

# **NPS Partnership Training and Development Program**



## **Working With NPS Agreements for Partnerships: Module I Tools for Effective Partnering**



**NPS TEL Event  
November 3, 2004  
12:00 - 4:00 p.m. Eastern Time**

### **Participant's Guide**

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**Preparing for the Course:**

As a participant, we suggest that you read through this Participant's Guide and the Resource Materials before the workshop. Bring the Guide with you to the workshop. Check with your local TEL Site Coordinator (email addresses to the various TEL classrooms are on My Learning Manager) to be sure that you know the location of the room and facility where the workshop is being held. Plan to arrive a little before 12:00 p.m. ET (or at the time arranged by your Site Coordinator), as the workshop will start promptly.

**How to Interact**

You can interact with the course instructors and other participants during discussion sessions throughout the workshop via fax or push to talk microphones. Depending on the number of students at your location, you may have one directly in front of you or be sharing with other participants at your table.

When you want to speak, press the to talk button and say,

*"This is (your first name) at (your location). I have a question (or comment)."*

Then release the push to talk button. This is important. Until you release the button, you will not be able to hear the instructor. The best distance from the microphone is 10-12 inches. If you get closer than this, the instructor will have difficulty in hearing you clearly.

The instructor will acknowledge you and then ask for your question or comment. Stating your name and location not only helps the instructor, but also helps other students who are participating at different locations to get to know their classmates.

**Fax you questions to 1-877-884-6282.** A sample Q & A Fax Sheet is attached in the Appendix. Please **DO NOT** add a cover sheet. You may send faxes at any time during the broadcast, and they will be answered (time permitting) during the discussion sessions.

**Course Objectives***Module I: Agreements: Tools for Effective Partnering*

Participants will learn to:

- identify factors to consider in pre-partnership planning.
- describe the important role of agreements in the partnership process.
- name and describe different types of agency agreements and authorities and their appropriate uses for partnerships.
- locate NPS guidelines and resources for drafting agreements for NPS partnerships.

<p><b>Partnerships</b></p> <p>“Voluntary relationships that advance our respective missions by doing work collaboratively...”</p> <p style="text-align: right;">Director Mainella</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>...Benefits often extend into the future, because many people who participate as partners connect more strongly with the parks and commit themselves to long-term stewardship.</p> <p style="text-align: right;">NPS Management Policies, 2001</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p><b>Pre-agreement work provides opportunities for :</b></p> <ul style="list-style-type: none"><li>• clarifying the task</li><li>• dialogue with partner(s) to shape the proposal</li><li>• early consultation and approval of project concept by appropriate officials before formalizing in written agreement</li></ul>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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**Interim Partnership Process --  
Phases**

- initial
- project definition
- agreement
- implementation

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**Initial Phase**

- briefly describe proposal
- clarify the need and priority
- address policy issues
- evaluate capacity of your organization

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**Initial Phase**

- identify a partner(s)
- evaluate readiness / capacity of partner
- establish communication with up-line officials

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**Initial Phase**

- prepare Memo of Intent -- signed by park / office and partner
- approval of Memo of Intent allows project to move to next phase

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**Project Definition Phase**

**Partners seek to identify:**

- common understanding of project, scope, expectations, needs
- shared vision
- how best to work together

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**Project Definition Phase**

- prepare summary report
- review of report
- approval – project ready to move to agreement phase

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**Partnership Exercise**

**Thinking About Partnering Relationships And How They Come Together**

*Instructions: Unscramble the steps of the first two phases of the NPS partnership process (on this page) in the left hand column by drawing arrows to match the corresponding steps that characterize a typical personal relationship.*

**INITIAL PHASE**

(1) Getting hooked on a feeling	Finding the right partner
(2) The feeling gets stronger	Approval to move to Project Definition Phase
(3) Thinking twice about the feeling	Letter of intent
(4) Surveying the field; looking for love; on the prowl	Evaluating the proposal
(5) Finding the right partner	Considering a partnership
(6) The first date	Generating an idea
(7) Second date	Describing/developing the idea into a proposal

**PROJECT DEFINITION PHASE**

(1) The courtship	Preparing a report and submitting the report for review
(2) Getting serious	Defining the nature of the collaboration
(3) Thinking about commitment	Receiving approval to proceed to the agreement phase
(4) Asking for the parents consent	Framing a shared vision
(5) Engagement	Establishing a common understanding among the partners

**AGREEMENT PHASE**

Forging the relationship and deciding on  
the vows  
The wedding

Formulating and negotiating the  
agreements  
Approval of agreement

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**IMPLEMENTATION PHASE**

Consummating the relationship –  
Marriage

Working together as partners to  
achieve the goal(s)

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Note: For partnership projects that involve design and/or fund-raising, such activities will be included during a development phase that will occur between the agreement and implementation phases.

<p><b>Initial Phase</b></p> <p><b>1. Describe the proposed work</b></p>
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**Initial Phase**

**2. Evaluate the proposed work**

- tangible project?
- define compelling need
- consistent with approved plans?
- high priority?
- can your organization do all the work?

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**Initial Phase**

**3. Consider a partnership**

- in what areas is help needed?
- is a partnership the best way to meet goal?
- legal or policy issues that effect?
- buy-in from your organization?

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**Initial Phase**

**4. Find the right partner**

- if you already have a partner .....
- are missions compatible?
- is the partner willing to work with NPS constraints & procedures?
- match needs to capabilities

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**Initial Phase**

**5. Memo of Intent**

- statement of mutual interest
- signed by each partner
- review of memo
- approval to move to project definition phase

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**See Appendix (Attachment A.)**

**Types of Partnership Agreements**

- What's in the name
- Common ingredients but specific functions
- Match the type to fit the function
- Higher sensitivity when transfers of funds, fundraising, or design and construction activities are involved

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**Types of Partnership Agreements**

- Will be reviewed for legal sufficiency, indemnification and compliance with DO#20,DO#21
- Anticipate Solicitor and Partnership Office reviews

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**Basic Menu of Partnership Agreements**

- Cooperative Agreements (CA)
- Interagency Agreements
- General Agreements / Agreements
- Other

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**Cooperative Agreements**

- NPS intends to transfer funds, property, services, or something of value to partner
- NPS will maintain substantial involvement with the partner(s)
- NPS will develop cooperative research / training with a partner re: NPS resources

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**Cooperative Agreements**

- Distinct from a grant where NPS is not involved in the expenditure and result achieved by the grantee.
- Eg. CCSP, RTCA, CESU's

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**Interagency (Acquisition) Agreements**

- For Agreements between two or more federal agencies

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**General Agreement/Agreement**

- Basic Agreement to cover basic activities of Friends Groups, Cooperating Associations and other Partners providing assistance to parks and programs including fundraising/financial support
- Programmatic support
- Law enforcement and firefighting assistance
- Reimbursement of NPS by nongovernmental entity

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**General Agreement/Agreement**

- For high profile and focused initiatives, you need to negotiate a separate agreement with more detailed terms and conditions to ensure adequate NPS oversight and involvement
- Major fund-raising campaign
- Design and construction projects

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**Memorandum of Understanding (MOU)**

- Agreement to work together
- Mutual assistance relationship
- Does not obligate funds
- More appropriately titled now as a general agreement / agreement

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**Memorandum of Agreement (MOA)**

- Enables receipt of funds, goods, and/or services by NPS from a non-federal party
- More appropriately titled now as a general agreement / agreement

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**Other Agreements**

- On an exception basis, we may sign an agreement in our partner's format and nomenclature when there are compelling rationales to enable the partnership
- Eg, Driven by Partner's legal requirement, Only way the partner can get approval/funding, NPS is asked to join a partnership with many partners brokered by others, etc.

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**Other Agreements**

- Must still meet NPS agreement sufficiency and legal standards
- Consult with your solicitor and partnership coordinator early on
- NPS won't sign without solicitor review
- Advise solicitor of the context and background

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**Bottomline**

- Use preferred NPS terminology whenever possible : CA, GA, IA
- Focus on intent and content of the agreement
- Keep your eye on the prize – be flexible when you need to
- Work with your solicitor and partnership coordinator

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**Sources of Assistance**

- Model agreements you can adapt to your situation
- Solicitor and partnership coordinator
- Contracting and procurement
- DO#20 Agreements Handbook
- DO#21, Donations and Fundraising
- NPS Partnerships Webpage

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**Agreements Case Studies**

- Yosemite National Park and Friends of Yosemite Search and Rescue **Agreement**
  
- Manzanar National Historic Site and Friends of Manzanar **General Agreement**
  
- PWR NPS and California State Parks **General Agreement**

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**Agreements Case Studies**

- John Muir National Historic Site and John Muir Memorial Association **Memorandum of Understanding**
  
- Challenge Cost Share Project **Cooperative Agreements**
  
- Outside Las Vegas Federal Managers Partnership **Interagency Agreement**

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**Agreements Case Studies**

- National Park Service, California State Parks and Angel Island Immigration Station **Cooperative Agreement**
  
- National Park Service and California State Parks **Agreement for the Exercise of Joint Powers**

