

CONTRACT PROVISIONS

A. PREFERENTIAL RIGHT TO PROVIDE ADDITIONAL SERVICES

The preferential right to provide additional services is discretionary and should be included in a contract only upon a specific determination that granting such a right is in the public interest. This right has been defined by the Solicitor's Office as a "right of first refusal" to provide such additional concession accommodations, facilities and services of the same character as required and authorized by the concession contract.

If a concessioner doubts the necessity, desirability, timeliness, reasonableness, or practicability of such new or additional accommodations, facilities, or services or declines or fails within a reasonable time to comply with the designation of the Secretary, then the Secretary in his discretion may authorize others under substantially the same terms and conditions to provide such designated accommodations, facilities or services.

In establishing the area of preferential right, consideration must be given to the facilities and services authorized any other concessioner in the park to assure there is no overlap in either the area or the service.

A preferential right to provide additional services can:

1. Include an entire park or area and all services and facilities to be provided therein.
2. Include all services and facilities within a certain portion of a park or area.
3. Be restricted to the facilities and services authorized under the contract, but include the entire park or area.
4. Be restricted to the facilities and services authorized under the contract and to a certain area of the park. In this case, also, the area should be delineated on an exhibit to the contract.

The right of preference of an existing satisfactory concessioner to continue operations under a new concession contract or permit (Right of Preference in Renewal) should not be confused with "preferential right" to provide additional facilities and services sometimes granted under a concession contract.

B. POSSESSORY INTEREST

The reader must bear in mind that the following dissertation is based on the current standard concession contract language which has been in effect since February 1981. There are many existing contracts that were around prior to that

time which utilize different standard concession contract language not only with respect to possessory interest but in other respects as well. Accordingly, the person using this manual may find it difficult to correlate the following with their specific concession contracts.

In actuality, while the verbage may be different in the current standard contract language there really is no difference in its application pursuant to P.L. 89-249 than in the past. The real difference is in the method by which concessioners may be compensated for their Possessory Interest under different and varying circumstances. Should you require additional information on this matter you should feel free to contact your Regional Chief of Concessions, and/or your Region/Field Solicitor or the Concessions Division in PASO.

1. Definitions

a. GOVERNMENT IMPROVEMENTS

Improvements constructed or acquired by the Government that are provided (assigned) to the concessioner for use in the concession operations. They may include buildings, structures, utility systems, fixtures, equipment and other improvements affixed to the assigned government land and are part of the realty.

b. CONCESSIONER IMPROVEMENTS

Improvements constructed or acquired by the concessioner with the written consent of the Secretary, for the purpose of the contract on assigned government land. This does not include improvements the concessioner makes to government improvements. The concessioner has no interest in the assigned land. Such improvements include buildings, structures, fixtures, equipment and other improvements affixed to the assigned government land and are part of the realty.

c. JUST COMPENSATION

Reconstruction cost less depreciation, not to exceed fair market value, unless otherwise provided by agreement of the parties. This definition is also referred to as "sound value." Unless by other agreement, just compensation equals sound value at the time of taking based on reconstruction cost less depreciation evidenced by its conditions and prospective serviceability in comparison with a new unit of like kind not to exceed fair market value.

d. SOUND VALUE

As set forth in P.L. 89-249, sound value of structures, fixtures, or improvements at the time of taking by the United States is determined upon the basis of reconstruction cost less depreciation evidenced by its condi-

tion and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value.

e. BOOK VALUE

This is the value of property as shown on the books of a business operator (concessioner). Simply stated, it is determined to be the cost of property less depreciation.

f. FAIR MARKET VALUE

The amount a willing buyer is willing to pay a willing seller in the open market.

2. Concession Contracts

Section 6 of Public Law 89-249 grants to concessioners a possessory interest in any structure, fixture or improvement which they acquire or construct with the approval of the Secretary on land owned by the United States within the National Park System. Possessory interest, in effect, is the concessioner's partial ownership (compensable interest) in Government acquired or constructed buildings, structures and facilities and/or concessioner acquired or constructed buildings, structures and facilities and, as such, is a potential liability (see Compensation Section) of the United States. This possessory interest includes all incidents of ownership except legal title which is vested in the United States.

