification

The general concessioner organization objected to the indemnification provision as being too broad. NPS has considered the views of the commenter but believes the terms of the indemnification provision are appropriate. Nevertheless, NPS has changed the phrase "relating to" to "connected with" in this section to address this concern. Another commenter suggested that a concessioner should not be required to indemnify NPS if the injury arose from the negligence of NPS. NPS does not consider that the indemnification provision as written suggests this.

#### Section 12(b). Insurance in General

Several commenters objected to this on the grounds that it permits the Director to alter the contract's insurance requirements. However, the liabilities of a concessioner necessarily will change over time as a result of new construction, new concessioner activities or means to implement activities, or changing visitor patterns and activities. NPS must have the authority to require changes to the concessioner's insurance program to reflect changing conditions in order to properly provide for the protection of park resources and visitors. NPS, in response to comments, has added a sentence to this section in the final contract setting forth the scope of any changes that may be required.

#### Section 12(c). Commercial Public Liability

NPS has amended subsection (4) in response to public comments. However, NPS has an obligation to park visitors to make sure that concessioners carry adequate insurance. Levels and types of insurance necessarily change over time.

#### Section 12(d). Property Insurance

Several comments were made regarding this section. NPS has duly considered them and has made a change to the final contract to make clear that replacement cost coverage is the basis of required property insurance. In addition, it has changed the final contract to make clear that the concessioner may obtain additional

insurance other than that required by NPS or in higher amounts. Also, it has changed the final contract to clarify that the concessioner is responsible for repair or replacement of damaged property even if insurance proceeds are not sufficient.

The general concessioner organization argued that monies a concessioner spends to repair or replace property over and above insurance proceeds should result in leasehold surrender interest. NPS agrees with this to the extent that the concessioner may construct or install a capital improvement within the meaning of 36 CFR Part 51 with its own funds (not insurance proceeds).

Finally, NPS has changed this section in the final contract to provide that any additional insurance NPS may require must be consistent with industry practices.

### *Section 13. Bonds and Liens*

#### *Section 13(a)*

The general concessioner organization states that historically NPS has not required bonds. However, NPS concession contracts for many years have contained a bond provision. NPS has changed this section in the final contract to make clear that bond amounts are to be reasonable in response to a comment.

#### *Section 13(b). Liens*

The general concessioner organization objects to this section only to the extent that it should not include personal property of a concessioner located outside the boundaries of the park area. NPS has amended this section in the final rule to reflect this comment. Another commenter suggested that the government's lien is unworkable in the marketplace. However, this lien provision has been included in NPS concession contracts at least since 1965. NPS considers it to be workable.

### *Section 14. Accounting Records and Reports*

#### *Section 14(a). Accounting System*

The general concessioner organization considers that the \$250,000 threshold for accrual method accounting is too low. NPS disagrees. NPS has a direct interest in the accounting methods of concessioners that pay a franchise fee on gross receipts. NPS does not consider that the benefits of the accrual method are outweighed by any additional costs that the general concessioner organization asserts may result from use of accrual method accounting.

The general concessioner organization reads subsection (3) of this section as

suggesting that it is not proper for a concessioner to purchase services from an affiliate or allocate overhead. This is not the case. The provision only states that the concessioner must keep its books in such a manner that no diversion or concealment of profits may result from such arrangements. This has been a standard provision (in the General Provisions section) of concession contracts for many years.

#### *Section 14(b).—Annual Financial Report*

The general concessioner organization requested several changes to this section. In response, NPS has changed the time period in subsection (1) to 120 days. It has not changed the thresholds for accounting by certified independent accountants in order to protect the interests of the United States in the collection of franchise fees.

#### *Section 14(c). Other Financial Reports*

The general concessioner organization objected to the last sentence of subsection (1) on the grounds that the concepts of useful life and book value are irrelevant because of leasehold surrender interest. NPS has changed the section in accordance with this comment.

### *Section 15. Other Reporting Requirements*

The general concessioner organization objected to this section as overbroad. NPS has considered these comments but believes that the described reporting requirements are necessary for the proper administration of the park area.

### *Section 16. Suspension and Termination*

#### *Section 16(a). Suspension*

The general concessioner organization objected to the circumstances in which NPS may suspend a concessioner's operations under this section. NPS notes that this provision is the same as in its current standard contract. However, NPS has modified this section in the final contract in response to this comment and to more directly track 36 CFR Part 51.

#### *Section 16(b). Termination*

##### *Section 16(b)(1)*

A commenter suggested that there is no authority for NPS to have the ability to terminate concession contracts "nor is such power provided any government agent under general contract law." This, however, is not the case. NPS clearly has not only the authority but the obligation to include termination provisions in concession contracts in

circumstances, among others, where park area and visitor protections so require. NPS also notes that government procurement contracts almost always contain a "termination for convenience" clause which permits the government to terminate the contract for any reason whatsoever. The termination clause contained in most current NPS concession contracts and in the final new contract is significantly more restrictive (to the benefit of the concessioner) than the standard government termination for convenience clause. NPS also notes that this section is the same as contained in the current NPS standard contract. However, NPS has modified this section in the final contract in response to this comment and to more directly track 36 CFR part 51. It has also included the modifier "material" with respect to contract breaches in response to a comment.

##### *Section 16(b)(2)*

The general concessioner organization objected to this section on the grounds that it should not permit partial termination of a concession contract by NPS. NPS notes that this section has been contained in NPS concession contracts for many years. However, in response to this comment, NPS has deleted reference to partial termination.

##### *Section 16(b)(3)*

The general concessioner organization objected to this section with respect to the "sole discretion" provided to NPS. NPS has deleted this phrase in the final contract. NPS has also, in response to the comments of the general concessioner organization, defined "repeated breaches" in the final contract.

##### *Section 16(b)(3)*

The general concessioner organization stated that this section should permit the concessioner an appropriate time period in which to obtain the dismissal of such filings. NPS has not made this change, as termination in these circumstances is discretionary, not mandatory.

##### *Section 16(c). Bankruptcy*

In response to the comments of the general concessioner organization, NPS has amended this section in the final rule to provide for notification of NPS in the event of the filing of a petition in bankruptcy and to make clear that the description of a concession contract with respect to bankruptcy law is the position of NPS.



Section 16(d). Requirements in the Event of Termination

Section 16(d)(1)

NPS has included the phrase "in accordance herewith" after the word "contract" in this section as requested by the general concessioner organization.

Section 16(d)(2)

Section 16(d)(3)

The general concessioner organization objects to this provision which requires a concessioner, if requested by NPS, to continue to operate for a period of time after contract expiration or other termination. This has been a standard provision of concession contracts for many years. However, in light of NPS's new authorities under the 1998 Act, NPS does not consider this provision to be necessary and has deleted it from the final contract.

Section 16(d)(4)

NPS has considered the comments of the general concessioner organization and does not believe that this section should be changed. The provision provides adequate compensation to a prior concessioner for the temporary use by a new concessioner of the prior concessioner's personal property. NPS notes, in response to a comment, that the compensation provisions for temporary use of a concessioner's property are generally the same or even more beneficial to the concessioner than those that have been contained in NPS concession contracts at least since 1965.

*Section 17. Compensation*

Section 17(a). Just Compensation

The general concessioner organization states that this provision requires the concessioner to accept the compensation provided by Section 17 even if NPS breaches the concession contract.

However, the provision is only applicable to the circumstances described in the provision, which do not reference breach of contract by NPS.

Section 17(b). Compensation for Contract Expiration or Termination

Section 17(b) has been reworded for clarity, to reflect the deletion of subsection (c), and to delete its last sentence as unnecessary.

Section 17(c). Compensation When Contract Terminated for Default

The general concessioner organization objected to this provision on the grounds that NPS may not offset leasehold surrender interest payments

based on damages caused by a concessioner's breach of contract. NPS does not necessarily agree with this comment but has deleted this section in the final contract as unnecessary.

Section 17(d). Procedures for Establishing the Value of a Leasehold Surrender Interest

This provision has been changed in accordance with the terms of the final amendment to 36 CFR part 51 and for clarity.

Section 17(e). Compensation for Personal Property

NPS has modified this section in response to comments from the general concessioner organization. Particularly, the contract now provides 30 days in most cases for a concessioner to remove its personal property from a park area after contract expiration or termination. This provision has been moved to Section 16(d). However, NPS does not agree that concession contracts should provide compensation for a concessioner's personal property for the reasons discussed above.

*Section 18. Assignment, Sale, or Encumbrance of Interests*

This section has been clarified in the final contract to make clear that a sale or transfer is subject to all applicable laws, including, without limitation, 36 CFR Part 51. Several commenters were concerned that this provision (and other provisions of the contract) permits NPS to change the conditions for sales and transfers by amending 36 CFR Part 51. Amendments to 36 CFR Part 51, however, or to other laws or regulations, may be made applicable to existing contracts only to the extent permissible under law.

*Section 19. General Provisions*

Section 19(a)

Section 19(b)

The general concessioner organization suggests that this provision requires NPS to release concessioner information. The provision, however, merely states the fact that information provided to NPS by a concessioner is subject to public release if required or authorized by law. NPS has clarified this provision in the final contract in this connection.

Section 19(c)

NPS has modified this section in the final contract in response to a comment from the general concessioner organization that it should be clarified to make clear that it only applies to arrangements where a third party is to

provide visitor services. In addition, NPS has deleted the sentences in this section that permitted subconcessions in limited circumstances. To the extent that NPS may permit subconcessions in the circumstances of a particular concession contract, a contract amendment would be negotiated with the concessioner.

Section 19(d)

Section 19(e)

Section 19(f)

Section 19(g)

Section 19(h)

Section 19(i)

This section has been deleted in the final contract as unnecessary.

Section 19(k)

*Exhibits*

On February 23, 2000, NPS published for public comments proposed exhibits to the proposed standard concession contract. Thirteen comments were received and responded to as follows. An environmental consulting firm made a number of comments on the exhibits requesting that many references to environmental concerns be included in them. Some changes have been made in response to these comments.

Exhibit A. Non-Discrimination (Exhibit C in the Final Contract)

A comment suggested deleting reference to the term "permit." This change has been made in the final contract.

A comment suggested that the posting requirements of this section might be redundant with other federal requirements. The inclusion of this provision in the contract, however, is required by law.

Exhibit B. Existing Facilities (Exhibit D in the Final Contract)

A comment pointed out that the land assignment under this section is limited to "housekeeping purposes." The term "housekeeping" has been deleted in the final contract.

Exhibit C. Assigned Government Personal Property (Exhibit E in the Final Contract)

Exhibit D. Leasehold Surrender Interest as of the Effective Date of the Contract (Exhibit G in the Final Contract)

Exhibit E. Insurance Requirements (Exhibit I in the Final Contract)

The general concessioner organization made a number of suggestions regarding this section. Several changes have been made in the final contract in response

to these comments. However, in general, NPS notes that this Exhibit E is intended to be tailored on a case by case basis to fit the needs of particular concession operations.

A comment objected to the \$5,000 self-insured retention as being inconsistent with some concessioners' business practices. This may be the case, but NPS, in order to protect its interests and those of park visitors, considers this limit to be appropriate.

One commenter objected to the concessioner being required to provide NPS with copies of insurance policies. However, this only occurs upon the express request of NPS.

Several comments objected to the specific deductibles required by this Exhibit. NPS, however, considers that relatively low deductibles are necessary in order to assure that the concessioner will have sufficient resources to cover losses.

The proposed requirement for professional liability insurance has been deleted in response to comments.

A comment stated that flood and other forms of insurance are not always available. NPS notes that the insurance exhibit will be tailored to fit the needs of particular concession operations. If insurance is not obtainable, as determined by the Director, it will not be required.

#### Exhibit F. Sample Maintenance Plan (Exhibit H in the Final Contract)

The published maintenance plan was a sample only. None of its provisions (except for its introduction) are required. Rather, a maintenance plan will be developed for each concession operation on the basis of the circumstances of that operation. Accordingly, the final contract includes only the required introductory paragraph of the maintenance plan but not any of the sample provisions. A number of comments objected in general to the fact that this plan may be changed from time to time by the Superintendent. Such comments were also made in response to the initial publication of the proposed contract. They are discussed in the response to comments on Section 10(b). In addition, in response to a comment, it is noted that NPS administrative guidelines will provide an administrative appeal by the concessioner to the appropriate NPS Regional Director with respect to changes to a Maintenance Plan proposed by a superintendent of a park area.

The plan has been amended to include reference to the fact that amendments to it must be reasonable

and in furtherance of the purposes of the contract.

#### Exhibit G. Operating Plan (Exhibit B in the Final Contract)

The published operating plan is a sample only. None of its provisions (except for its introduction) are required. An operating plan will be developed for each concession operation on the basis of the circumstances of that operation. Accordingly, the final contract includes only the required introductory paragraph of the operating plan but not any of the sample provisions. A number of comments objected in general to the fact that this plan may be changed from time to time by the Superintendent. Such comments were also made in response to the initial publication of the proposed contract. They are discussed in the response to comments on Section 3(c). In addition, in response to a comment, it is noted that NPS administrative guidelines will provide an administrative appeal by the concessioner to the appropriate NPS Regional Director with respect to changes to an Operating Plan proposed by a superintendent of a park area.

The plan has been amended to include reference to the fact that amendments to it must be reasonable and in furtherance of the purposes of the contract.

#### Exhibit H. Concessioner Construction and Repair and Maintenance Project Procedures (Exhibit F in the Final Contract)

A number of comments were made on this exhibit that duplicated comments made on the proposed contract with respect to leasehold surrender interest provisions and related matters.

These comments are responded to under the leasehold surrender interest provisions. In addition, Exhibit H has been changed in the final contract to reflect the changes made to the leasehold surrender interest provisions of the final contract and regulations.

A comment suggested that there is no definition of repair and maintenance projects. Further definitions have been included in the final exhibit in this connection.

A comment suggested that the identification of individuals by function should permit an individual to perform more than one function. NPS considers that this ability is implicit in the terms of the Exhibit.

A comment suggested that the two separate plans should be combined. NPS disagrees. There are clear distinctions between the plans.

A comment suggested that the requirements for identification of projects is vague and subjective. The language has been changed in the final contract to make it more specific.

A comment suggested that the procedures for conferences and review are unduly burdensome. NPS does not believe this to be the case, at least in the circumstances of construction in areas of the national park system. The comment suggested that the complete procedures only be applicable to construction projects. NPS disagrees. Repair and maintenance projects may have the same impacts as construction projects.

A comment suggested that wording should be added providing compensation to the concessioner if a project is not permitted to proceed. NPS does not consider this appropriate. Concessioners are aware that a number of legal and policy considerations must be dealt with before any binding commitment to permit construction on park lands may be made. The risk that proposed construction or repair and maintenance projects may not be approved is a cost of doing business as a concessioner.

A comment suggested that the terms regarding total project cost and total project price do not define what costs and expenses are included. This would be difficult and non-productive in a generic document such as Exhibit H. The expenses and costs associated with projects will be identified on a case by case, subject to the limitations of leasehold surrender interest cost as described in Exhibit A to the contract.

A comment suggested that the exhibit provide for a simplified process in emergency situations. No change has been made but the Superintendent would have such authority in emergency situations.

#### Suggestions for Additional Provisions

Several commenters requested that additional provisions not mentioned in the above discussion be included in concession contracts.

A commenter suggested that a dispute resolution clause be included in the contract. NPS does not consider this appropriate in light of the several arbitration requirements of the contract. In circumstances where a dispute is not subject to arbitration, the matter is subject to resolution under applicable legal procedures.

A commenter also suggested that the contract contain a clause that permits the parties to agree to alternative dispute resolution procedures by mutual agreement. NPS considers that this ability exists under the terms of the

contract as drafted and general contract law.

A commenter suggested that the concession contract contain an exclusivity clause. NPS disagrees for the reasons discussed in response to comments on the amendment to 36 CFR part 51.

A commenter suggested that performance standards should be contained in the contract or in an exhibit. NPS is considering the possibility of adding additional performance measures to concession contracts. For the present, however, NPS considers that the standard contract and its exhibits, particularly the operating and maintenance plans, are adequate for this purpose. NPS also notes that it has previously published for public comment its concessioner evaluation program currently in place.

A commenter suggested that the contract include as an exhibit a standard document equivalent to a non-disturbance and attornment agreement. NPS disagrees that such a document should be included as part of the standard concession contract in light of the greatly varying circumstances of concession contracts with respect to the scopes of activities.

Several commenters suggested including a provision referring to the preferential right to renewal of certain concession contracts that NPS is to grant to some concessioners under certain conditions pursuant to the terms of section 403(7) of the 1998 Act. NPS considers, however, that inclusion of a contractual provision referring to a possible preferential right to renewal under the terms of the 1998 Act would only create confusion as it is impossible to know, upon execution of any particular concession contract, whether the contract will be renewed at all or, if renewed, whether NPS is to give a preferential right of renewal to the concessioner under the terms of the 1998 Act in light of the conditions applicable to the exercise of such preference.