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**Partnership Functions**

- NPS receives donated funds
- NPS receives agency funds
- NPS transfer funds to government agency
- NPS transfers funds to nonprofit
- Challenge Cost Share Program award transfer

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**Partnership Functions**

- Exchange/transfer funds with a federal agency
- Work with Cooperating Association
- Accept in-kind donations/services
- Partner will undertake fundraising campaign

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**Partnership Functions**

- Partner will construct capital improvement in your park
- Work with University to establish research center
- Work with non profit to set up a park education center

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**What's the Difference?**

Procurement Contracts  
vs.  
Cooperative Agreements  
vs.  
Grants

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**Procurement Contracts vs. Cooperative Agreements vs. Grants  
What's the Difference?**

Overview

***Contracts** shall be used only when the principal purpose is the acquisition of supplies or services for the direct benefit or use of the Federal Government. **Grants or cooperative agreements** should be used when the principal purpose of the transaction is to stimulate or support research and development for another public purpose.*

(Federal Acquisition Regulation (FAR) 35.003(a))

**What's the Difference?  
Procurement Contracts**

- Goods and Services that benefit the mission of the Agency
- Vendors are selected based on competitive procedures governed by the Federal Acquisition Regulation (FAR)
- The Government is typically entirely paying for the supplies or services

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**What's the Difference?  
Procurement Contracts**

- Examples
  - Any requirement to continue operations and fulfill the mission of NPS
    - Furniture, Computers, etc. for use by NPS employees to perform their job
  - A requirement that Congress has specifically funded for a procurement
    - Building or renovating a Park visitor center.

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**What's the Difference?  
Cooperative Agreements and Grants**

- Statute
  - Governed by the Federal Grant and Cooperative Agreement Act of 1977 (35 U.S.C. § 3601-6308)

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**What's the Difference?  
Cooperative Agreements and Grants**

- Used to transfer a thing of value to a State or local government or other recipient when there is specific statutory authority to do so and when the transfer accomplishes a public purpose
- The principal purpose finding is legitimate and is not simply a means of non-competitively acquiring property or services for the direct benefit or use of the Government

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**What's the Difference?  
Cooperative Agreements**

- Statutes
  - Governed by the Federal Grant and Cooperative Agreement Act of 1977 (35 U.S.C. § 3601-6308)
- +
- NPS Statutes
  - 16 U.S.C. § 1g
  - 16 U.S.C. § 1a-2(j)

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**What's the Difference?  
Cooperative Agreements**

- Substantial involvement anticipated between the Government and the recipient
  - NPS and Recipient collaboration or joint participation
  - NPS participation in the development of deliverables or end results

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**What's the Difference?  
Cooperative Agreements**

- Example
  - NPS providing funding and technical assistance to an organization in order for that organization to develop interpretive media to be located at a Park
    - Requires substantial involvement (NPS would specify and be actively involved with the development of the final product)
    - Principal purpose will benefit the public (i.e. educate visitors to the Park).

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**What's the Difference?  
Grants**

- No Substantial involvement anticipated between the Government and the recipient
- Grants require special legislative authority
- Often comes with a match requirement that the applicable statute would define (e.g. ratio of \$1 of Federal funds for each \$4 of funds contributed by non-Federal sources)

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**What's the Difference?  
Grants**

- Example
  - 16 U.S.C. Chapter 1, Subchapter CXI, Part A, § 460zz-5(a)

"...the Secretary is authorized to make grants to the State of Minnesota, or its political subdivisions, to cover not more than 50 percent of the cost of acquisition and development within the Area of lands and waters or interests therein in a manner consistent with the purposes of this part."

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**Procurement Contracts vs. Cooperative Agreements vs. Grants  
What's the Difference?**

For More Information...

More guidance and examples may be found in:

- Director's order 20  
<http://www.nps.gov/policy/DOrders/DOrder20.html>
- Agreement's Handbook  
<http://www.nps.gov/hfc/acquisition/agreements.html>
- Assistance can be obtained from:
  - Your Procurement Office
  - Your Solicitor's Office

**What's the Difference?  
Grants**

• Example

– 16 U.S.C. Chapter 1, Subchapter CXI, Part A, § 460zz-5(a)

"...the Secretary is authorized to make grants to the State of Minnesota, or its political subdivisions, to cover not more than 50 percent of the cost of acquisition and development within the Area of lands and waters or interests therein in a manner consistent with the purposes of this part."

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**Partnership Construction Projects**

In June 2004 the NPS introduced an interim policy to guide partnership construction projects as part of an effort to standardize the way the agency structures, manages, implements and monitors some of our partnership agreements, including fundraising agreements, plans and campaigns, the relationship between these efforts, our priorities for funding park projects, and communication with Congress.

Your regional partnership coordinator can walk you through the process and help you determine whether or not to pursue such an arrangement. Additional training on this topic will be provided in the spring.

**See Appendix:**

***(Attachment B) – NPS Director’s Memo re: Building Better Partnerships Process***

***(Attachment C) – Partnership Construction Project Checklist***

***(Attachment D) – Interim Construction Process Flowchart***

**Special Park Use Permit**

- Once a partnership agreement is in place, there may be activities by the partner that may require a special park use permit for a partner special event, activity or period of time.
- Examples would be special donor cultivation events in the park or construction activity

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**Special Park Use Permit**

- Superintendent must determine which partner on-site activities warrant a special park use permit and how to handle fees
- Partner will often expect special consideration and privileges in order to successfully deliver results
- Take a reasoned and collaborative approach

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**Special Park Use Permit**

- Accommodate where feasible but protection of park values and visitor experience is always priority #1
- Consult special use permit staff and DO #53 and DO#23 Handbook

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**Legal Requirements for Partnership Agreements**

In order for NPS to enter into any partnership it must have:

1. Statutory authority
2. Appropriated funds
3. Must not delegate an inherently federal function to partner.

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<b>Authorities</b>	
Types of Authorities:	_____
1. Government Wide Authorities	_____
2. Department Wide Authorities	_____
3. NPS Authorities	_____
	_____
	_____

**Government-Wide Authorities:**

*The following partial list of statutory authorities has broad application and includes government-wide authorities available to most or all federal agencies.*

Agency Requests for Goods or Services to be Provided by Another Federal Agency (31 U.S.C. § 1535A – Economy Act; See also, Federal Acquisition Regulation 48 CFR 17.5):

The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services under certain conditions. Such orders are made on a reimbursable basis. This authority may be particularly helpful when an Interior agency is partnering with both federal and non-federal parties to achieve a common goal.

**Government-Wide Authorities: (cont.)**

Agreements to Provide Specialized or Technical Assistance on a Reimbursable Basis to Requesting State or Local Governments (31 U.S.C. § 6505 – Intergovernmental Cooperation Act):

The President may prescribe statistical and other studies and compilations, development projects, technical tests and evaluations, technical information, training activities, surveys, reports, documents, and other similar services that an executive agency is especially competent and authorized by law to provide. The head of an executive agency may provide services prescribed by the President under this section to a State or local government on a reimbursable basis when a written request is made by the State or local government. This authority may be particularly helpful where an Interior agency is partnering with both federal and non-federal parties to achieve a common goal.

**Department-wide Authorities:**

The Secretary of the Interior may decide to delegate authority provided to her under legislation

to specific agencies through formal written delegations. NPS has been delegated some departmental authorities and may be able to obtain others if agreed to by the Secretary. The following are a few examples of department-wide authorities that are or may be available to NPS.

Department of the Interior Appropriations Act for FY 2004 (section 323):

Employees of the foundations established by Acts of Congress to solicit private sector funds on behalf of Federal land management agencies shall, in fiscal year 2005, qualify for General Service Administration contract airfares.

Outdoor Recreation Authority (16 U.S.C. § 460l):

The Outdoor Recreation Act of June 23, 1963, authorizes the Secretary of the Interior to sponsor, engage in, and assist in research relating to outdoor recreation, directly or by contract or cooperative agreements and make payments for such purposes; undertake studies and assemble information concerning outdoor recreation; and cooperate with educational institutions and others in order to assist in establishing education programs and activities and to encourage public use and benefits from outdoor recreation.

## **NPS Authorities**

There are well over 200 NPS specific authorities that may be cited to support agreement for partnerships and activities. However, many of these authorities are NPS region, park, or situation specific. Therefore, significant legal research may be needed to identify an authority or authorities to support a partnership proposal. The Solicitor's Office can assist in this regard. The authorities discussed below are often cited for support in agreements for partnerships. This list is by no means exhaustive so, again, work with the Solicitor's Office to identify appropriate authorities for your partnership.

General Authority to Take Actions That Promote and Regulate Units of the National Park System (16 U.S.C. § )

The NPS Organic Act directs the Secretary to promote and regulate National Park System lands by such means and measures as to conform to the fundamental purpose of such lands.

General Authority to Take Actions That Promote and Regulate Units of the National Park System (16 U.S.C. §1 )

The NPS Organic Act directs the Secretary to promote and regulate National Park System lands by such means and measures as to conform to the fundamental purpose of such lands.

