



United States Department of the Interior

NATIONAL PARK SERVICE

1849 C Street, N. W.
Washington, D.C. 20240

IN REPLY REFER TO:

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Policy Memorandum 07-01

To: Regional Directors,

From:

As Director *David H. Work*

Subject: Authorizing activities through leases versus concession contracts or commercial use authorizations

The guidance contained in this memorandum is to be used in making a determination as to whether **an** activity proposed to be authorized under a lease must be authorized, instead, by a concession contract, commercial use authorization (CUA) or similar instrument. This guidance will be incorporated at a later date into the appropriate Director's Order(s) applicable to commercial park uses.

Background

36 CFR Part 18 (Leasing of Properties in Park Areas) and Director's Order #38 (Real Property Leasing) describe NPS regulatory and policy requirements for the award and management of leases of park area property. Among other matters, these documents incorporate applicable provisions of the authorizing statutes for Part 18 leases. Of particular significance in this connection is the provision in Section 802 of P.L. 105-391 (16 U.S.C. 1a-2(k)) that prohibits the utilization of leases for activities that are subject to authorization through a concession contract, CUA, or similar instrument. Section VI.B of Director's Order #38 discusses this prohibition as follows:

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.

To promote a better understanding of these requirements and to avoid potential violations of Section 802 of Public Law 391, this memorandum amplifies the distinctions between concession contracts, commercial use authorizations, and leases.

Concession Contracts and Commercial Use Authorizations

A "concession contract" is defined in 36 CFR Part 51 as a binding written agreement between NPS and a concessioner to provide specified visitor services within a park area. "Visitor services" are defined in 36 CFR 51.3 as follows:

Visitor services means accommodations, facilities and services determined by the Director as necessary and appropriate for public use and enjoyment of a park area provided to park area visitors for a fee or charge by a person other than the Director. The fee or charge paid by the visitor may be direct or indirect as part of the provision of comprehensive visitor services (e.g., when a lodging concessioner may provide free transportation services to guest). Visitor services may include, but are not limited to, lodging, campgrounds, food service, merchandising, tours, recreational activities, guiding, transportation, and equipment rental. Visitor services also include the sale of interpretive materials or the conduct of interpretive programs for a fee or charge to visitors.

A "commercial use authorization" is a written authorization from NPS to provide services to park area visitors under Section 418 of Public Law 105-391. There are no implementing regulations for CUAs as of the date of this memorandum. However, interim guidance has been issued through a previous memorandum, dated November 18, 2005.

In accordance with 36 CFR 18.6(b), proposed activities of a commercial nature must be reviewed in light of 36 CFR Part 51, park area planning documents, and related guidelines and policies. Upon review:

- if the proposed activity meets applicable requirements for issuance of a concession contract, then a concession contract (and not a lease) must be used to authorize the activity;
- if the proposed activity meets applicable requirements for issuance of a CUA, then a CUA (and not a lease) must be used to authorize the activity.

Supplemental to the 36 CFR Part 51 conditions for issuing concession contracts, Section 10.2.2 of *Management Policies* 2006 states that a concession contract may be issued only when (among other factors) a determination is made that the proposed concession facilities or services:

- are consistent with the park area's enabling legislation;
- are complementary to the park area's mission and visitor services objectives;
- are necessary and appropriate for the public use and enjoyment of the park area; and
- are not, and cannot be, provided outside park area boundaries.

In general, when a determination is made that neither a concession contract nor a CUA is appropriate, it is likely that (as provided in Section 8.12 of *Management Policies* 2006) a lease may be used to authorize the activity if:

- the property where the proposed services are to be provided is not near a particular visitor destination of the park area; and
- the patrons of the lessee are expected to be primarily persons who come to the park area only to utilize the lessee's services.

Replacing a Concession Contract or Commercial use Authorization with a Lease

Particular attention must be paid to the "not subject to authorization under a concession contract or commercial use authorization" determination if a lease is being considered that will authorize the conduct of an activity that was previously authorized by a concession contract or CUA. If the activity had previously taken place under a concession contract or CUA, it necessarily means that the NPS had previously determined that the activity was "subject to authorization" under one of those instruments. Therefore, if a change to a lease from one of the other instruments is proposed, the administrative record must convincingly document why the proposed activity under the lease is no longer subject to authorization under a concession contract or CUA. This discussion must be based on the existence of circumstances that have changed from the time the concession contract or CUA was awarded.

For example, a finding could be made that food service in a park area currently authorized by a concession contract is no longer a necessary and appropriate visitor service (and thus not subject to authorization by a concession contract). This could occur when, for example, new food facilities open outside the boundaries of the park area after the award of the contract, and the new facilities adequately meet the needs of the park area's visitors.

A change from a concession contract or CUA to a lease cannot be justified on the basis of administrative ease or financial advantage to NPS.

Approval by the Director

In order to achieve national program consistency, and in light of the potential for conflict with Section 802 of Public Law 105-391, in circumstances where a lease is being considered to authorize activities previously authorized by a concession contract or CUA, all proposed leases of this nature must be approved in writing by the Washington Concession Management Program in advance of the issuance of the lease solicitation and, in addition, in advance of the lease award.

If there are any questions, please call Ms. Jo A. Pendry, Concession Program Manager, at 202/513-7156.