Even though legal title to improvements is vested in the United States, the Concessions Act specifically states that the (concessioner's) possessory interest may be assigned, transferred (sold), and encumbered (mortgaged for concession construction and/or provide collateral for loan used to purchase the concession operation) by the concessioner. In addition, possessory interest "shall not be extinguished by the expiration or other termination of the contract and may not be taken for public use without just compensation."

Possessory interest does not include or imply any authority, privilege or right to operate or engage in any business or other activity. Possessory interest does not extinguish with expiration or other termination of the contract and may not be taken for public use without just compensation. Possessory interest may be assigned, transferred, encumbered or relinquished.

It is important for the reader to understand that the National Park Service recognizes only those assets which are affixed to the real estate (fixed assets) and considered to be part of the real estate as defined by the law of each State wherein located or in which specific approval was given by the Secretary or his designee. Possessory interest does not include personalty, viz., automobiles, knives, forks, linens, freely moveable tables, chairs, etc.

The Office of the Solicitor has interpreted Section 6 of P.L. 89-249 to mean that concessioners have possessory interest in concessioners' improvements which, by law, cannot be waived or extinguished except in special circumstances. In that opinion the Solicitor states in part, "the just compensation for taking of the possessory interest may be defined by the contract to be other than reproduction (reconstruction) cost less depreciation. A provision for amortization of improvements over the term of the contract, with compensation for the unamortized balance in the event of termination prior to expiration, represents, in the abstract, an acceptable measure of compensation." The foregoing is one example of a "special circumstance."

In order to solve special problems at certain parks, the Service has negotiated special concession contracts in which, among other things, standard possessory interest compensation as set forth in Public Law 89-249 was replaced by provisions requiring amortization of the possessory interest over the life of the contract. While this procedure can be an appropriate solution to special problems, each of those special contracts was closely guided by the Washington Office. As a matter of policy, however, possessory interest should be used as provided for in the standard contract language. Exceptions to amortizing possessory interest should be entertained on a case-by-case basis where a service is being discontinued or improvements are additions to Government improvements. Adjustments of possessory interest compensation should occur only after thorough analysis by the field and written justification sent to the Director for his written approval.

3. Compensation For Possessory Interest Pursuant To Section 12 Of The Standard Concession Contract Language:

a. JUST COMPENSATION: The compensation described in subsequent subsections to Section 12 constitutes full and just compensation from the Secretary to the concessioner.

b. CONTRACT EXPIRATION OR TERMINATION WHERE OPERATIONS ARE TO BE CONTINUED

The Concessioner must sell its possessory interest in Government-owned improvements to a successor to the extent of book value. The successor will not be permitted to revalue such possessory interest. For possessory interest in concessioner improvements, the successor will pay the sound value thereof not to exceed fair market value.

If the concessioner and the successor, excepting Government agencies, cannot agree upon the fair value of any item or items, either party may serve a request for arbitration upon the other party pursuant to established arbitration procedures as stated in Section 12 of the contract.

c. CONTRACT EXPIRATION OR TERMINATION WHERE OPERATIONS ARE TO BE DISCONTINUED

If for any reason, including contract expiration or termination, the Secretary no longer requires the concessioner to conduct the authorized operations, or substantial part thereof, and operations are to be discontinued, and the Secretary chooses to abandon, remove OR demolish any of the concessioner's improvements, the Secretary will take necessary action to compensate the concessioner for its possessory interest in Government and concessioner's improvements in the amount of book value (unrecovered cost as shown in Federal Income Tax Returns). Refer to standard contract language for non-possessory interest reimbursable costs to the concessioner.

d. CONTRACT TERMINATION FOR DEFAULT FOR UNSATISFACTORY PERFORMANCE WHERE OPERATIONS ARE TO BE CONTINUED

If the Secretary terminates a contract for default for failing to maintain and operate the concession to the satisfaction of the Secretary, the concessioner will be compensated at book value for any possessory interest in concessioner's improvements as described in subsection 12(c) of the contract.