Agreements for the Transfer of Appropriated Funds to Carry Out NPS Programs (16 U.S.C. § 1g):

The National Park Service may enter into cooperative agreements that involve the transfer of National Park Service appropriated funds to State, local and tribal governments, other public entities, educational institutions, and private nonprofit organizations for the public purpose of carrying out National Park Service programs.

**Agreements to Allow Exhibits and Interpretive Demonstrations in Parks (16 U.S.C. § 1a-2(g):**

The Secretary is authorized to enter into contracts including cooperative arrangements, to conduct living exhibits and interpretive demonstration in areas of the National Park System. The Secretary is also authorized to sell at fair market value, products and services produced in the conduct of living exhibits and interpretive demonstration and to credit any proceeds to the account bearing the cost of such exhibits and demonstrations.

**Agreements Concerning Cooperative Research and Training on NPS Resources (16 U.S.C. § 1a-2(j)):**

The Secretary may enter into agreements with public or private educational institutions, States and their political subdivisions, for the purpose of developing adequate, coordinated, cooperative research and training programs concerning the Resources of the National Park System, and Pursuant to such agreements, to accept from and make available to the cooperator such technical and support staff, financial assistance for mutually agreed upon research projects, supplies and equipment, facilities, and administrative services relating to cooperative research units as the Secretary deems appropriate.

**General Authority for NPS to Accept Donations (16 U.S.C. § 6):**

The Secretary is authorized to accept patented lands, rights-of-way over patented lands or others lands, buildings, or other property within the various national parks and national monuments, and moneys which may be donated for the purposes of the national park and monument system.

**Acceptance of Volunteer Services (16 U.S.C. 18g-j):**

The Secretary is authorized to recruit, train, and accept the services of individuals without compensation as volunteers for or in the aid of interpretive functions, or other visitor services or activities in and related to areas of the National Park System. Such volunteers may not be used for hazardous duty or law enforcement work or in policymaking processes, or to displace any employee. A special exception allows the acceptance of the services of individuals that the Secretary determines “are skilled in performing hazardous activities.”

***Additional legal authorities of interest in Appendix (Attachment D)***

***For a comprehensive discussion of legal issues that arise in partnerships and supporting legal authorities visit***

***[http://www.doi.gov/partnerships/partnership\\_legal\\_framework.html](http://www.doi.gov/partnerships/partnership_legal_framework.html)***

**Authority Exercise**

*Write the appropriate NPS authority below each situation. (Refer to NPS authorities on previous two pages)*

NPS, EPA, and a state Department of Environmental Quality propose to enter into an agreement to share information about water quality in a river running through a national park.

Authority: \_\_\_\_\_

A theater company proposes to put on theater productions and educational programs at an old theater located on NPS property. The theater company also wants a to sell theater programs. The theater is currently being used for storage.

Authority: \_\_\_\_\_

A partner wants to raise funds, goods, and services to construct a monument commemorating a battle that occurred within a National Historical Park. The monument will be located outside the park entrance.

Authority: \_\_\_\_\_

A university proposes to establish an office within an NPS Regional Office to assist NPS in developing a Model Park General Management Plan, and to teach the model to NPS employees. NPS will provide university staff and students with all resources necessary to accomplish this goal, e.g., office machines and supplies, telephones, etc.

Authority: \_\_\_\_\_

NPS proposes to transfer \$100,000.00 in appropriate funds to a non-profit organization for the study crane habitat.

Authority: \_\_\_\_\_

A community group wished to provide labor to maintain and improve a local park. The group would also provide some landscaping materials such as flowers and mulch.

Authority: \_\_\_\_\_

**Inherently Governmental Functions:**

When assessing whether a particular partnering authority applies, NPS must determine whether the activity to be performed by a partner is “inherently government” and therefore cannot be delegated to a partner. “Inherently Governmental Functions” are functions so intimately related to the public interest as to mandate performance by Government personnel.” These functions include activities that require the exercise of substantial discretion in applying Government authority and/or in making decisions for the Government. Inherently governmental activities normally fall into two categories: 1) the exercise of sovereign government authority or the establishment of procedures; and 2) processes related to the oversight of monetary transactions or entitlements.

While the inherently governmental function doctrine might at first glance appear to be a significant obstacle to partnerships, in most instance inappropriate delegations of NPS authority and responsibility can be avoided. The Solicitor’s Office and your Contracting and Procurement office can assist in identifying and correcting inherently governmental function issues.

**Appropriations:**

NPS must have appropriations available to support any partnership activity. Entering into an agreement without sufficient appropriations available violates the Anti-Deficiency Act and places the NPS employee authorizing the activity at risk for criminal prosecution. As a precaution, all agreements for partnerships contain an anti-deficiency clause making the agreement contingent upon availability of appropriations. If there is any question as to the availability of appropriations for contemplated partnership work NPS employees should contact their budget office and the Solicitor’s Office to determine the best course of action.

**Solicitor’ Office Involvement in Agreement for Partnership Formation:**

The Solicitor’s Office reviews each agreement for legal sufficiency. It is also responsible for identifying potential policy issues for consideration at appropriate levels within NPS and the Department. Often the Solicitor’s Office isn’t consulted on a partnership arrangement until after the partners have reached a meeting of the minds on specific partnership goals and individual roles and responsibility. When this happens there is a greater likelihood that the Solicitor’s Office will identify legal or policy issue that need further consideration, thereby disturbing the initial expectations of the parties and potentially delaying execution of the agreement.

The Solicitor’s Office understands the importance of partnerships to NPS and has recently reorganized to help facilitate them. Further, the Solicitor’s Office suggest that NPS and its prospective partner meet with a Solicitor’s Office attorney early in the formation of a partnership for a legal and practical reality check. This reality check will help the parties anticipate objections, identify opportunities, and make adjustments to partnership plans, if necessary. In sum, the Solicitor’s Office can play an important role in crafting lasting and beneficial partnership arrangement.

**Case Study****Working with Friends Groups – Ethics Considerations**

*The following is a hypothetical fact situation. Please read this scenario from the point of view of a park or unit manager. In reviewing and analyzing these facts, identify as many issues as you can. There may be non-ethics as well as ethics issues within this scenario.*

A former NPS employee founded an independent, nonprofit organization called “Friends of the Park” (Friends). Friends seeks to provide various services for the agency and the park. The group was originally formed with the idea that it would collect materials reflecting the history of the park, preserve those materials, and publicize the history of the park. Friends has made progress in all of these areas; however, they tell you, the park manager, that there is still a lot of work to be done. The park will be celebrating a milestone anniversary in two years. The former employee/founder of Friends approached you and proposed that Friends head up the anniversary celebrations and serve formally as the park historian. Anxious to celebrate the anniversary with special activities, but limited in your resources, you are interested in taking advantage of the Friends’ offer.

The former employee drafted “A Proposal on the History of the Park.” In this proposal, Friends suggests that the group and the park enter into an agreement whereby Friends would head up the anniversary celebrations; serve as park historian; and prepare, for the park, an archive to be located within the park’s offices. The park would not pay Friends for any of these services but would designate a park employee to serve on a Friends’ advisory committee; designate one or two park employees to coordinate with Friends; provide clerical support for transcribing taped historical interviews and organizing the archive; provide a secure space for the archive within the park’s offices; officially recognize the role of the former employee/Friends in the history project; encourage park employees and former employees to join Friends and to provide materials for the archive; help raise foundation and other funds to support the project, co-sponsor with Friends, an event “kicking off the project;” and use some portion of the park’s winter meeting to highlight the projects being undertaken by Friends and the park.

*Are there any restrictions that would preclude the park from entering into these arrangements? Try and spot as many issues as you can to form the basis for discussion in class.*

For more information on ethics related to partnerships visit  
<http://www.doi.gov/partnerships/ethics.html>

## **Appendix**

**(ATTACHMENT A)**

**Instructions:** This exercise is about relating a partnership project that you are familiar with to the steps in the NPS partnership process. What steps did you and your partner(s) address? How thoroughly was each step dealt with? Which steps did you touch upon lightly or skip? Place a check mark and / or brief comments in the appropriate box for each step. To the extent that a timeline is helpful, go ahead and list dates for each step, where appropriate. At the end of the worksheet is space to summarize your thoughts. Thinking about the various steps and how they were addressed, why was your partnership successful? If the partnership is experiencing problems, what do you think are the causes?