A commenter, in response to the notice regarding the revised section 6 and exhibits, requested that the standard concession contract be republished for further public comment. NPS does not believe this to be in the public interest for the reasons discussed in the preamble to the final regulations (which are equally applicable to the standard contract).

Based on the foregoing, NPS adopts the following standard form concession contract for use in its concession management program, with the understanding that it is only an internal guideline. The Director, in his

discretion, may utilize any form of concession contract he/she may choose consistent with the requirements of the 1998 Act and 36 CFR part 51.

## UNITED STATES DEPARTMENT OF THE INTERIOR

### NATIONAL PARK SERVICE

[Name of Area]

[Site]

[Type of Service]

CONCESSION CONTRACT NO. \_\_\_\_\_

[Name of Concessioner]

[Address, including email address and phone number]

Doing Business As \_\_\_\_\_

Covering the Period  
through \_\_\_\_\_

#### Concession Contract

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#### [Corporation]

THIS CONTRACT is made and entered into by and between the United States of America, acting in this matter by the Director of the National Park Service, through the Regional Director of the \_\_\_\_ Region, (hereinafter referred to as the "Director"), and \_\_\_\_\_, a corporation

organized and existing under the laws of the State of \_\_\_\_\_ (hereinafter referred to as the "Concessioner"):

*[Partnership]*

THIS CONTRACT is made and entered into by and between the United States of America, acting in this matter by the Director of the National Park Service, through the Regional Director of the \_\_\_\_ Region, hereinafter referred to as the "Director", and \_\_\_\_\_ a partnership organized under the laws of the State of \_\_\_\_\_, hereinafter referred to as the "Concessioner":

*[Sole Proprietorship]*

THIS CONTRACT made and entered into by and between the United States of America, acting in this matter by the Director of the National Park Service, through the Regional Director of the \_\_\_\_ Region, hereinafter referred to as the "Director," and, \_\_\_\_\_, an individual of, doing business as \_\_\_\_\_, hereinafter referred to as the "Concessioner":

*Witnesseth:*

*That Whereas, [Name of Park, Recreation Area, etc.] is administered by the Director as a unit of the national park system to conserve the scenery and the natural and historic objects and the wildlife therein, and to provide for the public enjoyment of the same in such manner as will leave such Area unimpaired for the enjoyment of future generations; and*

*Whereas, to accomplish these purposes, the Director has determined that certain visitor services are necessary and appropriate for the public use and enjoyment of the Area and should be provided for the public visiting the Area; and*

*Whereas, the Director desires the Concessioner to establish and operate these visitor services at reasonable rates under the supervision and regulation of the Director; and*

*Whereas, the Director desires the Concessioner to conduct these visitor services in a manner that demonstrates sound environmental management, stewardship, and leadership;*

*Now, Therefore, pursuant to the authority contained in the Acts of August 25, 1916 (16 U.S.C. 1, 2-4), and November 13, 1998 (Pub. L. 105-391), and other laws that supplement and amend the Acts, the Director and the Concessioner agree as follows:*

**Sec. 1. Term of Contract**

This Concession Contract No. \_\_\_\_\_ ("CONTRACT") shall be effective as of \_\_\_\_\_, and shall be for the term of \_\_\_\_\_ (\_\_\_\_) years until its expiration on \_\_\_\_\_, 20 \_\_\_\_ [if the Concessioner

satisfactorily completes the Concession Facilities Improvement Program described in Section 9(e) of this CONTRACT. If the Concessioner fails to complete this program to the satisfaction of the Director within the time specified, then this CONTRACT shall be for the term of \_\_\_\_\_ (\_\_\_\_) years until its expiration on \_\_\_\_\_. The Director may extend this shortened term (but not beyond the original date of expiration of this CONTRACT) in circumstances where the Director determines that the delay resulted from events beyond the control of the Concessioner.]

**Sec. 2. Definitions**

The following terms used in this CONTRACT will have the following meanings, which apply to both the singular and the plural forms of the defined terms:

(a) "Applicable Laws" means the laws of Congress governing the Area, including, but not limited to, the rules, regulations, requirements and policies promulgated under those laws (e.g., 36 CFR Part 51), whether now in force, or amended, enacted or promulgated in the future, including, without limitation, federal, state and local laws, rules, regulations, requirements and policies governing nondiscrimination, protection of the environment and protection of public health and safety.

(b) "Area" means the property within the boundaries of [Name of Park Unit].

(c) "Best Management Practices" or "BMPs" are policies and practices that apply the most current and advanced means and technologies available to the Concessioner to undertake and maintain a superior level of environmental performance reasonable in light of the circumstances of the operations conducted under this CONTRACT. BMPs are expected to change from time to time as technology evolves with a goal of sustainability of the Concessioner's operations. Sustainability of operations refers to operations that have a restorative or net positive impact on the environment.

(d) "Capital Improvement" shall have the meaning set forth in Exhibit A to this CONTRACT.

(e) "Concession Facilities" shall mean all Area lands assigned to the Concessioner under this CONTRACT and all real property improvements assigned to or constructed by the Concessioner under this CONTRACT. The United States retains title and ownership to all Concession Facilities.

(f) "Days" shall mean calendar days.

(g) "Director" means the Director of the National Park Service, acting on

behalf of the Secretary of the Interior and the United States, and his duly authorized representatives.

(h) "Exhibit" or "Exhibits" shall mean the various exhibits, which are attached to this CONTRACT, each of which is hereby made a part of this CONTRACT.

(i) "Gross receipts" means the total amount received or realized by, or accruing to, the Concessioner from all sales for cash or credit, of services, accommodations, materials, and other merchandise made pursuant to the rights granted by this CONTRACT, including gross receipts of subconcessioners as herein defined, commissions earned on contracts or agreements with other persons or companies operating in the Area, and gross receipts earned from electronic media sales, but excluding:

(1) intracompany earnings on account of charges to other departments of the operation (such as laundry);

(2) charges for employees' meals, lodgings, and transportation;

(3) cash discounts on purchases;

(4) cash discounts on sales;

(5) returned sales and allowances;

(6) interest on money loaned or in bank accounts;

(7) income from investments;

(8) income from subsidiary companies outside of the Area;

(9) sale of property other than that purchased in the regular course of business for the purpose of resale;

(10) sales and excise taxes that are added as separate charges to sales prices, gasoline taxes, fishing license fees, and postage stamps, provided that the amount excluded shall not exceed the amount actually due or paid government agencies; and

(11) receipts from the sale of handicrafts that have been approved for sale by the Director as constituting authentic American Indian, Alaskan Native, Native Samoan, or Native Hawaiian handicrafts.

All monies paid into coin operated devices, except telephones, whether provided by the Concessioner or by others, shall be included in gross receipts. However, only revenues actually received by the Concessioner from coin-operated telephones shall be included in gross receipts. All revenues received from charges for in-room telephone or computer access shall be included in gross receipts.

(j) "Gross receipts of subconcessioners" means the total amount received or realized by, or accruing to, subconcessioners from all sources, as a result of the exercise of the rights conferred by a subconcession contract. A subconcessioner will report all of its gross receipts to the

Concessioner without allowances, exclusions, or deductions of any kind or nature.

(k) "Leasehold Surrender Interest" shall have the meaning set forth in Exhibit A to this CONTRACT.

(l) "Leasehold Surrender Interest Value" or the "value" of a Leasehold Surrender Interest shall have the meaning set forth in Exhibit A to this CONTRACT.

(m) "Major Rehabilitation" shall have the meaning set forth in Exhibit A to this CONTRACT.

(n) "Possessory Interest" shall have the meaning set forth in Exhibit A to this CONTRACT.

(o) "Real Property Improvements" shall have the meaning set forth in Exhibit A to this CONTRACT.

(p) "Subconcessioner" means a third party that, with the approval of the Director, has been granted by a concessioner rights to operate under a concession contract (or any portion thereof), whether in consideration of a percentage of revenues or otherwise.

(q) "Superintendent" means the manager of the Area.

(r) "Visitor services" means the accommodations, facilities and services that the Concessioner is required and/or authorized to provide by section 3(a) of this CONTRACT.

### **Sec. 3. Services and Operations**

#### **(a) Required and Authorized Visitor Services**

During the term of this CONTRACT, the Director requires and authorizes the Concessioner to provide the following visitor services for the public within the Area:

(1) *Required Visitor Services.* The Concessioner is required to provide the following visitor services during the term of this CONTRACT:

[Provide a detailed description of required services. Broad generalizations such as "any and all facilities and services customary in such operations" or "such additional facilities and services as may be required" are not to be used.]

(2) *Authorized Visitor Services.* The Concessioner is authorized but not required to provide the following visitor services during the term of this CONTRACT:

[Provide detailed description of authorized services. See note in subsection (a)(1) above.]

#### **(b) Operation and Quality of Operation**

The Concessioner shall provide, operate and maintain the required and authorized visitor services and any related support facilities and services in accordance with this CONTRACT to such an extent and in a manner

considered satisfactory by the Director. Except for any such items that may be provided to the Concessioner by the Director, the Concessioner shall provide the plant, personnel, equipment, goods, and commodities necessary for providing, operating and maintaining the required and authorized visitor services in accordance with this CONTRACT. The Concessioner's authority to provide visitor services under the terms of this CONTRACT is non-exclusive.

#### **(c) Operating Plan**

The Director, acting through the Superintendent, shall establish and revise, as necessary, specific requirements for the operations of the Concessioner under this CONTRACT in the form of an Operating Plan (including, without limitation, a risk management program, that must be adhered to by the Concessioner). The initial Operating Plan is attached to this CONTRACT as Exhibit B. The Director in his discretion, after consultation with the Concessioner, may make reasonable modifications to the initial Operating Plan that are in furtherance of the purposes of this CONTRACT and are not inconsistent with the terms and conditions of the main body of this CONTRACT.

#### **(d) Merchandise and Services**

(1) The Director reserves the right to determine and control the nature, type and quality of the visitor services described in this CONTRACT, including, but not limited to, the nature, type, and quality of merchandise, if any, to be sold or provided by the Concessioner within the Area.

(2) All promotional material, regardless of media format (i.e. printed, electronic, broadcast media), provided to the public by the Concessioner in connection with the services provided under this CONTRACT must be approved in writing by the Director prior to use. All such material will identify the Concessioner as an authorized Concessioner of the National Park Service, Department of the Interior.

(3) The Concessioner, where applicable, will develop and implement a plan satisfactory to the Director that will assure that gift merchandise, if any, to be sold or provided reflects the purpose and significance of the Area, including, but not limited to, merchandise that reflects the conservation of the Area's resources or the Area's geology, wildlife, plant life, archeology, local Native American culture, local ethnic culture, and historic significance.

#### **(e) Rates**

All rates and charges to the public by the Concessioner for visitor services shall be reasonable and appropriate for the type and quality of facilities and/or services required and/or authorized under this CONTRACT. The Concessioner's rates and charges to the public must be approved by the Director in accordance with Applicable Laws and guidelines promulgated by the Director from time to time.

#### **(f) Impartiality as to Rates and Services**

(1) Subject to Section (f)(2) and (f)(3), in providing visitor services, the Concessioner must require its employees to observe a strict impartiality as to rates and services in all circumstances. The Concessioner shall comply with all Applicable Laws relating to nondiscrimination in providing visitor services to the public including, without limitation, those set forth in Exhibit C.

(2) The Concessioner may grant complimentary or reduced rates under such circumstances as are customary in businesses of the character conducted under this CONTRACT. However, the Director reserves the right to review and modify the Concessioner's complimentary or reduced rate policies and practices as part of its rate approval process.

(3) The Concessioner will provide Federal employees conducting official business reduced rates for lodging, essential transportation and other specified services necessary for conducting official business in accordance with guidelines established by the Director. Complimentary or reduced rates and charges shall otherwise not be provided to Federal employees by the Concessioner except to the extent that they are equally available to the general public.

### **Sec. 4. Concessioner Personnel**

#### **(a) Employees**

(1) The Concessioner shall provide all personnel necessary to provide the visitor services required and authorized by this CONTRACT.

(2) The Concessioner shall comply with all Applicable Laws relating to employment and employment conditions, including, without limitation, those set forth in Exhibit C.

(3) The Concessioner shall ensure that its employees are hospitable and exercise courtesy and consideration in their relations with the public. The Concessioner shall have its employees who come in direct contact with the public, so far as practicable, wear a uniform or badge by which they may be

identified as the employees of the Concessioner.

(4) The Concessioner shall establish pre-employment screening, hiring, training, employment, termination and other policies and procedures for the purpose of providing visitor services through its employees in an efficient and effective manner and for the purpose of maintaining a healthful, law abiding, and safe working environment for its employees. The Concessioner shall conduct appropriate background reviews of applicants to whom an offer for employment may be extended to assure that they conform to the hiring policies established by the Concessioner.

(5) The Concessioner shall ensure that its employees are provided the training needed to provide quality visitor services and to maintain up-to-date job skills.

(6) The Concessioner shall review the conduct of any of its employees whose action or activities are considered by the Concessioner or the Director to be inconsistent with the proper administration of the Area and enjoyment and protection of visitors and shall take such actions as are necessary to correct the situation.

(7) The Concessioner shall maintain, to the greatest extent possible, a drug free environment, both in the workplace and in any Concessioner employee housing, within the Area.

(8) The Concessioner shall publish a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace and in the Area, and specifying the actions that will be taken against employees for violating this prohibition. In addition, the Concessioner shall establish a drug-free awareness program to inform employees about the danger of drug abuse in the workplace and the Area, the availability of drug counseling, rehabilitation and employee assistance programs, and the Concessioner's policy of maintaining a drug-free environment both in the workplace and in the Area.

(9) The Concessioner shall take appropriate personnel action, up to and including termination or requiring satisfactory participation in a drug abuse or rehabilitation program which is approved by a Federal, State, or local health, law enforcement or other appropriate agency, for any employee that is found to be in violation of the prohibition on the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

#### *(b) Employee Housing and Recreation*

(1) If the Concessioner is required to provide employee housing under this CONTRACT, the Concessioner's charges to its employees for this housing must be reasonable.

(2) If the visitor services required and/or authorized under this CONTRACT are located in a remote or isolated area, the Concessioner shall provide appropriate employee recreational activities.

#### **Sec. 5. Legal, Regulatory, and Policy Compliance**

##### *(a) Legal, Regulatory and Policy Compliance*

This CONTRACT, operations thereunder by the Concessioner and the administration of it by the Director, shall be subject to all Applicable Laws. The Concessioner must comply with all Applicable Laws in fulfilling its obligations under this CONTRACT at the Concessioner's sole cost and expense. Certain Applicable Laws governing protection of the environment are further described in this CONTRACT. Certain Applicable Laws relating to nondiscrimination in employment and providing accessible facilities and services to the public are further described in this CONTRACT.

##### *(b) Notice*

The Concessioner shall give the Director immediate written notice of any violation of Applicable Laws by the Concessioner, including its employees, agents or contractors, and, at its sole cost and expense, must promptly rectify any such violation.

##### *(c) How and Where to Send Notice*

All notices required by this CONTRACT shall be in writing and shall be served on the parties at the following addresses. The mailing of a notice by registered or certified mail, return receipt requested, shall be sufficient service. Notices sent to the Director shall be sent to the following address:

Superintendent  
Park name  
Address  
Attention:

Notices sent to the Concessioner shall be sent to the following address:

Concessioner  
Address  
Attention:

#### **Sec. 6. Environmental and Cultural Protection**

##### *(a) Environmental Management Objectives*

The Concessioner shall meet the following environmental management objectives (hereinafter "Environmental Management Objectives") in the conduct of its operations under this CONTRACT:

(1) The Concessioner, including its employees, agents and contractors, shall comply with all Applicable Laws pertaining to the protection of human health and the environment.

(2) The Concessioner shall incorporate Best Management Practices (BMPs) in its operation, construction, maintenance, acquisition, provision of visitor services, and other activities under this CONTRACT.

##### *(b) Environmental Management Program*

(1) The Concessioner shall develop, document, implement, and comply fully with, to the satisfaction of the Director, a comprehensive written Environmental Management Program (EMP) to achieve the Environmental Management Objectives. The initial EMP shall be developed and submitted to the Director for approval within sixty days of the effective date of this CONTRACT. The Concessioner shall submit to the Director for approval a proposed updated EMP annually.

(2) The EMP shall account for all activities with potential environmental impacts conducted by the Concessioner or to which the Concessioner contributes. The scope and complexity of the EMP may vary based on the type, size and number of Concessioner activities under this CONTRACT.

(3) The EMP shall include, without limitation, the following elements:

(i) *Policy.* The EMP shall provide a clear statement of the Concessioner's commitment to the Environmental Management Objectives.

(ii) *Goals and Targets.* The EMP shall identify environmental goals established by the Concessioner consistent with all Environmental Management Objectives. The EMP shall also identify specific targets (i.e., measurable results and schedules) to achieve these goals.