NOTE: In all circumstances compensation to a concessioner for its possessory interest in Government improvements, paid by the Government or a successor concessioner, will be in the amount of book value.

4. Concession Permits

Section 6 of P.L. 89-249 (Possessory Interest) specifically mentions "contracts" and not "permits." Yet, the term "permit" is generally interlaced throughout the rest of the law. Because of its conspicuous absence from Section 6, it is our conclusion, and that of the Solicitor's Office, that Congress, in legislating P.L. 89-249, did not intend that concession permittees have a possessory interest.

Special regulations for concession contracts and permits are incorporated in- 36 CFR Part 51.3(a), Definitions, which states in part as follows: "eee Concession Permits are generally utilized where the authorized concession operations are not expected to gross more than \$100,000 annually, where the term •s• is less than five (5) years, where no possessory interest is to be granted to the Conoessioner, •aa." (Emphasis added). Simply put, if a proposed conoession authorization will require the granting or recognition of a possessory interest, it should be a concession contract authorization.

C. SUBCONCESSIONS

1. Law

None

2. Regulation

None

3. Policy

Management Policies Manual, Chapter VIII  
Subconcessions

The National Park Service does not encourage and generally will not approve subconcession contracts or agreements unless: (1) the proposed subconcession operation is essential to provide better service to the public, and (2) the prime concessioner furnishes the basic facilities and/or services to the subconcessioner.

Any subconcession contract or agreement that a prime concessioner proposes to enter into that would authorize a third party (subconcessioner) to exercise certain responsibilities or privileges under the prime concession contract must be approved by the Secretary before becoming effective.

In the event that a subconcession contract is approved, the concessioner is required to pay to the Secretary within a prescribed time (in addition to the franchise fee payable on both the total gross receipts of the subconcessioner and of the prime concessioner, as provided for in the concession contract), fifty percent (50%) of any and all fees, commissions, or compensation payable to the concessioner by the subconcessioner.

A subconcession may not be permitted under any concession authorization except a concession contract.

4. Procedures

A subconcession agreement as noted above, is an agreement or contract "entered into by the concessioner with respect to the exercise by others of the privileges granted" by a concession contract. In determining whether an agreement constitutes a subconcession contract, it should not be determined by application of strict legal definitions (viz. agent vs. independent contractor) or by

simply determining if a fee is paid by a third party to the concessioner; but rather, by the degree to which management control and responsibility is transferred to a third party by the agreement. Section 14 of the Standard Concession Contract Language is intended to require approval of the third party contractual arrangements by the National Park Service so as to assure that the responsibilities, performance, and financial risks assumed under the concession contract substantially continue to rest with the concessioner of record.

Criteria in determining whether a proposed agreement constitutes a subconcession, the following points should be considered:

a. Does the proposed agreement clearly purport to authorize a third party to exercise certain of "the privileges granted by" the concession contract?

b. Does the agreement shift the risk of loss onto the third party? This is a principal indication of assumption of management control.

e. Do other provisions of the proposed agreement show evidence of the assumption of substantial management responsibility and control by the third party? For example, will the proposed agreement:

(1) Permit the third party to hire all personnel for the operations, subject only to disapproval by the concessioner?

(2) Give the concessioner a percentage of gross receipts in return for the privileges by the agreement, which effectively shifts risk of loss to the third party?

(3) Relieve the concessioner of any liability with respect to the operation, possession, ownership or control of the facilities used in the operation?

(4) Permit termination of the relationship by the concessioner if in its reasonable discretion there is a failure to perform.

(5) The concessioner designates the items to be sold and the prices thereof.