<b>INITIAL PHASE</b>	<b>Step Completed Thoroughly</b>	<b>Steps Touched Upon But Not Developed</b>	<b>Step Not Addressed</b>	<b>Unsure</b>	<b>Date Step Completed</b>
Generating an Idea					
Describing/Developing the Idea into a Proposal					
Evaluating the Proposal					
Considering a Partnership					

Finding the Right Partner					
Letter of Intent					
Approval to Move to Project					
Definition Phase					
<b>PROJECT DEFINITION PHASE</b>	<b>Step Completed Thoroughly</b>	<b>Steps Touched Upon But Not Developed</b>	<b>Step Not Addressed</b>	<b>Unsure</b>	<b>Date Step Completed</b>
Establishing a common understanding among the partners					
Framing a shared vision					
Defining the nature of the collaboration					

Preparing a report and submitting the report for review					
Receiving approval to proceed to the Agreement Phase					
<b>AGREEMENT PHASE</b>	Step Completed Thoroughly	Steps Touched Upon But Not Developed	Step Not Addressed	Unsure	Date Step Completed
Formulating and negotiating the agreement					
Approval of agreement					
<b>IMPLEMENTATION PHASE</b>	Step Completed Thoroughly	Steps Touched Upon But Not Developed	Step Not Addressed	Unsure	Date Step Completed
Working together as partners to achieve the goal(s)					
Comments					

**(ATTACHMENT B)**

F7767 (2501)

June 10, 2004

Memorandum

To: National Leadership Council

From: Director /s/ Fran P. Mainella

Subject: Building Better Partnership Projects

In an increasingly complex world, the National Park Service (NPS) cannot, and should not, accomplish our work in isolation. Partner organizations and other interested governments and private groups are integral to our success in achieving our organizational goals. Many of you, and our superintendents, have been fostering and developing excellent partnerships and partnership projects for years. Others are newer to the role partnerships can play in helping us to protect resources and provide quality visitor experiences. Together, it is my desire that we learn from our successes, as well as from our challenges, in moving forward to sustain the power of partnerships. That, at its core, was one of the primary objectives of the Joint Ventures: Partners in Stewardship conference last fall.

In recent weeks, considerable attention has been focused on how NPS manages partnerships and partnership construction projects. Some specific projects have received significant media coverage and interest by Congress. Other projects have been questioned with regard to their compliance to stated NPS policy. Still other projects have been scrutinized because of their capital cost and/or potential impact to the NPS operating budget. Some questions have been raised regarding the likelihood of non-Federal sources achieving the fundraising goals associated with individual projects.

These issues build on concerns that have been raised over the course of the last several years in the Congressional report language accompanying our annual appropriations bill. Specific bill language was enacted in FY 2003. Further changes could be imposed with the FY 2005 appropriations bill. If NPS is to retain our existing authorities to work with governments and private groups in promoting and realizing our mission, we must take seriously these issues and establish for ourselves a new standard of excellence in the project formulation, communication, and decision-making used in partnerships.

On April 1, 2004, I shared with you a memorandum transmitting emerging expectations regarding compliance with Director's Order 21 (Donations and Fundraising), an internal process for identifying partnership construction projects, and an evaluation and analysis of implementation issues associated with partnership construction projects. This memorandum builds on that earlier direction.

Included in your reading materials from the April, 2004 National Leadership Council meeting was a draft process for review of partnership projects, incorporating the established Development Advisory Board process. The objective of this effort is to achieve greater alignment of review of both the partnership agreements and the capital investment aspects of proposed projects. Neither review can happen in isolation. The draft process was not developed with the intention of adding more time and complexity to achieving successful partnership projects. Rather, the objective is to assure ourselves, our partners, and

other interested parties (e.g., the Department of the Interior, the Office of Management and Budget, Congress, the public) that a consistent approach has been applied to pursuing partnership agreements. We must be able to explain, with absolute transparency, the evaluative assessments conducted to assure that the interests of the taxpayers are being protected. The goal of the draft process is to engender confidence, to assure that the right questions are being asked about projects at the right time in the project's timeline, and to assure that commitments are being made at the appropriate level of the organization – not to impose burdensome process or reviews. Another goal of the proposed process is to engage more proactively in expectation management, so that there are no significant surprises to NPS or our partners in the course of bringing a project to completion. At the same time, we recognize that each partnership and project has its own characteristics and issues, and that some flexibility is needed if we are to achieve the success that is mutually desired.

In addition to comments provided regarding the draft process, other input has been received following discussions with officials in the Department of the Interior, the Office of Management and Budget, and Congress. The Development Advisory Board reviewed the draft process at its April, 2004 meeting and further comments were offered. Preliminary work on the process was presented to the Friends Alliance as well as the National Park Foundation's Superintendents Council.

Based on early reaction and input, some further changes have been made to the draft process since the April National Leadership Council meeting. It is my direction that the process developed to date under the leadership of Associate Directors Jarvi and Masica be followed as interim guidance while further refinements are made in the context of the ongoing review and update of Director's Order 21. Thus, parks, regions, and program offices will have further opportunity to comment and offer suggestions to improve the Service's management of partnerships and partnership construction projects.

For partnership construction projects still in the early (pre-agreement) stages, the draft process provides a framework for superintendents and regions to follow. For projects that are already underway, we will have to work collaboratively to determine where each of the projects is in the process, what agreements have already been executed, what steps were followed to assure that the types of issues identified in the process were addressed, and what steps need to be taken, if any, to bring the projects into compliance with this process.

As we have discussed previously, I need your direct involvement in communicating this message to our superintendents and program managers. A core team has been assembled under the direction of Associate Directors Jarvi and Masica to assist with communication and outreach, as well as to gather the further information needed for NPS to respond to Congress about the status of our partnership efforts. They will be in touch with you to answer any questions and provide additional information.

Thank you for your support and cooperation.

#### Attachments

Flow Chart (Interim Guidance, 6/1/04 draft)

Checklist (Interim Guidance, 6/3/04 draft)

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**(ATTACHMENT C)****DRAFT 6/4/04****CHECKLIST FOR PRIVATE-PUBLIC PARTNERSHIP CONSTRUCTION  
PROJECTS GREATER THAN \$500,000  
BY PHASES OF DEVELOPMENT**

The following represents a list of criteria that should be addressed before the Director will approve a private-public<sup>1</sup> partnership construction project.

**INITIAL PHASE**

1. The project is a desired priority for the park, and as such, is included along with the park's other non-recurring needs in PMIS. If not presently identified in PMIS, the project must be entered into PMIS.
2. The project is consistent with the approved park general management plan and/or other park planning documents.
3. The park staff has assessed the compliance requirements and prepared an initial plan to ensure that those and other statutory obligations will be met.
4. The project is appropriate for a fundraising partnership.
5. The superintendent and the partner have demonstrated the capacity to undertake a project of this size and scope. The superintendent and partner have reviewed relevant policy, and have been briefed regarding the NPS interim guidance for partnership construction projects. A primary point of contact has been identified in the region to work with the park and partner on project-related issues.
6. The Regional Director has received a statement of mutual interests, roles and responsibilities with regard to the development of the potential partnership contained in a memo of intent signed by the superintendent and the partner.
7. The Regional Director has determined that the potential partnership is ready to move forward to the Project Definition Phase.

**PROJECT DEFINITION PHASE**

1. The project's scope, in terms of location, size and function, is clearly refined.
2. Appropriate NPS planning models have been applied. Deviations from the models have been identified and justified. (Note: A project consistent with the model does not guarantee that NPS will deem the facility size acceptable.)
3. The projected visitation of the facility has been determined and verified through accepted procedures.
4. The gross construction cost of the project is clearly estimated (Class C).
5. The estimated costs of operation and maintenance to the NPS and the partner (as applicable) of the project are identified.

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<sup>1</sup> A joint project between NPS and a non-governmental entity (a Friends Group, for example) where the partner will be engaged in fundraising.

6. There is a decision as to whether an endowment for operation and maintenance of the facility or other improvement will be established.
7. The project's architectural themes, style and vocabulary are established.
8. The proposed functions of the building or other improvement are further refined and fully described.
9. The roles and responsibilities of the partners in the funding, construction, use and operation of the building are clearly delineated. All sources of funding for this project and responsibility for generating such funding have been determined.
10. Estimated revenue from the building, if applicable, is determined based upon elements of the building size and visitor use projections by qualified consultants.
11. DAB has seen the project and approved the conceptual design.
12. The Senate and House Interior Appropriations Committees have reviewed and approved a project over \$5 million (in accordance with guidance provided by the Director as well as statutory requirement).
13. Projects proposed for park sites in areas with joint management or legislated oversight by external bodies have secured the appropriate approval from those organizations.
14. The Regional Director has approved the project and authorizes the development of the fundraising plans and agreements as described in the agreement phase.

#### **AGREEMENT PHASE**

1. A planning study has been conducted to determine the feasibility of fundraising for the proposed project.
2. A fundraising plan has been developed. Elements include: case statement, fundraising goal, results of the feasibility/planning study, target market or audience, the fundraising strategies, NPS role, acknowledgement and reporting requirements, fundraising budget, and the benchmark and evaluation pieces.
3. A donor recognition plan has been developed.
4. A communications plan has been developed to describe all aspects of the public communication on the project. Elements include: 1) the proposed timing of the announcement of any public fundraising campaign, 2) communications within the NPS, and with the media, Interior Department Officials, and Congress, and 3) a description of how the campaign will be conducted.
5. The partner has agreed that soliciting Congress is not to be part of the fundraising strategy.
6. An exit strategy has been developed to describe how the project will be managed if conditions change and the partnership fundraising effort is not successful.
7. The project is phased in such a way as to allow components to be built in the event that the partner is not able to raise all of the funds in the agreed to timeline.
8. The roles and responsibilities of the NPS and partners are clearly delineated with regard to fundraising, government funding (if any), project design, funding for legal and regulatory compliance, operation and maintenance responsibilities, liability issues resulting from cost over-runs and design and construction standards, processes, oversight, and approvals.