(iii) *Responsibilities and Accountability.* The EMP shall identify environmental responsibilities for Concessioner employees and contractors. The EMP shall include the designation of an environmental program manager. The EMP shall include procedures for the Concessioner to implement the evaluation of employee and contractor performance

against these environmental responsibilities.

(iv) *Documentation.* The EMP shall identify plans, procedures, manuals, and other documentation maintained by the Concessioner to meet the Environmental Management Objectives.

(v) *Documentation Control and Information Management System.* The EMP shall describe (and implement) document control and information management systems to maintain knowledge of Applicable Laws and BMPs. In addition, the EMP shall identify how the Concessioner will manage environmental information, including without limitation, plans, permits, certifications, reports, and correspondence.

(vi) *Reporting.* The EMP shall describe (and implement) a system for reporting environmental information on a routine and emergency basis, including providing reports to the Director under this CONTRACT.

(vii) *Communication.* The EMP shall describe how the environmental policy, goals, targets, responsibilities and procedures will be communicated throughout the Concessioner's organization.

(viii) *Training.* The EMP shall describe the environmental training program for the Concessioner, including identification of staff to be trained, training subjects, frequency of training and how training will be documented.

(ix) *Monitoring, Measurement, and Corrective Action.* The EMP shall describe how the Concessioner will comply with the EMP and how the Concessioner will self-assess its performance under the EMP, at least annually, in a manner consistent with NPS protocol regarding audit of NPS operations. The self-assessment should ensure the Concessioner's conformance with the Environmental Management Objectives and measure performance against environmental goals and targets. The EMP shall also describe procedures to be taken by the Concessioner to correct any deficiencies identified by the self-assessment.

#### *(c) Environmental Performance Measurement*

The Concessioner shall be evaluated by the Director on its environmental performance under this CONTRACT, including, without limitation, compliance with the approved EMP, on at least an annual basis.

#### *(d) Environmental Data, Reports, Notifications, and Approvals*

(1) *Inventory of Hazardous Substances and Inventory of Waste Streams.* The Concessioner shall submit

to the Director, at least annually, an inventory of federal Occupational Safety and Health Administration (OSHA) designated hazardous chemicals used and stored in the Area by the Concessioner. The Director may prohibit the use of any OSHA hazardous chemical by the Concessioner in operations under this CONTRACT. The Concessioner shall obtain the Director's approval prior to using any extremely hazardous substance, as defined in the Emergency Planning and Community Right to Know Act of 1986, in operations under this CONTRACT. The Concessioner shall also submit to the Director, at least annually, an inventory of all waste streams generated by the Concessioner under this CONTRACT. Such inventory shall include any documents, reports, monitoring data, manifests, and other documentation required by Applicable Laws regarding waste streams.

(2) *Reports.* The Concessioner shall submit to the Director copies of all documents, reports, monitoring data, manifests, and other documentation required under Applicable Laws to be submitted to regulatory agencies. The Concessioner shall also submit to the Director any environmental plans for which coordination with Area operations are necessary and appropriate, as determined by the Director in accordance with Applicable Laws.

(3) *Notification of Releases.* The Concessioner shall give the Director immediate written notice of any discharge, release or threatened release (as these terms are defined by Applicable Laws) within or at the vicinity of the Area (whether solid, semi-solid, liquid or gaseous in nature), of any hazardous or toxic substance, material, or waste of any kind, including, without limitation, building materials such as asbestos, or any contaminant, pollutant, petroleum, petroleum product or petroleum by-product.

(4) *Notice of Violation.* The Concessioner shall give the Director in writing immediate notice of any written threatened or actual notice of violation from other regulatory agencies of any Applicable Law arising out of the activities of the Concessioner, its agents or employees.

(5) *Communication with Regulatory Agencies.* The Concessioner shall provide timely written advance notice to the Director of communications, including without limitation, meetings, audits, inspections, hearings and other proceedings, between regulatory agencies and the Concessioner related to compliance with Applicable Laws

concerning operations under this CONTRACT. The Concessioner shall also provide to the Director any written materials prepared or received by the Concessioner in advance of or subsequent to any such communications. The Concessioner shall allow the Director to participate in any such communications. The Concessioner shall also provide timely notice to the Director following any unplanned communications between regulatory agencies and the Concessioner.

#### *(e) Corrective Action*

(1) The Concessioner, at its sole cost and expense, shall promptly control and contain any discharge, release or threatened release, as set forth in this section, or any threatened or actual violation, as set forth in this section, arising in connection with the Concessioner's operations under this CONTRACT, including, but not limited to, payment of any fines or penalties imposed by appropriate agencies. Following the prompt control or containment of any release, discharge or violation, the Concessioner shall take all response actions necessary to remediate the release, discharge or violation, and to protect human health and the environment.

(2) Even if not specifically required by Applicable Laws, the Concessioner shall comply with directives of the Director to clean up or remove any materials, product or by-product used, handled, stored, disposed, or transported onto or into the Area by the Concessioner to ensure that the Area remains in good condition.

#### *(f) Indemnification and Cost Recovery for Concessioner Environmental Activities*

(1) The Concessioner shall indemnify the United States in accordance with section 12 of this CONTRACT from all losses, claims, damages, environmental injuries, expenses, response costs, allegations or judgments (including, without limitation, fines and penalties) and expenses (including, without limitation, attorneys fees and experts' fees) arising out of the activities of the Concessioner, its employees, agents and contractors pursuant to this section. Such indemnification shall survive termination or expiration of this CONTRACT.

(2) If the Concessioner does not promptly contain and remediate an unauthorized discharge or release arising out of the activities of the Concessioner, its employees, agents and contractors, as set forth in this section, or correct any environmental self-



assessment finding of non-compliance, in full compliance with Applicable Laws, the Director may, in its sole discretion and after notice to the Concessioner, take any such action consistent with Applicable Laws as the Director deems necessary to abate, mitigate, remediate, or otherwise respond to such release or discharge, or take corrective action on the environmental self-assessment finding. The Concessioner shall be liable for and shall pay to the Director any costs of the Director associated with such action upon demand. Nothing in this section shall preclude the Concessioner from seeking to recover costs from a responsible third party.

*(g) Weed and Pest Management*

The Concessioner shall be responsible for managing weeds, and through an integrated pest management program, harmful insects, rats, mice and other pests on Concession Facilities assigned to the Concessioner under this CONTRACT. All such weed and pest management activities shall be in accordance with Applicable Laws and guidelines established by the Director.

*(h) Protection of Cultural and Archeological Resources.*

The Concessioner shall ensure that any protected sites and archeological resources within the Area are not disturbed or damaged by the Concessioner, including the Concessioner's employees, agents and contractors, except in accordance with Applicable Laws, and only with the prior approval of the Director. Discoveries of any archeological resources by the Concessioner shall be promptly reported to the Director. The Concessioner shall cease work or other disturbance which may impact any protected site or archeological resource until the Director grants approval, upon such terms and conditions as the Director deems necessary, to continue such work or other disturbance.

**Sec. 7. Interpretation of Area Resources**

*(a) Concessioner Obligations*

(1) The Concessioner shall provide all visitor services in a manner that is consistent with and supportive of the interpretive themes, goals and objectives of the Area as reflected in Area planning documents, mission statements and/or interpretive prospectuses.

(2) The Concessioner may assist in Area interpretation at the request of the Director to enhance visitor enjoyment of the Area. Any additional visitor services that may result from this assistance must be recognized in writing through

written amendment of Section 3 of this CONTRACT.

(3) The Concessioner is encouraged to develop interpretive materials or means to educate visitors about environmental programs or initiatives implemented by the Concessioner.

*(b) Director review of content*

The Concessioner must submit the proposed content of any interpretive programs, exhibits, displays or materials, regardless of media format (i.e. printed, electronic, or broadcast media), to the Director for review and approval prior to offering such programs, exhibits, displays or materials to Area visitors.

**Sec. 8. Concession Facilities Used in Operation by the Concessioner**

*(a) Assignment of Concession Facilities*

(1) The Director hereby assigns the following Concession Facilities to the Concessioner for the purposes of this CONTRACT:

(i) certain parcels of Area land as described in Exhibit D upon which, among other matters, the Concessioner may be authorized to construct real property; and

(ii) certain real property improvements described in Exhibit D in existence as of the effective date of this CONTRACT, as may be modified from time to time to include additional real property improvements completed in accordance with the terms and conditions of this CONTRACT.

(2) The Director shall from time to time amend Exhibit D to reflect changes in Concession Facilities assigned to the Concessioner, including, without limitation, amending Exhibit D to reflect the addition of real property improvements completed in accordance with the terms and conditions of this CONTRACT and to reflect the withdrawal of concession facilities as set forth below.

*(b) Concession Facilities Withdrawals*

The Director may withdraw all or portions of these Concession Facilities assignments at any time during the term of this CONTRACT if:

(1) the withdrawal is necessary for the purpose of conserving, preserving or protecting Area resources or visitor enjoyment or safety;

(2) the operations utilizing the assigned Concession Facilities have been terminated or suspended by the Director; or

(3) land or real property improvements assigned to the Concessioner are no longer necessary for the concession operation.

*(c) Effect of Withdrawal*

Any permanent withdrawal of assigned Concession Facilities which the Director or the Concessioner considers to be essential for the Concessioner to provide the visitor services required by this CONTRACT will be treated as a termination of this CONTRACT pursuant to Section 16. The Concessioner will be compensated pursuant to Section 17 for the value of any Leasehold Surrender Interest it may have, if any, in permanently withdrawn Concession Facilities. No other compensation is due the Concessioner in these circumstances.

*(d) Right of Entry*

The Director shall have the right at any time to enter upon or into the Concession Facilities assigned to the Concessioner under this CONTRACT for any purpose he may deem necessary for the administration of the Area.

*(e) Personal Property*

(1) *Personal Property Provided by the Concessioner.* The Concessioner shall provide all personal property, including without limitation removable equipment, furniture and goods, necessary for its operations under this CONTRACT, unless such personal property is provided by the Director as set forth in subsection (e)(2).

(2) *Personal Property Provided by the Government.* The Director may provide certain items of government personal property, including without limitation removable equipment, furniture and goods, for the Concessioner's use in the performance of this CONTRACT. The Director hereby assigns government personal property listed in Exhibit E to the Concessioner as of the effective date of this CONTRACT. This Exhibit E will be modified from time to time by the Director as items may be withdrawn or additional items added. The Concessioner shall be accountable to the Director for the government personal property assigned to it and shall be responsible for maintaining the property as necessary to keep it in good and operable condition. If the property ceases to be serviceable, it shall be returned to the Director for disposition.

*(f) Condition of Concession Facilities*

The Concessioner has inspected the Concession Facilities and any assigned government personal property, is thoroughly acquainted with their condition, and accepts the Concession Facilities, and any assigned government personal property, "as is."



*(g) Utilities Provided by the Director*

The Director may provide utilities to the Concessioner for use in connection with the operations required or authorized hereunder when available and at rates to be determined in accordance with Applicable Laws.

*(h) Utilities Not Provided by the Director*

If the Director does not provide utilities to the Concessioner, the Concessioner shall, with the written approval of the Director and under any requirements that the Director shall prescribe, secure necessary utilities at its own expense from sources outside the Area or shall install the utilities within the Area with the written permission of the Director, subject to the following conditions:

(1) Any water rights deemed necessary by the Concessioner for use of water on Area or other federal lands must be acquired at the Concessioner's expense in accordance with applicable State procedures and law. Upon expiration or termination of this CONTRACT for any reason, the Concessioner must assign these water rights to the United States without compensation, and these water rights will become the property of the United States;

(2) If requested by the Director, the Concessioner must provide to the Director any utility service provided by the Concessioner under this section to such extent as will not unreasonably restrict anticipated use by the Concessioner. Unless otherwise agreed by the Concessioner and the Director in writing, the rate per unit charged the Director for such service shall be approximately the average cost per unit of providing such service; and

(3) All appliances and machinery to be used in connection with the privileges granted in this subsection, as well as the plans for location and installation of such appliances and machinery, shall first be approved by the Director.

**Sec. 9. Construction or Installation of Real Property Improvements**

*(a) Construction of Real Property Improvements*

The Concessioner may construct or install upon lands assigned to the Concessioner under this CONTRACT only those real property improvements that are determined by the Director to be necessary and appropriate for the conduct by the Concessioner of the visitor services required and/or authorized under this CONTRACT. Construction or installation of real property improvements may occur only

after the written approval by the Director of their location, plans, and specifications. The form and content of the application and the procedures for such approvals, as may be modified by the Director from time to time, are set forth in Exhibit F. All real property improvements constructed or installed by the Concessioner will immediately become the property of the United States and be considered Concession Facilities.

*(b) Removal of Real Property Improvements*

(1) The Concessioner may not remove, dismantle, or demolish real property improvements in the Area without the prior approval of the Director.

(2) Any salvage resulting from the authorized removal, severance or demolition of a real property improvement within the Area shall be the property of the United States.

(3) In the event that an assigned real property improvement is removed, abandoned, demolished, or substantially destroyed and no other improvement is constructed on the site, the Concessioner, at its expense, shall promptly, upon the request of the Director, restore the site as nearly as practicable to its original condition.

*(c) Leasehold Surrender Interest*

(1) This CONTRACT hereby provides the Concessioner, subject to all applicable definitions, requirements and limitations of this CONTRACT and Exhibit A, a Leasehold Surrender Interest in Capital Improvements constructed by the Concessioner under the terms of this CONTRACT, including, but not limited to, those Capital Improvements constructed as part of the Concession Facilities Improvement Program and those Capital Improvements which result from the Major Rehabilitation of an existing real property improvement. Upon completion of a Major Rehabilitation by the Concessioner, an existing real property improvement assigned to the Concessioner in which the Concessioner had no Leasehold Surrender Interest prior to the Major Rehabilitation shall be considered as a Capital Improvement for all purposes of this CONTRACT.

(2) This CONTRACT may provide the Concessioner a Leasehold Surrender Interest in real property improvements resulting from possessory interest obtained under the terms of a possessory interest concession contract. Exhibit G describes the real property improvements, if any, in which the Concessioner has such a Leasehold Surrender Interest and states the value

of this Leasehold Surrender Interest as of the effective date of this CONTRACT.

(3) The Concessioner shall not obtain Leasehold Surrender Interest under this CONTRACT except as may be provided in Exhibit A and Exhibit F. Among other matters, no Leasehold Surrender Interest shall be obtained as a result of expenditures from the Repair and Maintenance Reserve described in this CONTRACT, and this CONTRACT does not provide a Leasehold Surrender Interest as a result of expenditures for repair and maintenance of Concession Facilities of any nature.

*(d) Concession Facilities Improvement Program*

(1) The Concessioner shall undertake and complete an improvement program (hereinafter "Concession Facilities Improvement Program") costing not less than \$\_\_\_\_\_ as adjusted for each project to reflect par value in the year of actual construction in accordance with the appropriate indexes of the Department of Labor's CPI-U Index, as published by the Department of Labor.

(2) The Concession Facilities Improvement Program shall include: [Provide detailed description of the Concession Facilities Improvement Program.]

(3) The Concessioner shall commence construction under the Concession Facilities Improvement Program on or before \_\_\_\_\_ in a manner that demonstrates to the satisfaction of the Director that the Concessioner is in good faith carrying the Concession Facilities Improvement Program forward reasonably under the circumstances. No construction may begin until the Concessioner receives written approval from the Director of plans and specifications in accordance with Exhibit F. During the period of construction, the Concessioner shall provide the Director with such evidence or documentation, as may be satisfactory to the Director, to demonstrate that the Concession Facilities Improvement Program duly is being carried forward.

(4) The Concessioner shall complete and have the real property improvements available for public use on or before \_\_\_\_\_. The Director may extend this date in circumstances where the Director determines that the delay resulted from events beyond the control of the Concessioner.

**Sec. 10. Maintenance**

*(a) Maintenance Obligation*

The Concessioner shall be solely responsible for maintenance, repairs, housekeeping, and groundskeeping for

all Concession Facilities to the satisfaction of the Director.

*(b) Maintenance Plan*

For these purposes, the Director, acting through the Superintendent, shall undertake appropriate inspections, and shall establish and revise, as necessary, a Maintenance Plan consisting of specific maintenance requirements which shall be adhered to by the Concessioner. The initial Maintenance Plan is set forth in Exhibit H. The Director in his discretion may make reasonable modifications to the Maintenance Plan from time to time after consultation with the Concessioner. Such modifications shall be in furtherance of the purposes of this CONTRACT and shall not be inconsistent with the terms and conditions of the main body of this CONTRACT.

