

JAN 20 2006

DIRECTOR'S ORDER #38: REAL PROPERTY LEASING

Approved: 
Director

Effective Date: 1/19/06

Duration: Until rescinded or superseded

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I. BACKGROUND AND PURPOSE

This Director's Order applies to the leasing of National Park Service real property under the authority of 36 CFR Part 17 (Part 17) and 36 CFR Part 18 (Part 18). It supersedes any conflicting guidance with respect to leasing, including section 5.3.3 of *NPS Management Policies 2001*, which became obsolete when Part 18 was adopted. [Note: As of the date this Director's Order was approved, revisions to *Management Policies 2001* were pending and expected to be adopted in early 2006. Please check sections 5.3.3 and 8.12 for possible new information pertaining to leases.]

A. Relationship between Part 17 and Part 18 Leases. 36 CFR Part 17 provides NPS authority to lease certain park area lands through a competitive bidding award process. However, as Part 17 is limited in its application (see Section IV below) and as NPS does not have authority to retain rent proceeds under Part 17 leases, most NPS leases will be accomplished under Part 18. Part 18 provides effective leasing authority (including a competitive bidding award process comparable to that of Part 17) without the limitations of Part 17. Accordingly, this Director's Order focuses on Part 18 leases and does not establish separate policies for Part 17. However, the provisions of this Director's Order apply to Part 17 leases to the extent indicated in the text.

B. Limitations. The issuance of Part 17 or Part 18 leases by NPS is discretionary and may be undertaken only when the deciding official has determined that the proposed lease is in the best interests of the management of the applicable park area and is otherwise consistent with the requirements of 36 CFR Part 17 or 18 (as applicable) and this Director's Order. In general, in order for NPS real property to be eligible for Part 17 or 18 leasing, the deciding official must determine that the property is not needed for park area purposes and that the lease will not result in degradation of the purposes and values of the park area. Specific required determinations for Part 17 and 18 leases are set forth below.

C. Regulations Control. The purpose of this Director's Order is to provide summary and supplemental guidance to assist in the implementation of Parts 17 and 18. Since these regulations contain many additional procedures and requirements not described or only partially described in this Director's Order, it is imperative that NPS managers who wish to engage in leasing activities take the time to read and follow the requirements of Parts 17 or 18 (as applicable). In the event of any inconsistency between this Director's Order and the applicable regulation, the regulation will control. In addition, the discussion of leases contained in Section 5.3.3 of NPS *Management Policies 2001* was superseded by the subsequent adoption of Part 18. Therefore, Section 5.3.3 is no longer in effect with respect to leases. (However, the cooperative agreement guidance in Section 5.3.3 remains in effect. Section 8.12 of the expected 2006 revisions to *Management Policies* should be checked, as well.)

D. Enforceability. This Director's Order is intended only to improve NPS internal management and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, officers or employees, or any other person.

II. AUTHORITY TO ISSUE THIS DIRECTOR'S ORDER

The authority to issue this Director's Order is contained in 16 USC §§ 1 through 4, and in delegations of authority contained in Part 245 of the Department of the Interior Manual.

III. DELEGATION OF AUTHORITY

A. Management Responsibility. The Assistant Director for Business Services, through the Office of Concessions Management, will manage the NPS leasing program. The Assistant Director will prepare and make available a Leasing Reference Manual for Part 18. It will contain model leases, model prospectuses, and guidelines for issuing and managing Part 18 leases. It will also provide information that would be useful to any Part 17 leases that may be considered.

B. "Deciding Official." Authority to execute Part 17 and 18 leases and make the related determinations required by the applicable regulation (i.e., to be the "deciding official") is hereby vested in the responsible regional director, with authority to delegate this responsibility to the applicable superintendent where appropriate. An authorizing signature from a warranted contracting officer is not required.

C. Prior Approval. Prior to their execution by the deciding official, the Director must approve—

- Proposed leases with terms of more than ten (10) years;
- Proposed leases or lease amendments that provide for a leasehold mortgage or similar encumbrance; and
- Proposed amendments of existing leases that required the Director’s approval prior to execution.

D. Format. A Part 17 or 18 lease may be in any form acceptable to the deciding official, provided that it meets the requirements of Part 17 or 18 (as applicable) and this Director’s Order. However, model leases will be available in the Leasing Reference Manual, and Deciding Officials are encouraged to use these when appropriate to their circumstances.

E. Solicitor’s Review. A Part 17 or 18 lease may not be awarded or amended without the written approval of the applicable unit of the Solicitor’s Office as to the legal sufficiency of the lease document or amendment and its award process under the terms of Part 17 or 18 (as applicable).