9. A fundraising agreement has been prepared with the input from the park contracting officer if appropriate, the Solicitor's Office, the Regional Office and the WASO Partnership Office.
10. DO #21 has been adhered to in the development of this agreement and partnership.

Notes:

Fundraising efforts for capital construction campaigns (any project that would go to DAB) must be submitted to the Director for approval.

The Associate Director for PIEVOR will assess the fundraising proposal and provide a recommendation to the Director regarding approval and transmittal to the House and Senate Appropriations Committees. The review process is anticipated to include an interdisciplinary review and may involve a Partnership Review Board. The submission package will include: this checklist, a cover memo from the Regional Director requesting the Director's approval as outlined in DO-21 with the following addition: a determination by the RD that the partnership and the external environment are ripe for a project of the proposed scope.

The Associate Directors for PIEVOR and PPFL will provide recommendations regarding submittal to the House and Senate Appropriations Committees and the Director. Projects must be reviewed by the Associates before they may be presented for either Congressional or Director's Approval.

Projects of \$ 5 million or more will be submitted to the Appropriations Committees to receive approval to proceed based upon adherence to the aforementioned criteria.

Approval from the House and Senate Appropriations Committees and the Director constitute approval to move forward with the development phase.

### **FINAL DESIGN AND DEVELOPMENT PHASE**

1. All projects will proceed through the design process in accordance with established policy of the NPS.
2. Changes in the scope or cost of the project, or the funding requirements of the NPS or the partner, require that the fundraising agreements be revised and approved by the Director in accordance with the requirements of the "Agreements Stage". Changes in scope and cost may also require DAB Review.
3. Changes in the requirements of the "Quiet Campaign and Public Campaign" require the fundraising agreements be revised and approved by the Director in accordance with the requirements of the "Agreement Stage".

**(ATTACHMENT D)**

**INSERT “INTERIM FLOWCHART 060104 PDF” FILE HERE**

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**(ATTACHMENT E)**

*For a more comprehensive list of department level and government-wide authorities, visit*

*[http://www.doi.gov/partnerships/pdfs/department\\_level\\_authorities.pdf](http://www.doi.gov/partnerships/pdfs/department_level_authorities.pdf)*

**Partnership Authorities**

In order for NPS to enter into any partnership it must: 1) be able to cite to statutory authority granting it the ability to enter into a partnership; and 2) must have appropriated funds to accomplish the goals of the partnership; and 3) must not delegate any inherently federal functions to a partner. These prerequisites are discussed in detail below.

**Inherently Governmental Functions:**

When assessing whether a particular partnering authority applies, NPS must determine whether the activity to be performed by a partner is “inherently government” and therefore cannot be delegated to a partner. “Inherently Governmental Functions” are functions so intimately related to the public interest as to mandate performance by Government personnel.” These functions include activities that require the exercise of substantial discretion in applying Government authority and/or in making decisions for the Government. Inherently governmental activities normally fall into two categories: 1) the exercise of sovereign government authority or the establishment of procedures; and 2) processes related to the oversight of monetary transactions or entitlements.

While the inherently governmental function doctrine might at first glance appear to be a significant obstacle to partnerships, in most instance inappropriate delegations of NPS authority and responsibility can be avoided. The Solicitor’s Office and your Contracting and Procurement office can assist in identifying and correcting inherently governmental function issues.

**Appropriations:**

NPS must have appropriations available to support any partnership activity. Entering into an agreement without sufficient appropriations available violates the Anti-Deficiency Act and places the NPS employee authorizing the activity at risk for criminal prosecution. As a precaution, all agreements for partnerships contain an anti-deficiency clause making the agreement contingent upon availability of appropriations. If there is any question as to the availability of appropriations for contemplated partnership work NPS employees should contact their budget office and the Solicitor’s Office to determine the best course of action.

**Legal Authority**

The legal authority to enter into a partnership agreement and to undertake partnership activities is created by federal statutes. Legal authority is not created by Departmental, NPS, or Office of Management and Budget regulation, policy manuals, guidance, etc. There are hundreds of potential authorities that may be cited in support of partnership arrangements. This course will address only a relative few in order to illustrate the types of authorities available to NPS and to highlight some of the more significant ones used by NPS. Below the three general categories of

statutory authority explored. The categories are: a) government-wide authority, i.e., authority granted by statute to all government agencies; b) Department-wide authority, i.e., statutory authority granted to the Secretary of the Interior by Congress; and c) authority granted to NPS by Congress.

a. Government-wide Authorities:

The following partial list of statutory authorities has broad application and are considered government-wide authorities available to most or all federal agencies.

- 1) Agency Requests for Goods or Services to be Provided by Another Federal Agency (31 U.S.C. § 1535A – Economy Act; *See also*, Federal Acquisition Regulation 48 CFR 17.5): The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services under certain conditions. Such orders are made on a reimbursable basis. This authority may be particularly helpful when an Interior agency is partnering with both federal and non-federal parties to achieve a common goal.
- 2) Agreements to Provide Specialized or Technical Assistance on a Reimbursable Basis to Requesting State or Local Governments (31 U.S.C. § 6505 – Intergovernmental Cooperation Act): The President may prescribe statistical and other studies and compilations, development projects, technical tests and evaluations, technical information, training activities, surveys, reports, documents, and other similar services that an executive agency is especially competent and authorized by law to provide. The head of an executive agency may provide services prescribed by the President under this section to a State or local government on a reimbursable basis when a written request is made by the State or local government. This authority may be particularly helpful where an Interior agency is partnering with both federal and non-federal parties to achieve a common goal.

b. Department-wide Authorities:

The Secretary of the Interior may decide to delegate authority provided to her under legislation to specific agencies through formal written delegations. NPS has been delegated some departmental authorities and may be able to obtain others if agreed to by the Secretary. The following are a few examples of department-wide authorities that are or may be available to NPS.

- 1) Department of the Interior Appropriations Act for FY 2004 (section 323): Employees of the foundations established by Acts of Congress to solicit private sector funds on behalf of Federal land management agencies shall, in fiscal year 2005, qualify for General Service Administration contract airfares.

- 2) Outdoor Recreation Authority (16 U.S.C. § 460l): The Outdoor Recreation Act of June 23, 1963, authorizes the Secretary of the Interior to sponsor, engage in, and assist in research relating to outdoor recreation, directly or by contract or cooperative agreements and make payments for such purposes; undertake studies and assemble information concerning outdoor recreation; and cooperate with educational institutions and others in order to assist in establishing education programs and activities and to encourage public use and benefits from outdoor recreation.

c. NPS Authorities

*There are well over 200 NPS specific authorities that may be cited to support agreement for partnerships and activities. However, many of these authorities are NPS region, park, or situation specific. Therefore, significant legal research may be needed to identify an authority or authorities to support a partnership proposal. The Solicitor's Office can assist in this regard. The authorities discussed below are often cited for support in agreements for partnerships. This list is by no means exhaustive so, again, work with the Solicitor's Office to identify appropriate authorities for your partnership.*

- 1) General Authority to Take Actions That Promote and Regulate Units of the National Park System (16 U.S.C. § 1): The NPS Organic Act directs the Secretary to promote and regulate National Park System lands by such means and measures as to conform to the fundamental purpose of such lands, namely, conservation of the scenery and the natural and historic objects and wildlife therein, and to provide for the enjoyment of these resources in a manner and by such means as will leave them unimpaired for the enjoyment of future generations. Note: It may be tempting to cite the NPS Organic Act as authority for any action contemplated under a agreement for partnership. While the NPS Organic Act may be cited as support for a agreement for partnership, it is generally better to rely on more specific legal authority when available. When specific authority does not appear to be available work with the Solicitor's Office to determine whether the Organic Act provides sufficient authority for the partnership activity contemplated.
- 2) Agreements for the Transfer of Appropriated Funds to Carry Out NPS Programs (16 U.S.C. § 1g): The National Park Service may in fiscal year 1997 and thereafter enter into cooperative agreements that involve the transfer of National Park Service appropriated funds to State, local and tribal governments, other public entities, educational institutions, and private nonprofit organizations for the public purpose of carrying out National Park Service programs.
- 3) Cost Share Arrangements with Partners (16 U.S.C. § 1f): The Secretary may enter into an agreement with a cooperator for the purpose of sharing

costs or services in carrying out authorized functions and responsibilities with respect to the National Park System, any affiliated area, or any designated National Scenic or Historic Trail. Cooperators are any State or local government, public or private agency, organization, institution, corporation, individual or other entity.