*(c) Repair and Maintenance Reserve*

[No Repair and Maintenance Reserve is included in this CONTRACT.] OR

(1) The Concessioner shall establish and manage a Repair and Maintenance Reserve. The funds in this Reserve shall be used to carry out, on a project basis in accordance with Exhibits F and H, repair and maintenance of Concession Facilities that are non-recurring within a seven-year time frame. Such projects may include repair or replacement of foundations, building frames, window frames, sheathing, subfloors, drainage, rehabilitation of building systems such as electrical, plumbing, built-in heating and air conditioning, roof replacement and similar projects. Projects will be carried out by the Concessioner as the Director shall direct in writing in advance of any expenditure being made and in accordance with project proposals approved by the Director. No projects may be commenced until the Concessioner receives written approval from the Director.

(2) Projects paid for with funds from the Repair and Maintenance Reserve will not include routine, operational maintenance of facilities or housekeeping and groundskeeping activities. Nothing in this section shall lessen the responsibility of the Concessioner to carry out the maintenance and repair of Concession Facilities or housekeeping and groundskeeping responsibilities as required by this CONTRACT from Concessioner funds exclusive of the funds contained in the Repair and Maintenance Reserve.

(3) The Concessioner shall establish within its accounting system a Repair and Maintenance Reserve. The Concessioner shall debit to this Reserve,

within fifteen (15) days after the last day of each month that the Concessioner operates a sum equal to: \_\_\_\_\_ percent (\_\_\_\_%) of the Concessioner's gross receipts for the previous month. If the Concessioner fails to make timely debits to the Repair and Maintenance Reserve, the Director may terminate this CONTRACT for default or may require the Concessioner to post a bond in an amount equal to the estimated annual Repair and Maintenance Reserve allocation, based on the preceding year's gross receipts.

(4) The balance in the Repair and Maintenance Reserve shall be available for projects in accordance with the Reserve's purpose. For all expenditures made for each project from the Repair and Maintenance Reserve, the Concessioner shall maintain auditable records including invoices, billings, canceled checks, and other documentation satisfactory to the Director. Failure to expend Repair and Maintenance Reserve Funds when directed by the Director shall be considered as a material breach of this CONTRACT for which the Director may seek monetary damages and other legal relief, including, without limitation, termination of this CONTRACT.

(5) Repair and Maintenance Reserve funds shall not be used for a major rehabilitation as defined in this CONTRACT. The Concessioner shall obtain no ownership, Leasehold Surrender Interest, or other compensable interest as a consequence of the expenditure of Repair and Maintenance Reserve funds.

(6) Any Repair and Maintenance Reserve funds not duly expended by the Concessioner as of the termination or expiration of this CONTRACT shall be retained by the Concessioner (subject to otherwise applicable terms and conditions of this CONTRACT).

**Sec. 11. Fees**

*(a) Franchise Fee*

(1) For the term of this CONTRACT, the Concessioner shall pay to the Director for the privileges granted under this CONTRACT a franchise fee equal to \_\_\_\_\_ percent (\_\_\_\_%) of the Concessioner's gross receipts for the preceding year or portion of a year.

(2) Neither the Concessioner nor the Director shall have a right to an adjustment of the fees except as provided below. The Concessioner has no right to waiver of the fee under any circumstances.

*(b) Payments Due*

(1) The franchise fee shall be due on a monthly basis at the end of each

month and shall be paid by the Concessioner in such a manner that the Director shall receive payment within fifteen (15) days after the last day of each month that the Concessioner operates. This monthly payment shall include the franchise fee equal to the specified percentage of gross receipts for the preceding month.

(2) The Concessioner shall pay any additional fee amounts due at the end of the operating year as a result of adjustments at the time of submission of the Concessioner's Annual Financial Report. Overpayments shall be offset against the following year's fees. In the event of termination or expiration of this CONTRACT, overpayments will first be offset against any amounts due and owing the Government, and the remainder will be paid to the Concessioner.

(3) All franchise fee payments consisting of \$10,000 or more, shall be deposited electronically by the Concessioner using the Treasury Financial Communications System.

*(c) Interest*

An interest charge will be assessed on overdue amounts for each thirty (30) day period, or portion thereof, that payment is delayed beyond the fifteen (15) day period provided for above. The percent of interest charged will be based on the current value of funds to the United States Treasury as published quarterly in the Treasury Fiscal Requirements Manual. The Director may also impose penalties for late payment to the extent authorized by Applicable Law.

*(d) Adjustment of Franchise Fee*

(1) The Concessioner or the Director may request, in the event that either considers that extraordinary, unanticipated changes have occurred after the effective date of this CONTRACT, a reconsideration and possible subsequent adjustment of the franchise fee established in this section. For the purposes of this section, the phrase "extraordinary, unanticipated changes" shall mean extraordinary, unanticipated changes from the conditions existing or reasonably anticipated before the effective date of this CONTRACT which have or will significantly affect the probable value of the privileges granted to the Concessioner by this CONTRACT. For the purposes of this section, the phrase "probable value" means a reasonable opportunity for net profit in relation to capital invested and the obligations of this CONTRACT.

(2) The Concessioner or the Director must make a request for a

reconsideration by mailing, within sixty (60) days from the date that the party becomes aware, or should have become aware, of the possible extraordinary, unanticipated changes, a written notice to the other party that includes a description of the possible extraordinary, unanticipated changes and why the party believes they have affected or will significantly affect the probable value of the privileges granted by this CONTRACT.

(3) If the Concessioner and the Director agree that extraordinary, unanticipated changes have occurred, the Concessioner and the Director will undertake good faith negotiations as to an appropriate adjustment of the franchise fee.

(4) The negotiation will last for a period of sixty (60) days from the date the Concessioner and the Director agree that extraordinary, unanticipated changes occurred. If the negotiation results in agreement as to an adjustment (up or down) of the franchise fee within this period, the franchise fee will be adjusted accordingly, prospectively as of the date of agreement.

(5) If the negotiation does not result in agreement as to the adjustment of the franchise fee within this sixty (60) day period, then either the Concessioner or the Director may request binding arbitration to determine the adjustment to franchise fee in accordance with this section. Such a request for arbitration must be made by mailing written notice to the other party within fifteen (15) days of the expiration of the sixty (60) day period.

(6) Within thirty (30) days of receipt of such a written notice, the Concessioner and the Director shall each select an arbiter. These two arbiters, within thirty (30) days of selection, must agree to the selection of a third arbiter to complete the arbitration panel. Unless otherwise agreed by the parties, the arbitration panel shall establish the procedures of the arbitration. Such procedures must provide each party a fair and equal opportunity to present its position on the matter to the arbitration panel.

(7) The arbitration panel shall consider the written submissions and any oral presentations made by the Concessioner and the Director and provide its decision on an adjusted franchise fee (up, down or unchanged) that is consistent with the probable value of the privileges granted by this CONTRACT within sixty (60) days of the presentations.

(8) Any adjustment to the franchise fee resulting from this Section shall be prospective only.

(9) Any adjustment to the franchise fee will be embodied in an amendment to this CONTRACT.

(10) During the pendency of the process described in this Section, the Concessioner shall continue to make the established franchise fee payments required by this CONTRACT.

## **Sec. 12. Indemnification and Insurance**

### *(a) Indemnification*

The Concessioner agrees to assume liability for and does hereby agree to save, hold harmless, protect, defend and indemnify the United States of America, its agents and employees from and against any and all liabilities, obligations, losses, damages or judgments (including without limitation penalties and fines), claims, actions, suits, costs and expenses (including without limitation attorneys fees and experts' fees) of any kind and nature whatsoever on account of fire or other peril, bodily injury, death or property damage, or claims for bodily injury, death or property damage of any nature whatsoever, and by whomsoever made, in any way connected with or arising out of the activities of the Concessioner, its employees, agents or contractors under this CONTRACT. This indemnification shall survive the termination or expiration of this CONTRACT.

### *(b) Insurance in General*

(1) The Concessioner shall obtain and maintain during the entire term of this CONTRACT at its sole cost and expense, the types and amounts of insurance coverage necessary to fulfill the obligations of this CONTRACT as determined by the Director. The initial insurance requirements are set forth below and in Exhibit I. Any changed or additional requirements that the Director determines necessary must be reasonable and consistent with the types and coverage amounts of insurance a prudent businessperson would purchase in similar circumstances. The Director shall approve the types and amounts of insurance coverage purchased by the Concessioner.

(2) The Director will not be responsible for any omissions or inadequacies of insurance coverages and amounts in the event the insurance purchased by the Concessioner proves to be inadequate or otherwise insufficient for any reason whatsoever.

(3) At the request of the Director, the Concessioner shall at the time insurance is first purchased and annually thereafter, provide the Director with a Certificate of Insurance that accurately details the conditions of the policy as

evidence of compliance with this section. The Concessioner shall provide the Director immediate written notice of any material change in the Concessioner's insurance program hereunder, including without limitation, cancellation of any required insurance coverages.

### *(c) Commercial Public Liability*

(1) The Concessioner shall provide commercial general liability insurance against claims arising out of or resulting from the acts or omissions of the Concessioner or its employees, agents or contractors, in carrying out the activities and operations required and/or authorized under this CONTRACT.

(2) This insurance shall be in the amount commensurate with the degree of risk and the scope and size of the activities required and/or authorized under this CONTRACT, as more specifically set forth in Exhibit I. Furthermore, the commercial general liability package shall provide no less than the coverages and limits described in Exhibit I.

(3) All liability policies shall specify that the insurance company shall have no right of subrogation against the United States of America and shall provide that the United States of America is named an additional insured.

(4) From time to time, as conditions in the insurance industry warrant, the Director may modify Exhibit I to revise the minimum required limits or to require additional types of insurance, provided that any additional requirements must be reasonable and consistent with the types of insurance a prudent businessperson would purchase in similar circumstances.

### *(d) Property Insurance*

(1) In the event of damage or destruction, the Concessioner will repair or replace those Concession Facilities and personal property utilized by the Concessioner in the performance of the Concessioner's obligations under this CONTRACT.

(2) For this purpose, the Concessioner shall provide fire and extended insurance coverage on Concession Facilities for all or part of their replacement cost as specified in Exhibit I in amounts no less than the Director may require during the term of the CONTRACT. The minimum values currently in effect are set forth in Exhibit I.

(3) Commercial property insurance shall provide for the Concessioner and the United States of America to be named insured as their interests may appear.

(4) In the event of loss, the Concessioner shall use all proceeds of such insurance to repair, rebuild, restore or replace Concession Facilities and/or personal property utilized in the Concessioner's operations under this CONTRACT, as directed by the Director. Policies may not contain provisions limiting insurance proceeds to in situ replacement. The lien provision of Section 13 shall apply to such insurance proceeds. The Concessioner shall not be relieved of its obligations under subsection (d)(1) because insurance proceeds are not sufficient to repair or replace damaged or destroyed property.

(5) Insurance policies that cover Concession Facilities shall contain a loss payable clause approved by the Director which requires insurance proceeds to be paid directly to the Concessioner without requiring endorsement by the United States. The use of insurance proceeds for repair or replacement of Concession Facilities will not alter their character as properties of the United States and, notwithstanding any provision of this CONTRACT to the contrary, the Concessioner shall gain no ownership, Leasehold Surrender Interest or other compensable interest as a result of the use of these insurance proceeds.

(6) The commercial property package shall include the coverages and amounts described in Exhibit I.

### **Sec. 13. Bonds and Liens**

#### *(a) Bonds*

The Director may require the Concessioner to furnish appropriate forms of bonds in amounts reasonable in the circumstances and acceptable to the Director, in order to ensure faithful performance of the Concessioner's obligations under this CONTRACT.

#### *(b) Lien*

As additional security for the faithful performance by the Concessioner of its obligations under this CONTRACT, and the payment to the Government of all damages or claims that may result from the Concessioner's failure to observe any such obligations, the Government shall have at all times the first lien on all assets of the Concessioner within the Area, including, but not limited to, all personal property of the Concessioner used in performance of the CONTRACT hereunder within the Area and any Leasehold Surrender Interest of the Concessioner.

### **Sec. 14. Accounting Records and Reports**

#### *(a) Accounting System*

(1) The Concessioner shall maintain an accounting system under which its accounts can be readily identified with its system of accounts classification. Such accounting system shall be capable of providing the information required by this CONTRACT, including but not limited to the Concessioner's repair and maintenance obligations. The Concessioner's system of accounts classification shall be directly related to the Concessioner Annual Financial Report Form issued by the Director.

(2) If the Concessioner's annual gross receipts are \$250,000 or more, the Concessioner must use the accrual accounting method.

(3) In computing net profits for any purposes of this CONTRACT, the Concessioner shall keep its accounts in such manner that there can be no diversion or concealment of profits or expenses in the operations authorized under this CONTRACT by means of arrangements for the procurement of equipment, merchandise, supplies or services from sources controlled by or under common ownership with the Concessioner or by any other device.

#### *(b) Annual Financial Report*

(1) The Concessioner shall submit annually as soon as possible but not later than one hundred twenty (120) days after the last day of its fiscal year a financial statement for the preceding fiscal year or portion of a year as prescribed by the Director ("Concessioner Annual Financial Report").

(2) If the annual gross receipts of the Concessioner are in excess of \$1,000,000, the financial statements shall be audited by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards (GAAS) and procedures promulgated by the American Institute of Certified Public Accountants.

(3) If annual gross receipts are between \$250,000, and \$1,000,000, the financial statements shall be reviewed by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards (GAAS) and procedures promulgated by the American Institute of Certified Public Accountants.

(4) If annual gross receipts are less than \$250,000, the financial statements may be prepared without involvement by an independent Certified Public Accountant, unless otherwise directed by the Director.

#### *(c) Other Financial Reports*

(1) *Balance Sheet.* Within ninety (90) days of the execution of this CONTRACT or its effective date, whichever is later, the Concessioner shall submit to the Director a balance sheet as of the beginning date of the term of this CONTRACT. The balance sheet shall be audited or reviewed, as determined by the annual gross receipts, by an independent Certified Public Accountant. The balance sheet shall be accompanied by a schedule that identifies and provides details for all capital improvements in which the Concessioner claims a Leasehold Surrender Interest. The schedule must describe these capital improvements in detail showing for each such capital improvement the date acquired, constructed or installed.

(2) *Statements of Reserve Activity.* [No Repair and Maintenance Reserve is included in this CONTRACT.] OR

[The Concessioner shall submit annually, not later than one hundred twenty (120) days after the end of the Concessioner's accounting year, a statement reflecting total activity in the Maintenance Reserve for the preceding accounting year. The statement must reflect monthly inflows and outflows on a project by project basis.]

### **Sec. 15. Other Reporting Requirements**

The following describes certain other reports required under this CONTRACT:

#### *(a) Insurance Certification*

As specified in Section 12, the Concessioner shall, at the request of the Director, provide the Director with a Certificate of Insurance for all insurance coverages related to its operations under this CONTRACT. The Concessioner shall give the Director immediate written notice of any material change in its insurance program, including without limitation, any cancellation of required insurance coverages.

#### *(b) Environmental Reporting*

The Concessioner shall submit environmental reports as specified in Section 6 of this CONTRACT, and as otherwise required by the Director under the terms of this CONTRACT.

#### *(c) Miscellaneous Reports and Data*

The Director from time to time may require the Concessioner to submit other reports and data regarding its performance under the CONTRACT or otherwise, including, but not limited to, operational information.

**Sec. 16. Suspension, Termination, or Expiration****(a) Suspension**

The Director may temporarily suspend operations under this CONTRACT in whole or in part in order to protect Area visitors or to protect, conserve and preserve Area resources. No compensation of any nature shall be due the Concessioner by the Director in the event of a suspension of operations, including, but not limited to, compensation for losses based on lost income, profit, or the necessity to make expenditures as a result of the suspension.

**(b) Termination**

(1) The Director may terminate this CONTRACT at any time in order to protect Area visitors, protect, conserve, and preserve Area resources, or to limit visitor services in the Area to those that continue to be necessary and appropriate.

(2) The Director may terminate this CONTRACT if the Director determines that the Concessioner has materially breached any requirement of this CONTRACT, including, but not limited to, the requirement to maintain and operate visitor services to the satisfaction of the Director, the requirement to provide only those visitor services required or authorized by the Director pursuant to this CONTRACT, the requirement to pay the established franchise fee, the requirement to prepare and comply with an Environmental Management Program, the requirement to duly expend funds from the repair and maintenance reserve and the requirement to comply with Applicable Laws.

(3) In the event of a breach of the CONTRACT, the Director will provide the Concessioner an opportunity to cure by providing written notice to the Concessioner of the breach. In the event of a monetary breach, the Director will give the Concessioner a fifteen (15) day period to cure the breach. If the breach is not cured within that period, then the Director may terminate the CONTRACT for default. In the event of a nonmonetary breach, if the Director considers that the nature of the breach so permits, the Director will give the Concessioner thirty (30) days to cure the breach, or to provide a plan, to the satisfaction of the Director, to cure the breach over a specified period of time. If the breach is not cured within this specified period of time, the Director may terminate the CONTRACT for default. Notwithstanding this provision, repeated breaches (two or more) of the

same nature shall be grounds for termination for default without a cure period. In the event of a breach of any nature, the Director may suspend the Concessioner's operations as appropriate in accordance with Section 16(a).