IV. POLICY GUIDANCE

A. Property Subject to Part 17 Leasing. Only federally owned property that was acquired from non-federal sources and that is located within the boundaries of a park area that is not designated as a national park or as a national monument of scientific significance is eligible for Part 17 leasing. In addition, the park area’s General Management Plan must designate property proposed to be leased under Part 17 leased as a Special Use Zone for the proposed uses under the lease and other conditions of Part 17 and this Director’s Order must be met. The award of a Part 17 lease is discretionary. A decision to issue a Part 17 lease is subject to applicable compliance with the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act (NHPA).

B. Property Subject to Part 18 Leasing. All types of real property owned or administered by NPS (except non-historic land as defined in Part 18) are subject to leasing under the authority of 36 CFR Part 18 if all conditions of 36 CFR Part 18 and this Director’s Order are met. The award of a Part 18 lease is discretionary. A decision to issue a Part 18 lease is subject to applicable compliance with NEPA and Section 106 of NHPA.

C. Required Determinations. A Part 17 or 18 lease requires the following determinations to be made by the deciding official:

- (1) The lease will not result in degradation of the purposes and values of the park area;
- (2) The lease will not deprive the park area of property necessary for appropriate park protection, interpretation, visitor enjoyment, or administration of the park area;

- (3) The lease contains such terms and conditions as will assure the leased property will be used for activity and in a manner that are consistent with the purposes established by law for the park area in which the property is located;
- (4) The lease is compatible with the programs of the NPS;
- (5) The lease is for rent at least equal to the fair market value rent of the leased property;
- (6) The proposed activities under the lease are not subject to authorization through a concession contract, commercial use authorization or similar instrument;
- (7) If the lease is to include historic property, the lease will adequately insure the preservation of the historic property. (In addition, a lease that includes historic property may be executed by NPS only after compliance with the CFR Part 800, the commenting procedures of the Advisory Council on Historic Preservation); and,
- (8) Specific required determinations of Part 17 or 18 (as applicable).

V. ADMINISTRATIVE RECORD

An appropriate administrative record of each Part 17 or 18 lease transaction must be developed and maintained. The record must be in writing and contain, as appropriate, dates, discussions and the rationale involved in the decision process. In addition, the administrative record must contain all letters, compliance documentation, important notes, and other documents concerned with the issuance of the lease, including a copy of the executed lease and any amendments to the lease. The administrative record will be maintained in the park area files for at least six years and three months following expiration or termination of the lease. (See also Director's Order #19: Records Management, and Director's Order #88: Documents and Other Materials Needed for Litigation.)

VI. USE OF LEASED PROPERTY

A. In General. A Part 17 or 18 lease may authorize the use of the leased property for any lawful purpose, subject to the required determinations set forth above and the limitation described in section VI.B., below. A Part 17 or 18 lease may also limit the use of the leased property to specific uses.

B. Concession Activities. A Part 17 or 18 lease may not authorize the lessee to engage in activities that are subject to authorization through a concession contract, commercial use authorization or similar instrument. Proposed lease activities are subject to authorization under a concession contract if NPS determines in accordance with 36 CFR Part 51 and park area planning documents and related guidelines and policies that the proposed activities meet applicable requirements for issuance of a concession contract. Proposed activities are subject to authorization under a commercial use authorization or similar instrument if NPS determines in accordance with park area planning documents and related guidelines and policies that the

proposed activities meet applicable requirements for issuance of a commercial use authorization or similar instrument.

VII. PART 18 LEASING REQUIREMENTS

A. Award of Part 18 Leases.

(1) **In General.** There are three methods available for processing awards of Part 18 leases: (a) issuance of a Request for Bids (RFB); (b) issuance of a Request for Proposals (RFP); and (c) non-competitive award in limited circumstances. “Award” of a Part 18 lease under any of these methods occurs only when the lease is fully executed by both parties.

(2) **Request for Bids.** If the amount of the rent is the only criterion for award of a Part 18 lease, NPS may solicit bids through issuance of a RFB under the procedures described in 36 CFR 18.7.

(3) **Request for Proposals.** When the award of a lease is to be based on selection criteria in addition to or other than the amount of the rent, NPS, except as described below, must solicit proposals for the lease through issuance of a public RFP in accordance with the terms of 36 CFR 18.8. The criteria to be used in selection of the best proposal for award of the lease are contained in 36 CFR 18.8.