- 4) Agreements to Allow Exhibits and Interpretive Demonstrations in Parks (16 U.S.C. § 1a-2(g): The Secretary is authorized to enter into contracts, including cooperative arrangements, to conduct living exhibits and interpretive demonstration in areas of the National Park System. The Secretary is also authorized to sell at fair market value, without regard to the Federal Property and Administrative Services Act of 1949, products and services produced in the conduct of living exhibits and interpretive demonstration and to credit any proceeds therefrom to the appropriation bearing the cost of such exhibits and demonstrations.
- 5) Agreements to Operate, Develop, and Maintain Portions of National Trails (16 U.S.C. § 1246(h)(1): The National Trail System Act authorizes the Secretary to enter into agreements, including agreements providing limited financial assistance, to encourage acquisition, protection, operation, development, and maintenance, of national recreation, national scenic, or national historic trails located both within and outside the boundaries of federally administered areas. Such agreements may be with States or their political subdivisions, landowners, private organizations, or individuals.
- 6) Agreements for Cooperative Management Where Park System Lands are Near State or Local Parks (16 U.S.C. § 1a-2(1)): Where a unit of the National Park System is located adjacent to or near a State or local park area, and cooperative management between the National Park Service and a State or local government agency of a portion of either park will allow for more effective and efficient management of the parks, the Secretary may enter into an agreement with a State or local government agency to provide for the cooperative management of Federal and State or local park areas (but may not transfer “administration responsibilities” for any unit of the National Park System under this authority). Under such an agreement, the Secretary may acquire from and provide to a State or local government agency goods and services to be used in the cooperative management of land. Also, assignment of Federal, State or local employees for the cooperative management activity may be for any period determined by the Secretary or the State or local officials to be mutually beneficial.
- 7) Authority to Cooperate with Others on the Administration of Historic Sites (16 U.S.C. § 464): The Secretary is authorized to cooperate with Federal, State, and municipal governments, any educational or scientific institution, any patriotic association, or any individual in administering historic sites.

- 8) Agreements to Protect, Preserve, Maintain, or Operate Historic or Archeological Buildings, Sites, Objects, or Property (16 U.S.C. § 462(e)): The Historic Sites Act authorizes NPS to contract and make cooperative agreements with States, municipal subdivisions, corporations, associations, or individuals, with proper bond where deemed advisable, to protect, preserve, maintain, or operate any historic or archeological building, site, object, or property used in connection with public use. But no contract or cooperative agreement can be made that obligates the general fund of the Treasury unless Congress has appropriated money for that purpose.
  
- 9) Agreements Concerning Cooperative Research and Training on NPS Resources (16 U.S.C. § 1a-2(j)): The Secretary may enter into agreements with public or private educational institutions, States and their political subdivisions, for the purpose of developing adequate, coordinated, cooperative research and training programs concerning the resources of the National Park System, and pursuant to such agreements, to accept from and make available to the cooperator such technical and support staff, financial assistance for mutually agreed upon research projects, supplies and equipment, facilities, and administrative services relating to cooperative research units as the Secretary deems appropriate.
  
- 10) Agreements For Educational Lectures and Work Respecting National Park System Resources (16 U.S.C. § 17j-2(e)): Appropriations may be expended on educational lectures in or in the vicinity of, and with respect to, National Park System resources and the services of field employees may be utilized in cooperation with non-profit scientific and historical organization engaged in educational work on National Park System lands.
  
- 11) Agreements with Federal, State, and Local Entities to Study Parks, Parkways, and Recreation (16 U.S.C. § 17k): The Secretary is authorized to enter into cooperative agreements with other federal agencies as well as with State and local governments in order to study parks, parkways, and recreational areas, and to plan for providing adequate park and recreation areas for the people of the United States.
  
- 12) Agreements to Engage in and Fund Outdoor Recreation Research and Educational Programs (16 U.S.C. § 460-l(f)(1)): The Secretary is authorized to sponsor, engage in, and assist in research relating to outdoor recreation, directly or by contract or cooperative agreements, to undertake studies and assemble information concerning outdoor recreation, directly or by contract or cooperative agreement, and to cooperate with educational institutions and others in order to assist in establishing education programs to encourage public use and benefits from outdoor recreation.

- 13) Agreements with Educational Institutions to Study National Park System Resources and Non-Park Service Resources (16 U.S.C. § 5933): The Secretary is authorized and directed to enter into cooperative agreements with colleges and universities in partnership with other Federal and State agencies, to establish cooperative study units to conduct multi-disciplinary research and develop integrated information products on the resources of the National Park System or the larger region of which parks are a part.
- 14) General Authority for NPS to Accept Donations (16 U.S.C. § 6): The Secretary is authorized to accept patented lands, rights-of-way over patented lands or others lands, buildings, or other property within the various national parks and national monuments, and moneys which may be donated for the purposes of the national park and monument system.
- 15) Donations for Museum Purposes (16 U.S.C. §18(f)): The Secretary is authorized to accept donations of money or other personal property and to hold, use, expend and administer them for museum purposes.
- 16) Acceptance of Volunteer Services (16 U.S.C. 18g-j): The Secretary is authorized to recruit, train, and accept the services of individuals without compensation as volunteers for or in the aid of interpretive functions, or other visitor services or activities in and related to areas of the National Park System. Such volunteers may not be used for hazardous duty or law enforcement work or in policymaking processes, or to displace any employee. A special exception allows the acceptance of the services of individuals that the Secretary determines “are skilled in performing hazardous activities.”
- 17) Donations and Bequests of Money, Personal Property and Less than Fee Interests in Historic Property (16 U.S.C. § 470w-2): Secretary is authorized to accept donations and bequests of money and personal property for the purposes of historic preservation and to accepts gifts or donations of less than fee interests in any historic property where the acceptance of such interests will facilitate the conservation or preservation of such properties.

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**(ATTACHMENT F)****Office of Government Ethics****95 x 8****Letter to a Designated Agency Ethics Official dated July 10, 1995**

This is in response to your letter of April 10, 1995, regarding a proposed arrangement between [your agency] and the independent, nonprofit organization "Friends of [your agency]" (Friends). Friends was created by a former [agency employee] and seeks to provide various services for the [agency]. Your letter requests advice on the ethics implications of the proposed relationship.

Based on your April 10 letter, an attachment to that letter entitled "A Brief Proposal on the History of the [agency]" by [the former agency employee], and several phone conversations between you and an attorney in this Office, we understand the facts as follows: In 1992, [the former employee] organized Friends for the purpose of collecting materials reflecting the history of the [agency], preserving those materials, and publicizing the history of the [agency]. To date, Friends has made considerable progress in achieving these objectives; however, much work remains to be done. As an example, apparently 128 taped interviews have been completed, including interviews of all former [agency] directors, but fewer than one-third of the 128 interviews have been transcribed.

In anticipation of the [agency's] upcoming anniversary, [the former employee] approached the [agency] and proposed that Friends head up the anniversary celebrations and serve formally as [agency] historian. Anxious to celebrate the anniversary with special activities, but limited in its resources, the [agency] is interested in taking advantage of the Friends' offer.

More specifically, [the former employee's] proposal, as we understand it, contemplates that Friends and the [agency] enter into an agreement pursuant to which Friends would head up the anniversary celebrations; serve as [agency] historian (continuing with the development of historical materials); and prepare, for the [agency], an archive to be located within the agency's offices. The [agency] would not pay Friends for any of these services but would designate an [agency] employee to serve on a Friends' advisory committee; designate one or two [agency] employees to coordinate with Friends; provide clerical support for transcribing taped interviews and organizing the archive; provide a secure space for the archive within the [agency's] offices; officially recognize the role of [the former employee]/Friends in the history project; encourage [agency] employees and former employees to join Friends and to provide materials for the archive; help raise foundation and other funds to support the project; co-sponsor, with Friends, an event "kicking off the project"; and use some portion of the [agency's] September conference to highlight the projects being undertaken by Friends and the [agency].(1)

Your question, as we understand it, is whether there are any restrictions that would preclude [the agency] from entering into these arrangements. If so, you ask that we suggest alternatives.

**Non-ethics issues**

As a preliminary matter, we feel constrained to point out that the initial and, in many ways, most critical, issues raised by the proposed arrangement with Friends are not within the subject matter areas for which the Office of Government Ethics (OGE) has responsibility. First and foremost is the issue of whether the [agency] has the authority to enter into an agreement for these purposes. In addition, in light of the benefits to be conferred on the [agency] by Friends, the proposed arrangement may raise issues of improper augmentation of appropriations by the agency and improper acceptance of volunteer services by

agency employees.(2) The agency's acquisition of services from the organization may also raise an issue of compliance with applicable procurement law.

In resolving these issues, you may need to consider not only your agency's organic statute(s) and regulations, but also law applying to Federal agencies generally. On the augmentation issue, you may wish to seek advice from the Comptroller General. See also OGE Informal Advisory Letters 84 x 5, 85 x 16, 86 x 10.

Our discussion below of how the conflict of interest statutes and the Standards of Ethical Conduct (Standards) apply to the proposed arrangement assumes that these preliminary issues do not preclude the proposed arrangement, but this assumption is only for purposes of allowing us to address ethics considerations under the statutes and the Standards. Other than to note that these preliminary issues, like the related non-ethics issues noted below, are serious and, indeed, possibly determinative, we offer no opinion on these issues, which, as indicated, are outside OGE's purview.

**Assignment of [agency] employees to serve on a Friends' advisory committee, to provide support in other ways, and to act in matters affecting Friends**

Assuming the [agency] has the authority to assign [agency] employees to coordinate with Friends, to serve on an advisory committee, or to provide clerical or organizational help in support of authorized projects, the agency and affected employees will need to be aware of and take care to avoid conduct prohibited by the criminal conflict of interest statutes and the Standards. As a general matter, avoidance of such difficulties will be easier if one keeps in mind that, even though the objectives of the [agency] and Friends may sometimes overlap, they remain separate entities with distinct interests.