(4) The Director may terminate this CONTRACT upon the filing or the execution of a petition in bankruptcy by or against the Concessioner, a petition seeking relief of the same or different kind under any provision of the Bankruptcy Act or its successor, an assignment by the Concessioner for the benefit of creditors, a petition or other proceeding against the Concessioner for the appointment of a trustee, receiver, or liquidator, or, the taking by any person or entity of the rights granted by this CONTRACT or any part thereof upon execution, attachment or other process of law or equity. The Director may terminate this CONTRACT if the Director determines that the Concessioner is unable to perform the terms of CONTRACT due to bankruptcy or insolvency.

(5) Termination of this CONTRACT for any reason shall be by written notice to the Concessioner.

**(c) Notice of Bankruptcy or Insolvency**

The Concessioner must give the Director immediate notice (within five (5) days) after the filing of any petition in bankruptcy, filing any petition seeking relief of the same or different kind under any provision of the Bankruptcy Act or its successor, or making any assignment for the benefit of creditors. The Concessioner must also give the Director immediate notice of any petition or other proceeding against the Concessioner for the appointment of a trustee, receiver, or liquidator, or, the taking by any person or entity of the rights granted by this CONTRACT or any part thereof upon execution, attachment or other process of law or equity. For purposes of the bankruptcy statutes, NPS considers that this CONTRACT is not a lease but an executory contract exempt from inclusion in assets of Concessioner pursuant to 11 U.S.C. 365.

**(d) Requirements in the Event of Termination or Expiration**

(1) In the event of termination of this CONTRACT for any reason or expiration of this CONTRACT, the total compensation due the Concessioner for such termination or expiration shall be as described in Section 17 of this CONTRACT. No other compensation of any nature shall be due the Concessioner in the event of a termination or expiration of this

CONTRACT, including, but not limited to, compensation for losses based on lost income, profit, or the necessity to make expenditures as a result of the termination.

(2) Upon termination of this CONTRACT for any reason, or upon its expiration, and except as otherwise provided in this section, the Concessioner shall, at the Concessioner's expense, promptly vacate the Area, remove all of the Concessioner's personal property, repair any injury occasioned by installation or removal of such property, and ensure that Concession Facilities are in at least as good condition as they were at the beginning of the term of this CONTRACT, reasonable wear and tear excepted. The removal of such personal property must occur within thirty (30) days after the termination of this CONTRACT for any reason or its expiration (unless the Director in particular circumstances requires immediate removal).

(3) To avoid interruption of services to the public upon termination of this CONTRACT for any reason, or upon its expiration, the Concessioner, upon the request of the Director, shall consent to the use by another operator of the Concessioner's personal property, excluding inventories if any, not including current or intangible assets, for a period of time not to exceed one (1) year from the date of such termination or expiration. The other operator shall pay the Concessioner an annual fee for use of such property, prorated for the period of use, in the amount of the annual depreciation of such property, plus a return on the book value of such property equal to the prime lending rate, as published by the Federal Reserve System Board of Governors, effective on the date the operator assumes managerial and operational responsibilities. In such circumstances, the method of depreciation applied shall be either straight line depreciation or depreciation as shown on the Concessioner's Federal income tax return, whichever is less. To avoid interruption of services to the public upon termination of this CONTRACT for any reason or its expiration, the Concessioner shall, if requested by the Director, sell its existing inventory to another operator at the purchase price as shown on applicable invoices.

**Sec. 17. Compensation****(a) Just Compensation**

The compensation provided by this Section shall constitute full and just compensation to the Concessioner for

all losses and claims occasioned by the circumstances described below.

*(b) Compensation for CONTRACT Expiration or Termination*

If, for any reason, including CONTRACT expiration or termination, the Concessioner shall cease to be authorized by the Director to conduct operations under this CONTRACT, the Concessioner shall convey to a person designated by the Director (including the Director if appropriate) any Leasehold Surrender Interest it has under the terms of this CONTRACT and the Director shall, subject to the terms and conditions of this CONTRACT, assure that the Concessioner is paid the Leasehold Surrender Interest Value.

*(c) Procedures for Establishing the Value of a Leasehold Surrender Interest*

At any time during the term of this CONTRACT, the Concessioner shall, when requested by the Director, enter into negotiations with the Director as to the value of the Concessioner's Leasehold Surrender Interest under this CONTRACT. In the event that such negotiations fail to determine an agreed upon value within a reasonable period of time as determined by the Director, the Director or the Concessioner may initiate arbitration proceedings to determine such value upon written request to the other party. Such arbitration proceedings shall be conducted in accordance with the arbitration procedures set forth in Exhibit A. In these circumstances, the Concessioner and the Director shall each select an arbiter. The two arbiters, within thirty (30) days of selection, must agree to the selection of a third arbiter to complete the arbitration panel in accordance with Exhibit A. The arbitration panel shall consider the written submissions and any oral presentations made by the Concessioner and the Director and shall determine the value of the Leasehold Surrender Interest consistent with the terms of this CONTRACT, including without limitation Exhibit A. The arbitration panel shall also provide a means to calculate the change in the value of such Leasehold Surrender Interest as may occur for up to two (2) years from the date of the initial determination. The determination of the arbitration panel shall be binding on the Director and the Concessioner.

*(d) Compensation for Personal Property*

No compensation is due the Concessioner from the Director or a successor concessioner for the Concessioner's personal property used in operations under this CONTRACT.

However, the Director or a successor concessioner may purchase such personal property from the Concessioner subject to mutually agreed upon terms. Personal property not removed from the Area by the Concessioner in accordance with the terms of this CONTRACT shall be considered abandoned property subject to disposition by the Director, at full cost and expense of the Concessioner, in accordance with Applicable Laws. Any cost or expense incurred by the Director as a result of such disposition may be offset from any amounts owed to the Concessioner by the Director to the extent consistent with Applicable Laws.

**Sec. 18. Assignment, Sale or Encumbrance of Interests**

(a) This CONTRACT is subject to the requirements of Applicable Laws, including, without limitation, 36 CFR Part 51, with respect to proposed assignments and encumbrances, as those terms are defined by Applicable Laws. Failure by the Concessioner to comply with Applicable Laws is a material breach of this CONTRACT for which the Director may terminate this CONTRACT for default. The Director shall not be obliged to recognize any right of any person or entity to an interest in this CONTRACT of any nature, including, but not limited to, Leasehold Surrender Interest or operating rights under this CONTRACT, if obtained in violation of Applicable Laws.

(b) The Concessioner shall advise any person(s) or entity proposing to enter into a transaction which may be subject to Applicable Laws, including without limitation, 36 CFR Part 51, of the requirements of Applicable Law and this CONTRACT.

**Sec. 19. General Provisions**

(a) The Director and Comptroller General of the United States, or any of their duly authorized representatives, shall have access to the records of the Concessioner as provided by the terms of Applicable Laws.

(b) All information required to be submitted to the Director by the Concessioner pursuant to this CONTRACT is subject to public release by the Director to the extent provided by Applicable Laws.

(c) Subconcession or other third party agreements, including management agreements, for the provision of visitor services required and/or authorized under this CONTRACT are not permitted.

(d) The Concessioner is not entitled to be awarded or to have negotiating rights to any Federal procurement or service

contract by virtue of any provision of this CONTRACT.

(e) Any and all taxes or assessments of any nature that may be lawfully imposed by any State or its political subdivisions upon the property or business of the Concessioner shall be paid promptly by the Concessioner.

(f) No member of, or delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this CONTRACT or to any benefit that may arise from this CONTRACT but this restriction shall not be construed to extend to this CONTRACT if made with a corporation or company for its general benefit.

(g) This CONTRACT is subject to the provisions of 43 CFR, Subtitle A, Subpart D, concerning nonprocurement debarment and suspension. The Director may recommend that the Concessioner be debarred or suspended in accordance with the requirements and procedures described in those regulations, as they are effective now or may be revised in the future.

(h) This CONTRACT contains the sole and entire agreement of the parties. No oral representations of any nature form the basis of or may amend this CONTRACT. This CONTRACT may be extended, renewed or amended only when agreed to in writing by the Director and the Concessioner.

(i) This CONTRACT does not grant rights or benefits of any nature to any third party.

(j) The invalidity of a specific provision of this CONTRACT shall not affect the validity of the remaining provisions of this CONTRACT.

(k) Waiver by the Director or the Concessioner of any breach of any of the terms of this CONTRACT by the other party shall not be deemed to be a waiver or elimination of such term, nor of any subsequent breach of the same type, nor of any other term of the CONTRACT. The subsequent acceptance of any payment of money or other performance required by this CONTRACT shall not be deemed to be a waiver of any preceding breach of any term of the CONTRACT.

(l) Claims against the Director (to the extent subject to 28 U.S.C. 2514) arising from this CONTRACT shall be forfeited to the Director by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof within the meaning of 28 U.S.C. 2514.

In Witness Whereof, the duly authorized representatives of the parties have executed this CONTRACT as of the \_\_\_\_\_ day of \_\_, \_\_\_\_.

*Concessioner**United States of America*

BY \_\_\_\_\_

(Title),  
(Company Name).

BY \_\_\_\_\_

Director,  
National Park Service.

[Corporations]

ATTEST:

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

[Sole Proprietorship]

WITNESSES:

NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

TITLE \_\_\_\_\_

NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

TITLE \_\_\_\_\_

[Partnership]

WITNESSES AS TO EACH:

[Concessioner]

NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

(NAME)

NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

NAME \_\_\_\_\_

**Exhibit A****Leasehold Surrender Interest**

This Exhibit A to this CONTRACT establishes certain terms and conditions of the CONTRACT regarding the nature, scope and applicable conditions of leasehold surrender interest. In event of any inconsistency between this Exhibit A and Exhibit F of this CONTRACT this Exhibit A shall prevail.

*Section 1. Definitions*

“Arbitration” means binding arbitration conducted by an arbitration panel. All arbitration proceedings conducted under the authority of this Exhibit A will utilize the following procedures unless otherwise agreed by the Concessioner and the Director. One member of the arbitration panel will be selected by the Concessioner, one member will be selected by the Director, and the third (neutral) member will be selected by the two party-appointed members. The neutral arbiter must be a licensed real estate appraiser. The expenses of the neutral arbiter and other associated common costs of the arbitration will be borne equally by the Concessioner and the Director. The arbitration panel will adopt procedures that treat each party equally, give each party the opportunity to be heard, and give each party a fair opportunity to present its case. Determinations must be made by a majority of the members of the panel and will be binding on the Concessioner and the Director.

A “capital improvement” is a structure, fixture, or non-removable equipment provided by the Concessioner pursuant to the terms of this CONTRACT and located on lands of the United States within the area. A capital improvement does not include any interest in land. Additionally, a capital improvement does not include any interest in personal property of any kind including, but not limited to, vehicles, boats, barges, trailers, or other objects, regardless of size, unless an item of personal property becomes a fixture as defined in this Exhibit A.

“Construction cost” of a capital improvement means the total of the incurred eligible direct and indirect costs necessary for constructing or installing the capital improvement that are capitalized by the concessioner in accordance with Generally Accepted Accounting Principals (GAAP).

“Consumer Price Index” means the national “Consumer Price Index—All Urban Consumers” published by the Department of Labor. If this index ceases to be published, the Director will designate another regularly published cost-of-living index approximating the national Consumer Price Index.

“Depreciation” means the loss of value in a capital improvement as evidenced by the condition and prospective serviceability of the capital improvement in comparison with a new unit of like kind.

“Eligible direct costs” means the sum of all incurred capitalized costs (in amounts no higher than those prevailing in the locality of the project), that are necessary both for the construction of a capital improvement and are typically elements of a construction contract. Eligible direct costs may include, without limitation, the costs of (if capitalized in accordance with GAAP and in amounts no higher than those prevailing in the locality of the project): building permits; materials, products and equipment used in construction; labor used in construction; security during construction; contractor’s shack and temporary fencing; material storage facilities; power line installation and utility costs during construction; performance bonds; and contractor’s (and subcontractor’s) profit and overhead (including job supervision, worker’s compensation insurance and fire, liability, and unemployment insurance).

“Eligible indirect costs” means, except as provided in the last sentence of this definition, the sum of all other incurred capitalized costs (in amounts no higher than those prevailing in the locality of the project) necessary for the construction of a capital improvement.

Eligible indirect costs may include, without limitation, the costs of (if capitalized in accordance with GAAP and in amounts no higher than those prevailing in the locality of the project): architectural and engineering fees for plans, plan checks; surveys to establish building lines and grades; environmental studies; if the project is financed, the points, fees or service charges and interest on construction loans; all risk insurance expenses and ad valorem taxes during construction. The actual capitalized administrative expenses (in amounts no higher than those prevailing in the locality of the project did) of the Concessioner for direct, on-site construction inspection are eligible indirect costs. Other administrative expenses of the Concessioner are not eligible indirect costs.

“Fixtures and non-removable equipment” are manufactured items of personal property of independent form and utility necessary for the basic functioning of a structure that are affixed to and considered to be part of the structure such that title is with the Director as real property once installed. Fixtures and non-removable equipment do not include building materials (e.g., wallboard, flooring, concrete, cinder blocks, steel beams, studs, window frames, windows, rafters, roofing, framing, siding, lumber, insulation, wallpaper, paint, etc.). Because of their special circumstances, floating docks (but not other types of floating property) that may be constructed by the Concessioner pursuant to the terms of this CONTRACT are considered to be non-removable equipment for leasehold surrender interest purposes only. Except as otherwise indicated in Exhibit A, the term “fixture” includes the term “non-removable equipment.”

“Leasehold surrender interest” solely means a right to payment in accordance with this CONTRACT for related capital improvements that the Concessioner makes or provides within the area on lands owned by the United States pursuant to the terms and conditions of this CONTRACT. The existence of a leasehold surrender interest does not give the Concessioner, or any other person, any right to conduct business in a park area, to utilize the related capital improvements, or to prevent the Director or another person from utilizing the related capital improvements. The existence of a leasehold surrender interest does not include any interest in the land on which the related capital improvements are located.

“Leasehold surrender interest value” means the amount of compensation the



Concessioner is entitled to be paid for a leasehold surrender interest in capital improvements in accordance with this CONTRACT. The leasehold surrender interest value in existing capital improvements under the terms of this CONTRACT is an amount equal to:

(1) The initial construction cost of the related capital improvement;

(2) Adjusted by (increased or decreased) the same percentage increase or decrease as the percentage increase or decrease in the Consumer Price Index from the date the Director approves the substantial completion of the construction of the related capital improvement to the date of payment of the leasehold surrender interest value;

(3) Less depreciation of the related capital improvement on the basis of its condition as of the date of termination or expiration of this CONTRACT, or, if applicable, the date on which the Concessioner ceases to utilize a related capital improvement (e.g., where the related capital improvement is taken out of service by the Director pursuant to the terms of this CONTRACT).

"Major rehabilitation" means a planned, comprehensive rehabilitation of an existing structure that:

(1) The Director approves in advance and determines is completed within 18 months from start of the rehabilitation work (unless a longer period of time is approved by the Director in special circumstances); and

(2) The construction cost of which exceeds fifty percent of the pre-rehabilitation value of the structure.

"Pre-rehabilitation value" of an existing structure means the replacement cost of the structure less depreciation.

"Real property improvements" means real property other than land, including, but not limited to, capital improvements.

"Related capital improvement" or "related fixture" means a capital improvement in which the Concessioner has a leasehold surrender interest.

"Replacement cost" means the estimated cost to reconstruct, at current prices, an existing structure with utility equivalent to the existing structure, using modern materials and current standards, design and layout.

"Structure" means a building, dock, or similar edifice affixed to the land so as to be part of the real estate. A structure may include both constructed infrastructure (e.g., water, power and sewer lines) and constructed site improvements (e.g., paved roads, retaining walls, sidewalks, paved driveways, paved parking areas) that are permanently affixed to the land so as to be part of the real estate and that are in

direct support of the use of a building, dock, or similar edifice. Landscaping that is integral to the construction of a structure is considered as part of a structure. Interior furnishings that are not fixtures are not part of a structure.

"Substantial completion of a capital improvement" means the condition of a capital improvement construction project when the project is substantially complete and ready for use and/or occupancy.

#### *Section 2. Obtaining a Leasehold Surrender Interest*

The Concessioner will obtain leasehold surrender interest in capital improvements constructed in accordance with the terms and conditions of this CONTRACT, including, without limitation, the terms and conditions of this Exhibit A to the CONTRACT.

#### *Section 3. Authorizing the Construction of a Capital Improvement*

The Director may only authorize or require the Concessioner to construct capital improvements on area lands in accordance with the terms and conditions of this CONTRACT and for the conduct by the Concessioner of visitor services, including, without limitation, the construction of capital improvements necessary for the conduct of visitor services.