Agreements made between vending machine companies and an NPS concessioner are not to be considered as subconcession agreements when the following conditions exist:

a. The agreement constitutes only a lease of equipment and a supply contract for items sold;

b. The concessioner designates the items to be sold and the price thereof; and

c. The concessioner is responsible for maintaining the area where the vending machines are located.

A subconcession may not be permitted under any other concession authorization except a Concession Contract.

D. CONTRACT/PERMIT TERMINATION AND SUSPENSIONS

1. Contract Termination

Contract terminations do not occur often--but they do occur. The termination process can be very expensive in terms of NPS staff time, compensation for possessory interest, if necessary, and to the park visitor in the form of unsatisfactory accommodations, facilities and services. The Concessions Review Program is a very important adjunct to the Concessions Management Program to detect potentially unsatisfactory performance early on before minor deficiencies become major, which could lead to termination.

A concession contract may be terminated in whole or part at any time for the following reasons:

a. DEFAULT. The terms "breach of contract" and "default" are synonymous. A default is a breach of any contract requirement including failure to maintain and operate required accommodations, facilities and services to the satisfaction of the Secretary . In addition, pursuant to Chapter 19 of this Guideline pertaining to the Concessioner Review Program, a concessioner is in default of its contract if its annual overall rating is (i) unsatisfactory for a given year; or (ii) marginal for 2 consecutive years.

b. PROTECTION OF VISITORS. Threats to visitor health or safety because of unsanitary conditions, poorly maintained facilities and services, fire safety hazards and geologically hazardous conditions could result in termination.

c. PROTECTION OF AREA RESOURCES. Destructive compaction of trails by horses and mules, intrusions on wildlife habitats, and damage to the ecology of an area exemplify conditions where termination could be used to protect park resources.

d. FAILURE TO OBTAIN PRIOR APPROVAL FROM THE DIRECTOR FOR ALES, ASSIGNMENTS, OR ENCUMBRANCES OF CONCESSION CONTRACTS, PERMITS AND ASSETS. Transfers, sales, assignments, or encumbrances consummated in violation of 36 CFR 51.7 shall be considered a breach of the contract or permit-and shall be considered null and void by the Director.

e. DISCONTINUATION OF OPERATIONS IF SERVICES AND ACCOMMODATIONS ARE DEEMED TO BE NO LONGER NECESSARY AND APPROPRIATE. Should it be determined that the operations are no longer needed the concessioner should be given formal written notification of this determination along with supporting documentation. This cannot be determined at the last minute but should be determined during the life of the concession authorization. Prior to such a determination, steps must be taken to secure funds for compensating the concessioner for its possessory interests and any other interests, if applicable, in accordance with the contract. (See Subsection 12(c) of the Standard Contract Language.)

In considering termination actions primary emphasis should be given to those default situations affecting the quality of visitor services, those posing imminent threats to the safety, health and welfare of the public and threats to property. Default on provisions of the contract not having a direct effect on visitor services are of secondary importance and can be given more time for compliance if deemed in the public interest to do so. Any one factor or combination of factors should be carefully weighed in this context before arriving at a decision to terminate.

Upon arriving at a decision to terminate, the following initial concerns should be reviewed:

a. Inasmuch as terminations can have substantial legal ramifications with potential for court litigation, the nature of default, along with all supporting correspondence and documents, should be reviewed with the Field Solicitor. All correspondence with concessioners relative to terminations should be reviewed by the Solicitor before it is issued.

b. Review impact on visitor services. Will there be a temporary interruption? Will the existing concessioner be required to operate until a successor is selected? What further studies are needed before a prospectus can be issued? The Washington Office should be promptly notified of proposed termination actions. It may be advisable in some instances for the Superintendent or Regional Director to council with Congressional representatives of the applicable state so that we have their support.

c. Determine financial liabilities to the Government as accruing from the proposed termination. In most events the possessory interest would be acquired by a successor if the operations are to be continued. However, there could be circumstances requiring compensation by the Service to the concessioner for certain possessory interest items. There may also be expenses for appraisals, studies and investment in support facilities connected with the termination and placement of the operations under new management. These costs must be identified and programmed. Compensation for possessory interest is a contractual commitment upon the United States.