One concern that arises whenever Federal employees serve outside organizations is the basic conflict of interest prohibition set forth in 18 U.S.C. § 208. In the absence of a waiver issued pursuant to section 208(b), section 208(a) prohibits Federal employees from participating "personally and substantially as . . . Government employee[s] [in particular matters in which organizations they serve as] officer, director, . . . or employee . . . [have] a financial interest." The rationale for the disqualification is that the fiduciary duty owed to any organization served in one of the enumerated capacities may conflict with the duty an employee owes the Government.

In this context, the concern is that if [agency] employees were assigned to serve Friends in their official capacities as officers, directors or employees, they would be disqualified from participating "personally and substantially" in "particular matters" with a "direct and predictable" effect on the financial interests of Friends, unless the conditions of section 208(b) were satisfied. While it seems highly unlikely that any [agency] employee assigned to provide occasional clerical or organizational support to Friends, in furtherance of an agreement between Friends and the [agency], would ever be considered an "employee" of Friends, much less an "officer" or "director," the situation presented by an [agency] employee serving on a Friends advisory committee or board may be more problematic. While there are precedents indicating that section 208 is inapplicable where an employee serves as director of an outside organization in his official governmental capacity, those precedents have been construed narrowly, as applying only (1) where the employee's service as an "ex officio" director of the outside organization is "expressly authorized by statute" or (2) where "the rules of the private entity designate that official as a member of the board and neither the rules or State law appear to impose a fiduciary duty to the private entity on the director." Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Kenneth R. Schmalzbach, Assistant General Counsel, Department of the Treasury (June 22, 1994) at 3.

As we understand your situation, what is needed is to have an employee or employees of the [agency] represent the views of the [agency] to Friends and coordinate efforts jointly undertaken by the two organizations. These objectives may be achieved and difficulties under section 208 avoided if the employees assume the position of "coordinators," "liaisons to Friends," or "liaisons to the Friends advisory committee or board" and do not assume "employee," "director" or "officer" positions within

Friends. Of course, great care should be taken to ensure that all parties understand that the duty of such employees is to represent the interests of the United States and the [agency] and that they have no fiduciary obligations to Friends.

In addition, we suggest that, in order to avoid any conflicts under section 208 or under the impartiality provisions in the Standards, the [agency] should exercise care not to assign to work officially with Friends -- or on Friends-related matters -- [agency] employees who have significant involvement with Friends in their personal capacities. Section 208 clearly would restrict the official activities of any current [agency] employees serving Friends as employees, officers, or directors in their personal capacities. In the absence of a waiver under section 208(b), such employees would be prohibited from participating "personally and substantially," in their official [agency] capacities, in particular matters that could have a direct and predictable effect on the financial interests of Friends. Subpart E of the Standards of Ethical Conduct, Impartiality in Performing Official Duties, 5 C.F.R. § 2635.501 et seq., reaches further than section 208. Under section 2635.502(b)(1)(v) of the Standards, employees are said to have a "covered relationship" with organizations in which the employees are "active participants."<sup>(3)</sup> Because of this relationship, unless specifically authorized by their agencies, such employees may not participate in "particular matters involving specific parties" to which they know such organizations are parties if the employees "determine . . . that the circumstances would cause a reasonable person with knowledge of the relevant facts to question . . . [their] impartiality in the matter." Thus, in some circumstances, subpart E would restrict the official activities of employees who are simply "active" in Friends, even if they do not serve the organization as employees, officers, or directors.<sup>(4)</sup>

### **Fundraising**

The proposal by [the former employee] attached to your April 10 letter suggests that, pursuant to the proposed agreement with Friends, the [agency] would "encourage staff and retirees to join" Friends and, further, that it would "help raise foundation and other funds to support the project." The proposal thus seems to contemplate that the [agency] will participate actively in fundraising to benefit Friends and projects to be undertaken jointly by Friends and the [agency].

Any fundraising for Friends by [agency] employees would be covered by the Standards, which define "fundraising" as "the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. § 527(e), through [inter alia] . . . [s]olicitation of funds or sale of items." 5 C.F.R. § 2635.808(a)(1). Section 2635.808(b) describes the circumstances under which an employee may engage in fundraising in an official capacity. It provides that "[a]n employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties." Our understanding is that fundraising for Friends by the [agency] is not authorized by a statute, Executive order, regulation, or any other authority. The phrase "or otherwise as determined by the agency," moreover, does not provide an agency with authority to engage in fundraising simply because the fundraising is consistent with the agency's mission or in furtherance of its programs. See OGE Informal Advisory Memorandum 93 x 19.

Fundraising for Friends by [agency] employees acting in their personal capacities stands on a different footing but is also regulated by the Standards. Under section 2635.808(c), employees may not personally solicit funds or other support from subordinates or from persons known to be "prohibited sources" within the meaning of section 2635.203(d) of the Standards,<sup>(5)</sup> except that generally solicitations addressed to large groups are permissible unless the employee knows that the solicitation is targeted at subordinates or persons known to be prohibited sources. See 5 C.F.R. §§ 2635.808(a)(4) and 2635.808(c). Thus, any [agency] employee who, in a one-on-one setting or by means of a targeted solicitation, encouraged his subordinates to pay a membership fee and join Friends, or otherwise donate funds to Friends, would violate this restriction; and the same result would obtain if like encouragement were directed at people or organizations that do business with the [agency] or are, for other reasons, "prohibited sources." In

addition, section 2635.808(c)(2) prohibits employees engaged in personal fundraising from using or permitting use of "official title, position or any authority associated with . . . public office to further the fundraising effort." This provision would impact the manner of fundraising efforts directed at other likely donor candidates -- former [agency] employees and organizations with former ties to the agency -- along with persons and organizations or foundations that have no present or past relationship with the agency. Current [agency] officials may participate in such fundraising efforts but are prohibited from using their official titles, positions, or authority to further the fundraising.(6)

Finally, it is also noteworthy that, while not entirely clear, [the former employee's] proposal seems to contemplate the raising of funds earmarked for projects undertaken jointly by the [agency] and Friends -- perhaps the archive, or the anniversary celebration. To the extent that such funding is provided for agency programs or activities, as distinct from the Friends organization, it may not be covered by section 2635.808, which, as noted, applies to the raising of funds for nonprofit organizations. However, such fundraising would have to be based on an agency gift acceptance authority that includes the authority to solicit gifts as well as accept them. Without such gift acceptance authority, the activity could be an improper augmentation of agency appropriations. Again, however, we express no view on this issue, which, as previously noted, is not within our purview.

**Promoting the Friends' organization or staff, or projects jointly undertaken by the [agency] and Friends**

The proposal submitted by [the former employee] indicates that, pursuant to the proposed agreement between the [agency] and Friends, the [agency] would be expected to promote certain activities undertaken jointly by the [agency] and Friends. These promotional efforts would include encouraging [agency] employees and former employees to provide materials for the archive to be located within the [agency] offices, using some portion of the September [agency] staff conference to highlight the affiliation between Friends and the agency and the history project/archive; recognizing [the former employee's] role in the history project; and co-sponsoring, with Friends, an "event kicking off the project." The issue is whether such official activities promoting Friends and Friends' projects would be considered use of public office for private gain, in violation of section 2635.702 of the Standards.

Subject to the qualification noted below, and again assuming the existence of agency authority to enter into the proposed agreement with Friends for the specified purposes, our view is that such promotional activities are appropriate and permissible under the Standards. The primary purpose of section 2635.702 is to prohibit use of public office to promote activities for private, i.e., nonpublic purposes. It has no application to promotion of an authorized Government project, notwithstanding that a separate, private entity involved in the project may reap some benefit from the promotion, provided that the official involved in the promotion is not affiliated with the private entity in a non-governmental capacity.

In this context, we again emphasize that, in order to avoid even the appearance of use of public office for private gain, the [agency] should exercise care when assigning agency employees to work on Friends-related matters. We strongly advise that the agency not involve in such matters [agency] employees who are privately affiliated with Friends.(7) With this caveat, however, we do not believe that an [agency] official who is participating in the history project/archive as part of his official responsibilities would be precluded by the Standards from either directing current employees or requesting former employees to search for and provide relevant materials for use in the history project/archive. We also see no ethics issue if an [agency] official takes the opportunity presented by the September conference to advise agency staff regarding the affiliation between Friends and the [agency], to explain the development of the history project to date, and to describe future plans for its completion and incorporation in an archive. In this connection, recognition of [the former employee's] role in the project would seem appropriate. On the other hand, endorsement of the Friends' organization generally, as distinct from jointly undertaken and properly authorized projects, should be avoided. In our view, it would be improper for an agency official

to use his office to encourage agency employees to join Friends, even if payment of a membership fee were not required.