#### *Section 4. Requirements for Beginning To Construct a Capital Improvement*

Before beginning to construct any capital improvement, the Concessioner must obtain written approval from the Director in accordance with the terms of this CONTRACT, including the terms and conditions of this Exhibit A and Exhibit F. The request for approval must include appropriate plans and specifications for the capital improvement and any other information that the Director may specify. The request must also include an estimate of the total construction cost of the capital improvement. The estimate of the total construction cost must specify all elements of the cost in such detail as is necessary to permit the Director to determine that they are elements of construction cost as defined in this Exhibit. (The approval requirements of this and other sections of this CONTRACT also apply to any change orders to a capital improvement project and to any additions to a structure or replacement of fixtures as described in this CONTRACT.)

#### *Section 5. Requirements After Substantial Completion of a Capital Improvement*

Upon substantial completion of the construction of a capital improvement in which the Concessioner is to obtain a leasehold surrender interest, the Concessioner must provide the Director a detailed construction report in accordance with the terms and conditions of this CONTRACT, including without limitation Exhibit A and Exhibit F. The construction report must be supported by actual invoices of the capital improvement's construction cost together with, if requested by the Director, a written certification from a certified public accountant. The construction report must document, and any requested certification by the certified public accountant must certify, that all components of the construction cost were incurred and capitalized by the Concessioner in accordance with GAAP, and that all components are eligible direct or indirect construction costs as defined in this Exhibit. Invoices for additional construction costs of elements of the project that were not completed as of the date of substantial completion may subsequently be submitted to the Director for inclusion in the project's construction cost.

#### *Section 6. Determining Construction Cost for Purposes of Leasehold Surrender Interest Value*

After receiving the detailed construction report (and certification, if requested), from the Concessioner, the Director will review the report, certification and other information as appropriate to determine that the reported construction cost is consistent with the construction cost approved by the Director in advance of the construction and that all costs included in the construction cost are eligible direct or indirect costs as defined in this Exhibit A. The construction cost determined by the Director will be the construction cost for purposes of the leasehold surrender interest value in the related capital improvement unless the Concessioner requests arbitration of the construction cost under Section 7 of this Exhibit A. The Director may at any time amend a construction cost determination (subject to arbitration under Section 7 of this Exhibit A) if the Director determines that it was based on false, misleading or incomplete information.

#### *Section 7. Arbitrating the Construction Cost of a Capital Improvement*

If the Concessioner requests arbitration of the construction cost of a



capital improvement determined by the Director, the request must be made in writing to the Director within 3 months of the date of the Director's determination of construction cost under Section 6 of this Exhibit A. If a timely request is not made, the Director's determination of construction cost under Section 6 shall be the final determination of the construction cost. The arbitration procedures are described in Section 1 of this Exhibit A. The decision of the arbitration panel as to the construction cost of the capital improvement will be binding on the concessioner and the Director.

*Section 8. Actions the Concessioner May or Must Take Regarding Leasehold Surrender Interest*

The Concessioner:

(a) May encumber a leasehold surrender interest in accordance with the terms of this CONTRACT;

(b) Where applicable, must transfer its leasehold surrender interest in connection with any assignment, termination or expiration of this CONTRACT; and

(c) May waive or relinquish a leasehold surrender interest.

*Section 9. Extinguishment of a Leasehold Surrender Interest*

A leasehold surrender interest may not be extinguished by the expiration or termination of this CONTRACT and a leasehold surrender interest may not be taken for public use except on payment of just compensation. Payment of leasehold surrender interest value pursuant to the terms of this CONTRACT will constitute the payment of just compensation for leasehold surrender interest within the meaning of this CONTRACT and for all other purposes.

*Section 10. Leasehold Surrender Interest Under a New Concession Contract*

If the Concessioner under this CONTRACT is awarded a new concession contract by the Director, and the new concession contract continues a leasehold surrender interest in related capital improvements, then the Concessioner's leasehold surrender interest value (established as of the date of expiration or termination of this CONTRACT) in the related capital improvements will be continued as the initial value of the Concessioner's leasehold surrender interest under the terms of the new concession contract.

*Section 11. Payment for Leasehold Surrender Interest if the Concessioner is not Awarded a New Concession Contract*

(a) If the Concessioner is not awarded a new concession contract after expiration or termination of this CONTRACT, or, the Concessioner, prior to such termination or expiration, ceases to utilize under the terms of this CONTRACT capital improvements in which the Concessioner has a leasehold surrender interest, the Concessioner will be entitled to be paid its leasehold surrender interest value in the related capital improvements. The leasehold surrender interest will not be transferred until payment of the leasehold surrender interest value. The date for payment of the leasehold surrender interest value, except in special circumstances beyond the Director's control, will be the date of expiration or termination of this CONTRACT, or the date the Concessioner ceases to utilize related capital improvements under the terms of this CONTRACT. Depreciation of the related capital improvements will be established as of the date of expiration or termination of this CONTRACT, or, if applicable, the date the Concessioner ceases to utilize the capital improvements under the terms of this CONTRACT.

(b) In the event that extraordinary circumstances beyond the control of the Director prevent the Director from making the leasehold surrender interest value payment as of the date of expiration or termination of this CONTRACT, or, as of the date the Concessioner ceases to utilize related capital improvements under the terms of this CONTRACT, the payment when made will include interest on the amount that was due on the date of expiration or termination of this CONTRACT or cessation of use for the period after the payment was due until payment is made (in addition to the inclusion of a continuing Consumer Price Index adjustment until the date payment is made). The rate of interest will be the applicable rate of interest established by law for overdue obligations of the United States. The payment for a leasehold surrender interest value will be made within one year after the expiration or termination of this CONTRACT or the cessation of use of related capital improvements under the terms of this CONTRACT.

*Section 12. Process for Determining Leasehold Surrender Interest Value*

In the event that the Concessioner and the Director cannot reach agreement as to a leasehold surrender interest value

where required by the terms of this CONTRACT, the leasehold surrender interest value will be determined by arbitration upon request of the Director or the Concessioner. The arbitration procedures are described in Section 1. A prior decision as to the construction cost of capital improvements made by the Director or by an arbitration panel in accordance with this Exhibit A are final and not subject to further arbitration.

*Section 13. Payment of Leasehold Surrender Interest by a New Concessioner*

A new concession contract awarded to a new concessioner will require the new concessioner to pay the Concessioner its leasehold surrender interest value in existing capital improvements as determined under Section 12.

*Section 14. Obtaining Additional Leasehold Surrender Interest by Undertaking a Major Rehabilitation or Adding to a Structure in Which the Concessioner has a Leasehold Surrender Interest*

If the Concessioner, with the written approval of the Director, undertakes a major rehabilitation or adds a new structure (e.g., a new wing to an existing building or an extension of an existing sidewalk) to an existing structure in which the Concessioner has a leasehold surrender interest, the Concessioner will increase its leasehold surrender interest in the related structure, effective as of the date of substantial completion of the major rehabilitation or new structure, by the construction cost of the major rehabilitation or new structure. The Consumer Price Index adjustment for leasehold surrender interest value purposes will apply to the construction cost as of the date of substantial completion of the major rehabilitation or new structure. Approvals for major rehabilitations and additions to structures are subject to the same requirements and conditions applicable to new construction as described in this CONTRACT.

*Section 15. Obtaining Additional Leasehold Surrender Interest by Replacing a Fixture in Which the Concessioner has a Leasehold Surrender Interest*

If the Concessioner replaces an existing fixture in which the Concessioner has a leasehold surrender interest with a new fixture, the Concessioner will increase its leasehold surrender interest by the amount of the construction cost of the replacement

fixture less the construction cost of the replaced fixture.

*Section 16. Obtaining a Leasehold Surrender Interest in Existing Real Property Improvements in which no Leasehold Surrender Interest Exists*

(a) If the main body of this CONTRACT requires the Concessioner to replace fixtures in real property improvements in which there is no leasehold surrender interest (e.g., fixtures attached to an existing government facility assigned by the Director to the Concessioner), a leasehold surrender interest will be obtained by the Concessioner in such replacement fixtures subject to the approval and determination of construction cost and other conditions contained in CONTRACT.

(b) If the main body of this CONTRACT requires the Concessioner to undertake a major rehabilitation of a structure in which there is no leasehold surrender interest (e.g., a government-constructed facility assigned to the Concessioner), upon substantial completion of the major rehabilitation, the Concessioner will obtain a leasehold surrender interest in the structure. The initial construction cost of this leasehold surrender interest will be the construction cost of the major rehabilitation. Depreciation for purposes of leasehold surrender interest value will apply only to the rehabilitated components of the related structure.

*Section 17. No Leasehold Surrender Interest Results from Repair and Maintenance of Real Property Improvements*

The Concessioner will not obtain initial or increased leasehold surrender interest as a result of repair and maintenance of real property improvements unless a repair and maintenance project is a major rehabilitation.

**Exhibit B**

**(Sample) Operating Plan**

*I. Introduction*

This Operating Plan between \_\_\_\_\_ (hereinafter referred to as the "Concessioner") and [Park Unit Name] (hereinafter referred to as the "Service") shall serve as a supplement to Concession Contract CC-xxxxnnnn-yy (hereinafter referred to as the "CONTRACT"). It describes specific operating responsibilities of the Concessioner and the Service with regard to those lands and facilities within [Park Unit Name] which are assigned to the Concessioner for the

purposes authorized by the CONTRACT.

In the event of any conflict between the terms of the CONTRACT and this Operating Plan, the terms of the CONTRACT, including its designations and amendments, shall prevail.

This plan will be reviewed annually by the Superintendent in consultation with the Concessioner and revised as determined necessary by the Superintendent of [Park Unit Name].

Any revisions shall not be inconsistent with the main body of this CONTRACT. Any revisions must be reasonable and in furtherance of the purposes of the CONTRACT.

[From this point on, this document is tailored to the requirements of each individual park.]

**Exhibit C**

**Nondiscrimination**

*Section I: Requirements Relating to Employment and Service to the Public*

*A. Employment*

During the performance of this CONTRACT the Concessioner agrees as follows:

(1) The Concessioner will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, national origin, or disabling condition. The Concessioner will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, age, national origin, or disabling condition. Such action shall include, but not be limited to, the following: Employment upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Concessioner agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Secretary setting forth the provision of this nondiscrimination clause.

(2) The Concessioner will, in all solicitations or advertisements for employees placed by on behalf of the Concessioner, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, national origin, or disabling condition.

(3) The Concessioner will send to each labor union or representative of workers with which the Concessioner has a collective bargaining agreement or other contract or understanding, a

notice, to be provided by the Secretary, advising the labor union or workers' representative of the Concessioner's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) Within 120 days of the commencement of a contract every Government contractor or subcontractor holding a contract that generates gross receipts which exceed \$50,000 and having 50 or more employees shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices, and procedures in accordance with the affirmative action program requirement.

(5) The Concessioner will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The Concessioner will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to the Concessioner's books, records, and accounts by the Secretary of the Interior and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the Concessioner's noncompliance with the nondiscrimination clauses of this CONTRACT or with any of such rules, regulations, or orders, this CONTRACT may be canceled, terminated or suspended in whole or in part and the Concessioner may be declared ineligible for further Government concession contracts in accordance with procedures authorized in Executive Order No.

11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The Concessioner will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations,

or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontractor or vendor. The Concessioner will take such action with respect to any subcontract or purchase order as the Secretary may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the Concessioner becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Secretary, the Concessioner may request the United States to enter into such litigation to protect the interests of the United States.

#### B. Construction, Repair, and Similar Contracts

The preceding provisions A(1) through A(8) governing performance of work under this CONTRACT, as set out in Section 202 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, shall be applicable to this CONTRACT, and shall be included in all contracts executed by the Concessioner for the performance of construction, repair, and similar work contemplated by this CONTRACT, and for that purpose the term "CONTRACT" shall be deemed to refer to this instrument and to contracts awarded by the Concessioner and the term "Concessioner" shall be deemed to refer to the Concessioner and to contractors awarded contracts by the Concessioner.

#### C. Facilities

(1) *Definitions:* As used herein:

(i) Concessioner shall mean the Concessioner and its employees, agents, lessees, sublessees, and contractors, and the successors in interest of the Concessioner;

(ii) facility shall mean any and all services, facilities, privileges, accommodations, or activities available to the general public and permitted by this agreement.

(2) The Concessioner is prohibited from:

(i) publicizing facilities operated hereunder in any manner that would directly or inferentially reflect upon or question the acceptability of any person because of race, color, religion, sex, age, national origin, or disabling condition;

(ii) discriminating by segregation or other means against any person.

#### Section II: Accessibility

Title V, Section 504, of the Rehabilitation Act of 1973, as amended in 1978, requires that action be taken to assure that any "program" or "service" being provided to the general public be provided to the highest extent reasonably possible to individuals who are mobility impaired, hearing impaired, and visually impaired. It does not require architectural access to every building or facility, but only that the service or program can be provided somewhere in an accessible location. It also allows for a wide range of methods and techniques for achieving the intent of the law, and calls for consultation with disabled persons in determining what is reasonable and feasible.

No handicapped person shall, because a Concessioner's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance or conducted by any Executive agency or by the U.S. Postal Service.

#### A. Discrimination Prohibited

A Concessioner, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(1) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(2) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(3) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(4) Provide different or separate aids, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(5) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(6) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(7) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

#### B. Existing Facilities

A Concessioner shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not require a Concessioner to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

#### Exhibit D

##### Assigned Land and Real Property Improvements (Concession Facilities)

##### Land Assigned

Land is assigned in accordance with the boundaries shown on the following map[s]:

##### Real Property Improvements Assigned

The following real property improvements are assigned to the concessioner for use in conducting its operations under this CONTRACT:

Building Number	Description	Approved, effective _____, 20____
By: _____		
Regional Director, _____ Region		

#### Exhibit E

##### Assigned Government Personal Property

Government personal property is assigned to the Concessioner for the purposes of this CONTRACT as follows:

Property Number	Description of Item	Effective, this ____ day of _____, 20____
By: _____		
Regional Director, _____ Region		

#### Exhibit F

##### Concessioner Construction, Major Rehabilitation, and Repair and Maintenance Project Procedures

##### A. Introduction

This exhibit presents step-by-step procedures for the administration of Concessioner building projects (construction, major rehabilitation, and repair and maintenance projects) within the park Area. Important terms are defined first. Project planning and design are presented second, followed by guidelines for project supervision. All projects undertaken by the Concessioner require a coordinated effort between the Concessioner and the Superintendent. This exhibit applies to

the building of new structures or facilities, major rehabilitations, and the repair and maintenance ("R&M projects") of existing Concession Facilities that change the nature, appearance or value of existing Concession Facilities. Rehabilitation projects that are not major rehabilitations as defined in the Contract are considered as R&M projects. Facility operations, custodial and preventive maintenance and maintenance needed for facility operations are not considered R&M projects subject to these procedures. Repair and maintenance is also not to be considered as a project subject to these procedures when the activity does not change the nature, appearance or value of existing Concession Facilities. All projects must be proposed, approved, and accomplished under these procedures. In the event of any inconsistency between this exhibit and the main body of this CONTRACT and Exhibit A, the main body of the CONTRACT and Exhibit A will prevail.

In accordance with the Contract, only certain new construction and major rehabilitation projects may qualify for leasehold surrender interest (LSI). Following these administrative procedures for both LSI and non-LSI projects will enable NPS to approve LSI, as well as to ensure that all requirements of law and NPS policy are undertaken with respect to any project. In addition, these procedures will enable the appraisal of LSI to occur in an orderly way. The documentation collected and organized by the use of these guidelines will provide a record of decision or "paper trail" of project development and implementation that will assist the park and concessioner in future planning and facility appraisal.

All project activities shall be directed and managed as presented in the "Annual Construction and Repair and Maintenance Management Plan" (CMP). In addition to these activities, the CMP is also to present scheduled project development and implementation, as presented below under Item C, Project Planning and Design, paragraph 1. Individual projects included in the CMP will be authorized by NPS through an approved Project Statement (PS).

Projects may be required to be reviewed under the National Environmental Policy Act (NEPA) of 1969, as amended. Projects within historic and culturally significant areas may require certain building management methods established under the National Historic Preservation Act of 1966, as amended. All construction shall comply with codes and building requirements adopted by NPS,

including without limitation and where applicable, the most recent International Building Code (IBC), National Fire Protection Association (NFPA) codes, the Americans with Disabilities Act (ADA) requirements, and NPS management policies.

The Concessioner is responsible for all aspects of project development and implementation. The role of the NPS is to provide direction, authorization and oversight. The Concessioner and the Park staff must work closely together to successfully complete construction projects in a manner that achieves the goals and objectives of the park Area and the NPS.

#### *B. Definition of Terms*

"Annual Construction and Repair and Maintenance Management Plan" (CMP): A written document presenting all construction, major rehabilitation and R&M projects to be undertaken by the Concessioner during the following calendar year after the final submittal date.

"Approved Project Documents": Project drawings and specifications approved by the Park Superintendent and used by the Concessioner to direct a contractor in the type, size and quality of projects.