Where multiple properties are offered for separate leases under a single RFP, the RFP must advise offerors as to how to specify the property or properties the offeror wishes to lease and of any special procedures NPS will use to evaluate proposals with respect to the multiple properties available for lease under the terms of the RFP.

When a lease award is to be made through an RFP process, all lease proposals received will be reviewed by an evaluation panel that is to make written recommendations to the deciding official as to the relative merits of the proposals. The panel should be appointed by the deciding official and have at least three members, one of whom should be chairperson. All members of the evaluation panel must be federal officials. The chair may retain technical advisors to the panel. Technical advisors do not need to be federal officials.

In circumstances where an RFP concerns an existing or prior lease that is to be reissued and the incumbent or prior lessee submits a proposal in response to the RFP, the evaluation panel shall not include any officials of the applicable park area. An official of the applicable park area may serve as a technical advisor to the evaluation panel.

(4) **Non-Competitive Award.** NPS generally may not enter into a Part 18 lease without issuing an RFB or RFP in accordance with 36 CFR 18.7 or 36 CFR 18.8. NPS may, however, enter into Part 18 leases in accordance with the terms of 36 CFR 18.9 on a non-competitive basis in two circumstances:

(a) The Part 18 lease is with a non-profit organization (recognized as such by the federal Internal Revenue Service) or a unit of government and the NPS determines that the non-profit

or governmental use of the property will contribute to the purposes and programs of the park area; or

(b) The Part 18 lease is short-term (sixty (60) continuous days or less) and NPS determines that to award the lease non-competitively is in the best interests of the administration of the park area.

All other requirements of 36 CFR Part 18 are applicable to Part 18 leases, even though awarded non-competitively. This includes the requirement that a lessee is not entitled to renewal of its lease or to the award of a new lease upon lease termination or expiration.

In situations where a Part 18 lease could be awarded but the same uses could also be permitted under a special use permit or other authorization, the deciding official is to issue the form of authorization most appropriate in the circumstances. However, the deciding official must be consistent in this decision. That is, if a Part 18 lease or special use permit is issued for a particular type of use, then the same form of authorization is to be issued in all instances of that type of use. This is to avoid the possibility that park area users may be issued differing types of use authorizations for the same type of use. The Leasing Reference Manual will provide guidelines for Deciding Officials to ensure the appropriate authorization is being utilized, and being utilized consistently throughout the Service.

B. Part 18 Lease Provisions.

(1) Term of Leases and Lease Extensions and Renewals

(a) Term of Lease. A Part 18 lease is to have a term that is as short as possible taking into account the financial obligations of the lessee and other factors related to determining an appropriate lease term. A lease may not have a term of more than sixty (60) years. Sixty year leases are permissible if the deciding official determines that such a term is necessary in order to provide a viable leasing opportunity in light of investment requirements and other relevant factors.

(b) Extensions. Part 18 leases may not be extended, except that leases with an initial term of one (1) year or more may be extended once for a period not to exceed one (1) additional year if the deciding official determines that an extension is necessary because of circumstances beyond the control of NPS.

(c) Renewals. A lessee is not entitled to renewal of its lease or to the award of a new lease upon lease termination or expiration. Unless otherwise qualified for non-competitive award under Part 18, renewal of a lease (or issuance of a new lease replacing a prior lease) must be accomplished in accordance with the competitive processes set forth in Part 18.

(2) Specific Lease Provisions

All Part 18 leases must contain the required provisions set forth in 36 CFR 18.12. In addition, all Part 18 leases must contain terms and conditions that are determined necessary by the

deciding official to assure use of the leased property in a manner consistent with the purposes of the applicable park area as established by law, and where applicable, to assure the preservation of historic property.

C. Rent

(1) **Payment of Rent.** Part 18 leases must contain appropriate provisions requiring the lessee to pay NPS at least the fair market value rent of the leased property. In accordance with Part 18, the determination of fair market value rent for a lease must take into account (a) any restrictions on the use of the property or terms of the lease that limit the value and/or the highest and best use of the property, and (b) any requirements under the lease for the lessee to restore, rehabilitate or otherwise improve the leased property. “Fair market value rent” is defined in 36 CFR 18.2.

(2) **Use of Rent Proceeds.** Except as otherwise provided by law, including, 16 USC 470h-3 with respect to historic properties, rent proceeds from Part 18 leases are to be deposited in a special account in the Treasury of the United States and will be available until expended for infrastructure needs of the applicable park area, including, without limitation, facility refurbishment, repair and replacement, infrastructure projects associated with park resource protection, and direct maintenance of the leased property.

-----*End of Director's Order*-----