Regarding the proposed co-sponsorship of an "event kicking off the project," we hesitate to comment without more information about the scope of the event and its purpose. If the envisioned event is, for example, a fundraiser, it would raise ethics issues under section 2635.808 of the Standards, as discussed above. If the purpose of the event is informational, however, it may be entirely proper, provided that it is an appropriate means of disseminating word of properly authorized projects undertaken jointly with Friends and if it is accomplished consistent with applicable appropriations law.

#### **Using Government time and property**

Although your letter does not specifically raise these issues, questions regarding proper use of Government time and property are likely, we think, to arise if the [agency] enters into the proposed arrangement with Friends. Section 2635.704 of the Standards prohibits use of Government property for other than authorized purposes.(8) Section 2635.705 prohibits use of official time for activities not required in the performance of official duties or otherwise authorized in accordance with law or regulations.

As we understand the proposed arrangement with Friends, there would likely be a number of [agency] employees involved in Friends-related matters in an official capacity. These matters would include the history project/archive and the anniversary celebration. There may also be other [agency] employees active in Friends in their private capacities who are involved in Friends-related matters to which the [agency] is not a party and which are not authorized by the agency. Such matters might include membership and fundraising. Under these circumstances, the concern is that the line separating authorized from unauthorized projects and activities may become blurred and the misimpression created that it is appropriate to use Government time and equipment to support all Friends' activities. In order to avoid this situation, we would advise the agency to take the time to advise employees about the rules on use of Government time and property and how those rules apply to Friends-related projects.(9)

#### **Status of [the former employee] or others similarly situated**

Our discussion above assumes that, in working on the archive or the anniversary celebration, [the former employee], founder of the Friends' organization, or others similarly involved, would not be acting as "special Government employees." As you know, "special Government employees" or "SGEs" are part-time or intermittent employees who serve the Government on 130 or fewer days during any consecutive 365-day period. 18 U.S.C. § 202. Generally, SGEs are appointed as such; in rare situations, however, individuals have been deemed de facto SGEs. The classification is a critical one for, while nonemployees are not subject to the Standards, 18 U.S.C. §§ 205 and 208, or most of the applications of 18 U.S.C. § 203, SGEs are subject to most of these restrictions, albeit in some instances to lesser restrictions than those that apply to regular employees.

Our understanding is that [the former employee], pursuant to the proposed arrangement, would be working on the archive or the anniversary celebration as a representative of Friends, not the United States, and that he would not be authorized to speak, or purport to speak, on behalf of the agency. In addition, our assumption is that his activities would not be subject to routine supervision by agency staff. To our knowledge, moreover, the [agency] does not intend to compensate [the former employee], either directly or through the Friends' organization, and it has no plans to formally appoint [the former employee] to a Government position. Under these circumstances, our assumption is that [the former employee] would not be considered an SGE. See OGE Informal Advisory Memorandum 82 x 22; 4B Op. O.L.C. 441 (1980); 1 Op. O.L.C. 20 (1977).

On the other hand, if our assumptions are incorrect, or if you are aware of other factors suggesting that [the former employee] would be an SGE, we would defer to the personnel classification adopted by your agency. If [the former employee] is deemed to be an SGE, his ability to undertake a number of

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contemplated activities will be impaired and the agency will need to reassess the viability of the proposed arrangement with Friends.

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We hope that the foregoing advice regarding the conflict of interest statutes and the Standards of Ethical Conduct assists you in deciding whether to accept [the former employee's] proposal. Again, however, we caution that the concerns raised by the proposal are not exclusively ethics issues. Questions regarding the scope of the [agency's] authority and augmentation of agency appropriations, as well as [the former employee's] official status, are critical.

If the [agency] decides to proceed with the proposed arrangement, additional ethics issues are sure to arise in the future. For example, the anniversary celebration and the "event kicking off . . . [the] project" may raise issues regarding employee acceptance of gifts from prohibited sources to the extent food or other entertainment is provided for [agency] employees at these events. Retirement of [agency] employees who play an official role in Friends-related projects may raise issues under the post-employment statute, 18 U.S.C. § 207. As these or other ethics issues arise, please feel free to contact us.

We have not consulted the Department of Justice concerning your inquiry or this response.

Sincerely,

Stephen D. Potts Director

Endnotes:

(1) Your letter of April 10 also requested advice on whether the agency could provide office space within the agency for [the former employee]. However, you have since advised this Office that [the former employee] has accepted an offer of office space elsewhere. This issue is therefore moot.

(2) In this connection, we understand that the [agency] does not now have agency gift acceptance authority but is in the process of seeking such authority. Without gift acceptance authority, agencies may accept certain types of benefits pursuant to 5 U.S.C. § 4111 and 31 U.S.C. § 1353. The circumstances under which benefits may be accepted pursuant to these statutes are, however, narrowly defined. See 5 C.F.R. §§ 410.701- 410.706 (implementing 5 U.S.C. § 4111) and 41 C.F.R. part 304-1 (implementing 31 U.S.C. § 1353). See also OGE Informal Advisory Letter 84 x 5.

(3) 5 C.F.R. § 2635.502(b)(1)(v) sets forth examples of activities that constitute "active participation." They include serving "as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, . . . [participating] in directing the activities of the organization . . . [devoting significant time to] promoting specific programs of the organization, including coordination of fundraising efforts." On the other hand, the rule makes clear that "[p]ayment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation."

(4) All [agency] employees involved with Friends in their private capacities should be cautioned that, depending on the circumstances, taking official actions affecting Friends could result in a violation of 18 U.S.C. § 208 or the impartiality section of the Standards. Such employees should also be made aware of the restrictions on private conduct imposed by 18 U.S.C. § 205. Section 205 generally prohibits Federal employees from acting as "agent or attorney" for anyone other than the United States before departments or agencies in connection with certain covered matters "in which the United States is a party or has a direct and substantial interest." Thus the statute precludes certain representational activities taken by employees acting in their personal capacities. In view of these restrictions, employees of the [agency] who are involved with Friends in their private capacities should be very cautious about any communications with the [agency] and [agency] officials, or other agencies and agency officials, regarding matters in which Friends has an interest. All communications are not necessarily precluded. See OGE Informal Advisory Letter 94 x 15; Memorandum for Janet Reno, Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (November 7, 1994) at 7-10. However, in

order to avoid the risk of a prohibited communication, we advise that Friends use people who are not currently Federal employees to serve as conduits of communications between Friends and the [agency]. Permissible candidates include [the former employee], or other former [agency] employees, whose representational activities are not covered by section 205. See *id.* at 1, 2- 3; OGE Informal Advisory Letter 95 x 15.

(5) The term "prohibited source" is defined in section 2635.203(d) to mean-- any person who: (1) Is seeking official action by the employee's agency; (2) Does business or seeks to do business with the employee's agency; (3) Conducts activities regulated by the employee's agency; (4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or (5) Is an organization a majority of whose members are described in paragraphs . . . (1) through (4) of this section.

(6) Note, however, that nothing in the Standards restricts the ability of nonemployees to engage in fundraising. Accordingly, notwithstanding his status as a former [agency employee], [the former employee] and the Friends' organization generally are not precluded by the Standards from engaging in fundraising for Friends or [agency]/Friends' projects whether the fundraising efforts are directed at [agency] employees or others.

(7) Under section 2635.802 of the Standards, [agency] employees who are assigned official responsibilities involving Friends may in fact be precluded from engaging in Friends' matters as an outside activity if the Standards set forth in section 2635.402 (conflicts of interest) or section 2635.502 (impartiality) "would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired." 5 C.F.R. § 2635.802(b). Under section 2635.702, even a lesser involvement than that contemplated by these two provisions -- e.g. mere membership in the outside organization -- could, in appropriate circumstances, raise the issue of use of public office for private gain. See 5 C.F.R. § 2635.702. Accordingly, the interests of all may best be served if no one person is involved in Friends-related matters in both a private and an official capacity.

(8) "Authorized purposes" are "those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation." 5 C.F.R. § 2635.704(b)(2).

(9) Under the proposed arrangement, the [agency] would agree to provide "a secure space [within the national [agency] offices] for an archive." Our understanding is that this archive would be part of the history project/archive to be jointly undertaken by Friends and the [agency] and that it would become a part of the [agency]. Under these circumstances, using Government resources for the archive would not raise Standards of Ethical Conduct issues provided that the decision to develop and maintain the archive is within the agency's authority and does not otherwise contravene applicable non-ethics law.

(10) We defer discussion of these issues until the circumstances underlying an offer of food or entertainment are known.

**Reference and Contacts on Agreements for Partnerships:**

Director's Order #20: Agreements at [www.nps.gov/policy/DOrders/DOrder20.html](http://www.nps.gov/policy/DOrders/DOrder20.html)

Agreement's Handbook at [www.nps.gov/hfc/acquisition/agreements.html](http://www.nps.gov/hfc/acquisition/agreements.html)

Director's Order #21: Donations and Fundraising at [www.nps.gov/policy/DOrders/DOrder21.html](http://www.nps.gov/policy/DOrders/DOrder21.html)

NPS Partnership Website at [www.nps.gov/partnerships](http://www.nps.gov/partnerships)

Department of Interior Partnership Website at [www.doi/partnerships](http://www.doi/partnerships)

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