"Change Order": A written agreement between the "Construction Supervisor" and the Contractor or Consultant that changes the contract documents or scope of project work as agreed upon contractually.

"Construction": The removal or assembly of a building, road, utility or any other facility part or material that changes the nature, appearance, or value of that facility.

"Construction Supervisor": A Concessioner employee designated to administer and coordinate day-to-day projects representing the interests of the Concessioner and NPS and assuring quality work is performed that meets the design and specifications of the project. This person must have the authority to direct the contractor in any way that may change the contractual agreement between the Concessioner and the contractor.

"Conventional Design-Bid-Build Methods": Construction developed and implemented under several separate agreements managed and coordinated directly by the Concessioner.

"Contact Person": A Concessioner employee designated as the person to contact with regard to a specific matter, concern, or issue.

"Facilitator": A Concessioner employee designated to have the role of providing structure and agendas for

meetings with NPS and who records meeting discussions and outcomes.

"Guaranteed Maximum Price Design-Build Construction Methods": An industry recognized type of construction where project consultants and contractors form an agreement to work as one entity providing facility construction in response to a developed request for proposal issued by the Concessioner. (Reference: Design Build Institute of America).

"Licensed Contractor": An entity performing construction certified or licensed by the State to perform construction services within that State.

"Major Rehabilitation": (Defined in the CONTRACT).

"Project Coordinator": A Concession employee vested with the authority to direct consultants and contractors in the expenditure of construction and R&M funds.

"Project Statement" (PS): An agreement between NPS and the Concessioner approved by the Park Superintendent that authorizes the development and implementation of individual projects identified in a CMP.

"Registered Technical Professionals": Architects, engineers, or any subject area expert either certified or licensed by the State to perform specialized services or certified by a widely recognized industry regulator held responsible for quality and standard application of technical subject matter.

"Substantially Complete": (Defined in the CONTRACT).

"Total Project Cost": The total of all actual project expenditures (invoiced and paid) for completion of a project.

"Total Project Price": The total of all estimated project expenditures for completion of a project.

#### **C. Project Planning and Design**

##### **(1) Submit an Annual Construction and Repair and Maintenance Plan (CMP)**

Before approval to proceed with any project is granted by NPS, the Concessioner must submit a CMP for implementation the following year. Some projects may require several years of planning and design before construction. The purpose of the plan is to identify the need and tentative scope of projects a complete year in advance of actual work to allow adequate time to prepare for project commencement. The CMP should include any intended projects. Projects shown in the plan must include at least a project title; project concept description; a brief statement of justification; and anticipated NEPA and Section 106 planning and compliance established in collaboration with NPS staff.

## (2) Notify NPS of Intent-to-Proceed

The Concessioner shall formally notify the Park Superintendent in writing of intent to proceed with any facility planning, design and/or projects. The project must be identified in the CMP the calendar year before to assist the NPS in sequencing and scheduling necessary support staff. The time of notification shall be sufficiently in advance of any Concessioner budget formulation to assure the requirements of the Park Superintendent are included in the project scope *before* the project is funded.

## (3) Identify a Project Coordinator

The Concessioner project coordinator must be identified for each project. This person should have the authority to obligate project expenditures and hire and direct consultants and contractors, and concessioner support staff.

## (4) Prepare a Proposed Project Statement (PS)

Arrange and facilitate a project planning conference with NPS staff and prepare a proposed PS to be submitted to the Park Superintendent for review. The conference should be performed on the proposed project site, if needed.

(a) *Conference goal and product.* The primary goal of the conference is to clearly identify the project concepts and scope at sufficient detail to carry the project through to completion without significant deviation from an approved PS. The product of the conference should be an approved PS prepared by the Concessioner resulting from collaboration between the Concessioner and the Park Superintendent.

(b) *Project Statement Content.* The PS shall include the following as a minimum: Project description; justification; scope of work, including NEPA and Section 106 planning and compliance; estimated Total Project Price; proposed schedule; milestones of NPS design review and third party project inspection and certification. The elements of the PS will function as check points of accountability and will vary in frequency and scope, contingent upon the nature, complexity and scope of the proposed project.

(c) *Leasehold Surrender Interest.* If the Concessioner seeks leasehold surrender interest as a result of a construction project, the Concessioner must request and receive the written approval of the proposed construction project by the Park Superintendent in accordance with the terms of this leasehold surrender interest concession contract. An estimate of the amount of leasehold surrender interest shall be identified in

advance if the Concessioner requests leasehold surrender interest. The estimated leasehold surrender interest costs shall be separately identified as part of the Total Project Price and substantiated, if requested, with written and competitively acquired price proposals or construction contracts. Not all projects qualify for LSI. LSI is only granted under the terms of this CONTRACT, including, without limitation, its Exhibit A.

(d) *Methods of Establishing the Expected Value of Leasehold Surrender Interest.* A number of methods are available to estimate the Concessioner's leasehold surrender interest as long as eligible direct and indirect costs are specified. The methods of identifying the expected value of leasehold surrender interest include guaranteed maximum price design-build construction methods, conventional design-bid-build methods, and construction price estimates professionally prepared by subject area experts.

(e) *Professional Services and Construction.* The Concessioner must assure the park in its project statement that for any project requiring professional services, such services shall be acquired from appropriate registered technical professionals. Licensed contractors shall perform all project work unless otherwise approved in writing by the Superintendent. The Concessioner shall provide for registered technical professionals to perform project inspection and/or facility certification, or any other service needed for project implementation at the request of the Park Superintendent.

(f) *NPS Operations.* Any aspect of the proposed project where the scope of work interfaces with NPS operations such as utility service connections or road maintenance operations must be clearly identified in the PS.

## (5) Submit Project Statement for NPS Review

The proposed PS shall be submitted in written correspondence from the Concessioner to the Park Superintendent requesting review. A PS signed by the Park Superintendent constitutes official authority for the Concessioner to continue further project development to the level specified in written correspondence from the Superintendent. The Concessioner may obtain authority to complete a project when sufficient planning and design has been completed to meet the interests of the park. Projects that do not have the level of required planning are likely to receive only conceptual approval with authorization to proceed with further

planning and/or design as required to assure park objectives are met.

(a) *Project Statements Containing Claims for Leasehold Surrender Interest.* A PS must present an estimate of project expenditures to be claimed for LSI purposes. The eligibility of any expenditures for LSI will not be identified until all project planning is complete to the satisfaction of the Park Superintendent, including NEPA and Section 106 compliance, if required. An approved PS serves only as a guide for further project development to the level specified in the PS. The Park Superintendent shall only approve final LSI costs after project completion and written project close-out.

(b) *Design Required for Leasehold Surrender Interest Eligibility and Value.* The Park Superintendent may require an appropriate level of design to determine whether a project is eligible for LSI, and if so, its estimated cost. The level of project planning and design required may include completion of concept design, schematic design, or preliminary engineering design, to clearly identify the elements eligible for LSI. Some projects may require the completion of construction drawings and specifications before the proposed LSI is documented to the satisfaction of the Park Superintendent. All improvements for which LSI is claimed must be defined in record "as-built" construction drawings and specifications when the Concessioner submits its request for LSI at Project Close-out.

## (6) Establish a Project File

A file of all project documents shall be held by the Concessioner as a chronological audit trail of all project decision-making activity for each project from concept development to completion and NPS acceptance. Each project shall be identified with a unique project number assigned by the Park. All documents entered into the file should have the project identification number clearly displayed on it as part of document identity.

(a) *Leasehold Surrender Interest Project File.* The Project File will become an LSI project file when the Concessioner requests approval of LSI. It shall be established and maintained by the Concessioner and shall include all of the documents identified in section 6(C) of this Exhibit. This file shall be submitted at the time of Project Close-out to the Park Superintendent as the basis for the leasehold surrender interest request. As part of this file, the Concessioner must maintain auditable records of all expenditures attributable to each project and have them available

for review if requested by NPS personnel. Invoices shall contain sufficient information to identify the tasks completed or products delivered as agreed upon in contracts presenting a full scope of work. The file shall clearly provide a "paper trail" between expenditures eligible for LSI purposes and the payment of those expenses.

(b) *Typical Project File.* The organization of a typical project file is presented in the following sections:

*Section A. Project Statement.* The approved PS, scope of work, and a copy of the notice-to-proceed letter, authorizing planning and design, sent to the Concessioner by the Park Superintendent should be filed in this section.

*Section B. Planning.* This section should contain documents pertaining to any project planning. Typical documents include those produced for NEPA and Section 106 compliance. Also contained in this section should be any concept design, preliminary design, or schematic design correspondence and documents. When the Park Superintendent grants approval for any of the above stages of project development, correspondence from the Park Superintendent should be filed in this section.

*Section C. Assessment.* This section should contain a record of any assessment performed during project implementation. Soil, vegetation, floodplain, structural, electrical assessments, for example, should be filed in this section. Any other existing site or facility investigative reports, and all quality assurance documents such as third party project inspection, testing and certification should also be filed in this section.

*Section D. Design.* This section should contain a record of documents produced and decisions made during the design phase of a project. The design phase typically occurs when project activity has shifted from conceptual discussion to organizing detailed direction provided to a contractor for construction. Correspondence from the Park Superintendent providing design approval should be in this section.

*Section E. Project Work.* This section should contain a record of decisions made during project work. The letter from the Park Superintendent granting notice-to-proceed with the project should be in this section. All contractor proposals, change-orders, design modification documents, daily construction activity records, weekly meeting minutes, etc. should be in this section. Documentation for larger projects should be organized according to subcontractor activity or standard

specification enumeration. The final document filed in this section should be the NPS correspondence sent to the Concessioner providing project acceptance and close-out.

*Section F. Financial.* This is a very important section where a copy of all contracts and contract modifications should be filed. It is important to assure that all expenditures are accounted for. All expenditures must have sufficient supporting documentation cross-referenced with documents in other file sections, if necessary. Monthly financial detail reports shall be prepared and filed in this section with copies of all project budget documents. This section must contain all correspondence supporting LSI with appropriate cross reference to other sections for clarity of the LSI "paper trail." (For example, cross reference tabs). Also contained in this section shall be a copy of the project acceptance and close-out letter from the Park Superintendent that specifies the amount of leasehold surrender interest, if any, applicable to the project.

*Section G. Photo Documentation.* Complete documentation, including before-and-after photos, records of any special situations or conditions requiring changes, documentation of methods used, etc., should be kept to support requests for LSI and to assist future maintenance and/or appraisal efforts. Photographic documentation is also usually required for modifications to "listed" historic structures. To be most useful, photos should be filed with the documents they support.

#### (7) Submit Resource Compliance Documents for Review and Approval

During development of the project statement, responsibility for compliance work will be established. The Concessioner must request the participation of NPS staff early in project planning to assure uninterrupted project implementation. Development of compliance documentation must occur as soon as possible. Every effort shall be made to perform compliance document preparation tasks concurrently with project planning and design.

(a) *Historic/cultural compliance.* Historic and cultural compliance document approval is required for property listed in or eligible for inclusion in the National Register of Historic Places. Any undertaking affecting property listed shall be performed in accordance with The Secretary of the Interior's Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings. The Concessioner must document proposed actions using the "XXX Form"

(available from the National Park Service) before any work occurs for any project that may affect a historic structure, historic district, cultural landscape, archeological site or historic object or furnishing. Compliance will usually require the preparation of at least "assessment of effect" drawings and specifications to the level of final documents if required. Compliance shall carry through to submission of the "Construction or R&M Completion Report" for many projects where significant changes are made to the historic structure and/or landscape. Therefore, compliance document approval usually will not occur until after submission of project documents. In-park historic compliance review and approval will require at least several weeks from date of submittal. Where submittal is made to the State Historic Preservation Officer or the Advisory Council on Historic Preservation, additional time will be required before approval may be given. This may be performed concurrently with approval of project documents.

(b) *Ground disturbance.* Where ground disturbance will take place submittal of drawings that show area and depth of proposed ground disturbance will be required. Submittal of this document early in project planning is recommended. All project documents that include soil disturbance shall have the following specification included within them:

"Petroglyphs, artifacts, burial grounds or remains, structural features, ceremonial, domestic, and archeological objects of any nature, historic or prehistoric, found within the project area are the property of and will be removed only by the Government. Should Contractor's operations uncover or his/her employees find any archeological remains, Contractor shall suspend operations at the site of discovery; notify the Government immediately of the findings; and continue operations in other areas. Included with the notification shall be a brief statement of the location and details of the findings. Should the temporary suspension of work at the site result in delays, or the discovery site require archeological studies resulting in delays of additional work for Contractor, he/she will be compensated by an equitable adjustment under the General Provisions of the contract."

(c) *Archeological Monitoring.* Monitoring project activity is a requirement of cultural compliance when significant ground disturbance occurs during project work. Any cultural resource monitoring required shall be performed under the direction

of the NPS. The NPS shall be notified sufficiently in advance of the need for a monitor and will assist the Concessioner in making arrangements for the services of an archeological monitor at the expense of the Concessioner, if the NPS is unable to provide the expertise.

(d) *National Environmental Policy Act (NEPA) compliance.* NEPA compliance document approval is required before any construction or R&M project occurs for any project that has an impact on the environment. Projects requiring compliance will be identified by the NPS early during project planning. The actual review period length may vary widely depending on the nature, scope, and complexity of the project elements that relate to resource compliance. Projects that have an insignificant effect on park resources usually require a "categorical exclusion" determination—a process that may require sufficient extended lead-time from submittal of review documents. Projects having a significant effect on park resources or that are not part of other NEPA compliance documentation may also require a longer period of implementation.

(8) Submit Project Documents (PDs) for Review and Approval

The Concessioner shall submit PDs for review and approval to establish project activity for approval by the Superintendent. Approved PDs establish the full scope of the project and the quality of work to be performed by the Concessioner. The scope of the documents required will be identified in the PS. The scope and detail of the documents will vary depending on the nature and complexity of the project. "Manufacturer's cut-sheets" may be all that is required for some R&M projects, and for others, complete detailed drawings and specifications may be required. The Concessioner is responsible for the technical accuracy and completeness of PDs and shall provide the technical review as needed to assure compliance with all applicable federal, state and local statutes, codes, regulations and appropriate industry standards. Any exception to this will be by written authorization from the Superintendent.

(9) Submit a Project Estimate and Schedule

An estimate of the Total Project Price and completion schedule shall be submitted to the Superintendent before work begins. This is a revision of the Total Project Price and completion schedule estimated in the Project Statement. It is based on the best

information available identified during project planning and design.

*D. Project Management Procedures*

(1) Identify a Project Supervisor

A Project Supervisor shall be identified and vested with the authority to direct the contractor on behalf of the Concessioner. The NPS will direct its communication concerning the nature and progress of day-to-day project activity to this person. This person should have full responsibility for assuring that all construction complies with the approved Project Documents and specified code compliance. The NPS should not take any responsibility for projects until Project Close-out and Acceptance when the NPS receives certification of completed work performed in compliance with Project Documents and all specified codes.

(2) Submit a Total Project Price for Review

(a) All projects completed under the terms of this Contract where LSI is requested shall include submittal of a Total Project Price in writing to the Superintendent for review.

(b) Where no LSI is requested, the Total Project Price is provided as an informational item. Formal approval by the Superintendent is not required.

(3) Notice-to-Proceed with a Project

A "Notice-to-Proceed" with a project will be issued when all submittals requested by the Park Superintendent have been reviewed and approved. The Notice-to-Proceed must be received by the Concessioner in writing before any project work occurs.

(4) Hold a Pre-Project Conference with the Contractor

The Concessioner shall arrange and facilitate a pre-project conference as needed or as requested by the NPS with the Contractor. The purpose of the conference is to provide the NPS the opportunity to meet the Contractor and confirm that the Contractor has full understanding and knowledge of all work to be performed. In addition, the conference provides the opportunity to confirm established communication linkages between the Concessioner, the Contractor and the NPS. Any questions the Contractor may have regarding any matter of the project or anything about Area access, rules and regulations may also be discussed.

(5) Submit Project Activity Reports (As Required)

A record of project activity shall be provided by the Concessioner on all approved projects. The scope and

frequency of performing this documentation shall be identified upon submittal of PDs for Park approval. The Concessioner is responsible for the accuracy and completeness of all design and completed projects.

(a) *Content.* Project activity reports shall summarize daily project activity recording important observations and decisions. It shall also identify project expenditures to date if required for leasehold surrender interest purposes. The reports shall identify any changes to the approved PDs either by change order or any other variance from approved PDs. The NPS shall be notified immediately, if a change is likely to occur in the Total Project Price where the project involves LSI. (See discussion below for review and approval of change orders and contract modifications.)

(b) *Regulatory code compliance and project inspection (as required).*

Inspection reports specifically addressing regulatory code compliance and adherence to PDs will be required, at the request of the Superintendent, during certain stages of the work. Independent industry certified inspectors or registered professional subject area experts shall perform all inspections and project component certification. Inspection reports shall be prepared that include all findings and results of code compliance inspection. Section and paragraph of applicable codes shall be referenced when deficiencies are noted. Recommendations presenting remediation shall accompany line item deficiencies in the report. All inspection reports shall be included in the final project completion report submitted before project acceptance by the Superintendent.

(6) Submit Requests for Changes in Approved Project Documents

The Superintendent's approval will be required before any significant changes are made to the project scope during the completion of projects, as identified in the approved PDs. The Concessioner shall provide the NPS with written notification immediately upon identifying the need for a change in project scope that effects any of the items listed below. The written notification shall include a request for change in the approved PDs complete with justification and explanation of effect of change on all other aspects of project design and work. Requests for any significant changes in the approved PDs shall be reported in project activity reports with attachment of any documentation requested. Changes in approved project scope during the work



that will require review and approval of the Superintendent include the following:

(a) Changes affecting natural, cultural and/or historic resources;

(b) Changes in designated visual appearance;

(c) Changes in the interface with NPS utility and/or road facility maintenance operations;

(d) Changes in project scope and/or the estimated leasehold surrender interest, as required for facility improvement projects.

(e) Proposed changes where natural or cultural/historic resources are involved may require a significant period of review depending on the complexity of the concern.

(7) Submittal of Change Orders for Review and Approval (For Leasehold Surrender Interest Only)

When one of the five factors listed above exists, the Concessioner shall submit, for the review and approval of the Park Superintendent, documentation justifying the proposed changes. The Concessioner shall also submit a revised Total Project Price for each proposed change, as needed, indicating the proposed change in estimated LSI. All change orders or any other means of directing the Contractor that may have the effect of increasing the Total Project Price will require the Park Superintendent's review and approval, if the project has LSI implications.

(8) NPS Project Inspection

The project will be inspected periodically by a representative of the Park Superintendent. The purpose of these inspections is not in lieu of or in any way a substitute for project inspection provided by the Concessioner. The responsibility to assure safe, accountable project activity and for providing the contractor with direction to fulfill the full scope of approved work is the responsibility of the Concessioner.

(9) Project Supervision Documents

Project drawings and specifications must be kept on the project site complete with any design or project modifications, in a well-organized form. The Construction Supervisor shall keep a current "red-line" copy of approved PDs updated daily showing any changes. In addition, a well-organized file of submittals required in the approved PDs and approved where required by professional Architects and/or Engineers must also be kept on the project site with the PDs for periodic inspection by NPS staff.

(10) Substantial Completion Inspection and Occupancy

Joint inspection by the NPS and the concessioner will occur upon notification that the project is substantially complete. A "punch list" of work items will be formulated and performed to "close-out" the project. The Superintendent, in writing will accept the project, when the "punch-list" items are completed.

The Concessioner is not to occupy the facility until authorized in writing by the Park Superintendent.

(11) Requesting Approval of Leasehold Surrender Interest

Upon substantial completion of a project, as determined by the Park Superintendent, the Concessioner must provide the Superintendent a written schedule of requested LSI eligible costs incurred, which becomes the Concessioner's request for LSI approval. The project file, containing actual invoices and the administrative record of project implementation, must support these expenditures and shall be submitted to the Park Superintendent for review with the request. If requested by the Park Superintendent, the Concessioner shall also provide written certification from a certified public accountant regarding the LSI costs. The certification must comply with the requirements of Exhibit A of this Contract.

(12) Project Completion Report

Upon completion of any project, the Concessioner shall submit a Project Completion Report to the NPS. The completion report shall include the Total Project Cost; before-and-after photo documentation; warranties; operation and maintenance manuals, if required; all inspection and certification reports; and "as-constructed" drawings (see item section C(13) below). Projects where LSI is requested may require the submittal of any other similar documents deemed by the NPS necessary to establish complete project documentation. The level of documentation requested may also include adequate photo-documentation provided during construction to record significant unforeseen site and construction conditions resulting in changes to approved PDs and the approved Total Construction Price.

(13) "As-Constructed Drawings"

The "as constructed" drawings included with the Project Completion Report for all projects shall be full-size archival quality prepared in accordance with NPS management policies and must be submitted before project

acceptance by the National Park Service. At least two half-size sets of drawings shall also be provided. The drawings establishing LSI shall provide a full and complete record of all "as-constructed" facilities including reproduction of approved submittals and manufacturer's literature documenting quality of materials, equipment and fixtures in addition to a record set of project specifications approved for construction.

(14) Request Project Acceptance and Close-out by the Superintendent

The Concessioner shall request project acceptance by the Park Superintendent either at the time of submittal of the Project Completion Report or at any time thereafter. Project acceptance will be contingent upon fulfillment of all requested project completion work tasks and submittal of all project documentation in accordance with these guidelines and as requested by the NPS. Until receiving formal written project acceptance and close-out from the Park Superintendent, the Concessioner retains full responsibility for all project construction activity and liability for both completed and uncompleted work. For LSI projects, the project close-out letter issued by the Superintendent will specify the granted amount of LSI value resulting from the project.

**Exhibit G**

**Leasehold Surrender Interest as of the Effective Date of this Contract**

Pursuant to Section 9(c)(2), the Concessioner's leasehold surrender interest in real property improvements as of the effective date of this CONTRACT, if any, is as follows:

Building Number	Description	Value

[If there are none, this exhibit should say "NONE".]

Exhibit G Approved Effective \_\_\_\_\_

Concessioner

United States of America

By: \_\_\_\_\_

Director, National Park Service

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Exhibit H**

**(Sample) Maintenance Plan**

*I. Introduction*

This Maintenance Plan between \_\_\_\_\_ (hereinafter referred to as the "Concessioner") and [Park Unit Name], National Park Service (hereinafter referred to as the "Service") shall serve



as a supplement to Concession Contract CC-xxxxnnnn-yy (hereinafter referred to as the "CONTRACT"). It sets forth the maintenance responsibilities of the Concessioner and the Service with regard to those lands and facilities within [Park Unit Name] which are assigned to the Concessioner for the purposes authorized by the CONTRACT.

In the event of any apparent conflict between the terms of the CONTRACT and this Maintenance Plan, the terms of the CONTRACT, including its designations and amendments, shall prevail.

This plan shall remain in effect until superseded or amended. It will be reviewed annually by the Superintendent in consultation with the Concessioner and revised as determined necessary by the Superintendent of [Park Unit Name]. Revisions may not be inconsistent with the terms and conditions of the main body of this CONTRACT. Revisions must be reasonable and in furtherance of the purposes of this CONTRACT.

[From this point on, this document is tailored to the requirements of each individual park.]

## Exhibit I

### Insurance Requirements

#### I. Insurance Requirements

The Concessioner shall obtain and maintain during the entire term of this CONTRACT, at its sole cost and expense, the types and amounts of insurance coverage necessary to fulfill the obligations of the CONTRACT:

#### II. Liability Insurance

The following Liability Coverages are to be maintained at a minimum, all of which are to be written on an occurrence basis only. The Concessioner may attain the limits specified below by means of supplementing the respective coverage(s) with Excess or Excess "Umbrella" Liability.

##### A. Commercial General Liability

1. Coverage will be provided for bodily injury, property damage, personal or advertising injury liability (and must include Contractual Liability and Products/Completed Operations Liability).  
Bodily Injury and Property Damage Limit  
Products/Completed Operations Limit  
Personal Injury & Advertising Injury Limit  
General Aggregate  
Fire Damage Legal Liability "per fire"

2. The liability coverages may not contain the following exclusions/limitations:

- a. Athletic or Sports Participants
- b. Products/Completed Operations
- c. Personal Injury or Advertising Injury exclusion or limitation
- d. Contractual Liability limitation
- e. Explosion, Collapse and Underground Property Damage exclusion
- f. Total Pollution exclusion
- g. Watercraft limitations affecting the use of watercraft in the course of the concessioner's operations (unless separate Watercraft coverage is maintained)

3. For all lodging facilities and other indoor facilities where there may be a large concentration of people, the pollution exclusion may be amended so that it does not apply to the smoke, fumes, vapor or soot from equipment used to heat the building.

4. If the policy insures more than one location, the General Aggregate limit must be amended to apply separately to each location, or, at least, separately to the appropriate NPS location(s).

##### B. Automobile Liability

Coverage will be provided for bodily injury or property damage arising out of the ownership, maintenance or use of "any auto," Symbol 1. (Where there are no owned autos, coverage applicable to "hired" and "non-owned" autos, "Symbols 8 & 9," shall be maintained.)  
Each Accident Limit

##### C. Liquor Liability (if applicable)

Coverage will be provided for bodily injury or property damage including damages for care, loss of services, or loss of support arising out of the selling, serving or furnishing of any alcoholic beverage.

Each Common Cause Limit  
Aggregate Limit

##### D. Watercraft Liability (or Protection & Indemnity) (if applicable)

Coverage will be provided for bodily injury or property damage arising out of the use of any watercraft.

Each Occurrence Limit

##### E. Aircraft Liability (if applicable)

Coverage will be provided for bodily injury or property damage arising out of the use of any aircraft.

Each Person Limit  
Property Damage Limit  
Each Accident Limit

##### F. Garage Liability (if applicable)

This coverage is not required, but may be used in place of Commercial General Liability and Auto Liability coverages for some operations. Coverage will be provided for bodily injury, property damage, personal or advertising injury

liability arising out of garage operations (including products/completed operations and contractual liability) as well as bodily injury and property damage arising out of the use of automobiles.

Each Accident Limits—Garage Operations

Auto Only

Other Than Auto Only

Personal Injury & Advertising Injury Limit

Fire Damage Legal Liability "per fire"

Aggregate Limit—Garage Operations Other Than Auto Only

If owned vehicles are involved, Liability coverage should be applicable to "any auto" ("Symbol 21") otherwise, coverage applicable to "hired" and "non-owned" autos ("Symbols 28 & 29") should be maintained.

G. Excess Liability or Excess "Umbrella" Liability

This coverage is not required, but may be used to supplement any of the above Liability coverage policies in order to arrive at the required minimum limit of liability. If maintained, coverage will be provided for bodily injury, property damage, personal or advertising injury liability in excess of scheduled underlying insurance. In addition, coverage shall be at least as broad as that provided by underlying insurance policies and the limits of underlying insurance shall be sufficient to prevent any gap between such minimum limits and the attachment point of the coverage afforded under the Excess Liability or Excess "Umbrella" Liability policy.

H. Care, Custody and Control—Legal Liability (Describe Specific Coverage)

Coverage will be provided for damage to property in the care, custody or control of the concessioner.

Any One Loss

##### I. Environmental Impairment Liability

Coverage will be provided for bodily injury, personal injury or property damage arising out of pollutants or contaminants (on site and/or offsite).

Each Occurrence or Each Claim Limit  
Aggregate Limit

J. Special Provisions for Use of Aggregate Policies

At such time as the aggregate limit of any required policy is (or if it appears that it will be) reduced or exhausted, the concessioner may be required to reinstate such limit or purchase additional coverage limits.

**K. Self-Insured Retentions**

Self-insured retentions on any of the above described Liability insurance policies (other than Excess "Umbrella" Liability, if maintained) may not exceed \$5,000.

**L. Workers Compensation & Employers' Liability**

Coverage will comply with the statutory requirements of the state(s) in which the concessioner operates.

**III. Property Insurance****A. Building(s) and/or Contents Coverage**

1. Insurance shall cover buildings, structures, improvements & betterments and/or contents for all Concession Facilities, as more specifically described in Exhibit D of this CONTRACT.

2. Coverage shall apply on an "All Risks" or "Special Coverage" basis.

3. The policy shall provide for loss recovery on a Replacement Cost basis.

4. The amount of insurance should represent no less than 90% of the Replacement Cost value of the insured property.

5. The coinsurance provision, if any, shall be waived or suspended by an Agreed Amount or Agreed Value clause.

6. Coverage is to be provided on a blanket basis.

7. The Vacancy restriction, if any, must be eliminated for property that will be vacant beyond any vacancy time period specified in the policy.

8. Flood Coverage shall be maintained with a limit of not less than \$.

9. Earthquake Coverage shall be maintained with a limit of not less than \$.

10. Ordinance or Law Coverage shall be maintained with a limit of not less than \$.

**B. Boiler & Machinery Coverage**

1. Insurance shall apply to all pressure objects within Concession Facilities.

2. The policy shall provide for loss recovery on a Replacement Cost basis.

3. The amount of insurance should represent no less than 75% of the Replacement Cost value of the insured property.

4. The coinsurance provision, if any, shall be waived or suspended by an Agreed Amount or Agreed Value clause.

5. Coverage is to be provided on a blanket basis.

6. If insurance is written with a different insurer than the Building(s) and Contents insurance, both the Property and Boiler insurance policies must be endorsed with a joint loss agreement.

7. Ordinance or Law Coverage shall be maintained with a limit of not less than \$.

**C. Builders Risk Coverage**

1. Insurance shall cover new buildings or structures under construction at the Concession Facilities, and include coverage for property that has or will become a part of the project while such property is at the project site, at temporary off-site storage and while in transit. Coverage should also apply to temporary structures such as scaffolding and construction forms.

2. Coverage shall apply on an "All Risks" or "Special Coverage" basis.

3. The policy shall provide for loss recovery on a Replacement Cost basis.

4. The amount of insurance should represent no less than 90% of the Replacement Cost value of the insured property.

5. The coinsurance provision, if any, shall be waived or suspended by an Agreed Amount or Agreed Value clause.

6. Any occupancy restriction must be eliminated.

7. Any collapse exclusion must be eliminated.

8. Any exclusion for loss caused by faulty workmanship must be eliminated.

9. Flood Coverage shall be maintained with a limit of not less than \$.

10. Earthquake Coverage shall be maintained with a limit of not less than \$.

**D. Business Interruption and/or Expense**

1. Business Interruption insurance, if maintained by the Concessioner, should cover the loss of income and continuation of fixed expenses in the event of damage to or loss of Concession Facilities. Extra Expense insurance shall cover the extra expenses above normal operating expenses to continue operations in the event of damage or loss to covered property.

**E. Deductibles**

Property Insurance coverages described above may be subject to deductibles as follows:

1. Direct Damage deductibles shall not exceed the lesser of 10% of the amount of insurance or \$25,000 (except Flood & Earthquake coverage may be subject to deductibles not exceeding \$50,000).

2. Extra Expense deductibles (when coverage is not combined with Business Interruption) shall not exceed \$25,000.

**F. Required Clauses****1. Loss Payable Clause:**

A loss payable clause similar to the following must be added to Buildings and/or Contents, Boiler and Machinery, and Builders Risk policies:

"In accordance with Concession Contract No. \_\_\_ dated \_\_\_, between the United States of America and [the Concessioner] payment of insurance proceeds resulting from damage or loss of structures insured under this policy is to be disbursed directly to the Concessioner without requiring endorsement by the United States of America."

**IV. Construction Project Insurance**

Concessioners entering into contracts with outside contractors for various construction projects, including major renovation projects, rehabilitation projects, additions or new buildings/facilities will be responsible to ensure that all contractors retained for such work maintain an insurance program that adequately covers the construction project.

The insurance maintained by the construction and construction-related contractors shall comply with the insurance requirements stated herein (for Commercial General Liability, Automobile Liability, Workers' Compensation and, if professional services are involved, Professional Liability). Where appropriate, the interests of the Concessioner and the United States shall be covered in the same fashion as required in the Commercial Operator Insurance Requirements. The amounts/limits of the required coverages shall be determined in consultation with the Director taking into consideration the scope and size of the project.

**V. Insurance Company Minimum Standards**

All insurance companies providing the above described insurance coverages must meet the minimum standards set forth below:

1. All insurers for all coverages must be rated no lower than A- by the most recent edition of Best's Key Rating Guide (Property-Casualty edition).

2. All insurers for all coverages must have a Best's Financial Size Category of at least VIII according to the most recent edition of Best's Key Rating Guide (Property-Casualty edition).

3. All insurers must be admitted (licensed) in the state in which the concessioner is domiciled.

**VI. Certificates of Insurance**

All certificates of Insurance required by this CONTRACT shall be completed in sufficient detail to allow easy identification of the coverages, limits, and coverage amendments that are described above. In addition, the insurance companies must be accurately listed along with their A.M. Best

Identification Number ("AMB#"). The name, address and telephone number of the issuing insurance agent or broker must be clearly shown on the certificate of insurance as well.

Due to the space limitations of most standard certificates of insurance, it is expected that an addendum will be attached to the appropriate certificate(s) in order to provide the space needed to show the required information.

In addition to providing certificates of insurance, the concessioner, upon written request of the Director, shall provide the Director with a complete copy of any of the insurance policies (or endorsements thereto) required herein to be maintained by the concessioner.

*VII. Statutory Limits*

In the event that a statutorily required limit exceeds a limit required herein,

the higher statutorily required limit shall be considered the minimum to be maintained.

Dated: April 27, 2000.

**Linda Canzanelli,**

*Acting Associate Director, Park Operations and Education, National Park Service.*

[FR Doc. 00-10984 Filed 5-3-00; 8:45 am]

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