d. Monies owed the United States for franchise fees, utility services, etc. The concessioner is obligated to submit a financial report through

its final date of operation and pay all outstanding franchise fees and other debts due and owing to the United States. Every reasonable effort must be made to collect the monies that are due. Since the United States holds the first lien on concessioner's assets, any outstanding amounts owed the United States should be considered in the final disposition of the concessioner's assets as follows:

(1) If sold to a successor, responsibilities for any debts to the United States must be stated in the sales agreement;

(2) If assets are attached or repossessed by a creditor the United States has the right of first lien and prior approval; and

(3) If compensation is owed the concessioner for possessory interest, any amounts owed the United States should be deducted therefrom.

In proceeding with terminations the contract provisions that become applicable are as follows:

a. The section or sections of the contract in which the concessioner is in default. The applicable section(s) must be cited and it must be explained how and why the concessioner is in default.

b. The termination section (Sec. 11 of the current contract language). The contract language on termination used in older contract\* (those prior to 2/13/81) varies from the current standard contract language. The language of the contract in question must be explicitly followed.

c. The Section regarding "compensation" (section 12 of the current contract language), specifies how the concessioner is to be compensated for its possessory interest, if any, either by acquisition by the Service OR sale to a successor. This provision of the contract remains active after contract termination or expiration until such time as possessory interest claims are settled. The language on compensation can vary between contracts and the contract that is being terminated must be carefully reviewed and followed.

d. Section regarding "Accounting Records and Reports." A financial report must be submitted through the final date of operation which, among other things, establishes the amount of franchise fee that is due.

e. Section regarding "Franchise Fee." All outstanding franchise fees must be paid through final date of operation.

f. Section regarding "Utilities." If utilities are furnished to the concessioner all outstanding amounts through final day of operation must be collected.

All of the above contractual provisions and concerns thereunder as applicable must be spelled out to the concessioner in the letter of termination.

Termination procedures and the time involved can vary in a number of ways depending upon the services provided, nature of default, the contract language, and possessory interest situation. Therefore, no specific procedures can be laid out other than these general guidelines. Terminations are detrimental to the Service and public and should be avoided if possible. There are, however, situations that come about where terminations must be made in the interest of the public. The important things are:

- a. careful deliberation of the need to terminate and consideration of viable options;
- b. work with the field solicitor;
- c. consider any program funding requirements; and
- d. keep Regional and WASO officials informed.

Copies of the letter of termination should be forwarded to all offices involved in the distribution list for the concession contract.

## 2. Contract Suspension .

A concession contract may be suspended in whole or part when it is necessary to protect (i) the health and safety of visitors and employees; and (ii) area resources as described above under "Termination."

The difference between a concession contract termination and a suspension is that a termination is of a permanent nature while a suspension is generally for a relatively short period of time until a problem situation can be corrected.

Section 11(a) of the Standard Contract Language states that the concessioner must be advised in writing in the event that a termination or a suspension action is contemplated. In the event that it is proposed to terminate a concessioner for default, the concessioner must be given a reasonable opportunity to correct any stated deficiencies before final termination proceedings begin.

Sino<sup>p</sup> items of default that may culminate in termination do not 'occur overnight', it is vitally important that Superintendents maintain open lines of communication with concessioners in a continuing effort to resolve any emerging difficulties. When it is apparent that the concessioner is not taking necessary and expeditious steps to rectify problem areas, it is very important to

thoroughly document park and regional files with any and all correspondence with the concessioner in the event that the concessioner would appeal termination proceedings and/or pursue litigation. (See Section IT, Disputes, of the Standard Concession Contract Language and Paragraph E. below.)

### 3. Termination Authority

Pursuant to the delegation of contracting authority which was effected March 6, 1979, Regional Directors have authority to terminate all concession contracts and permits. If authority has been redelegated by Regional Directors, Superintendents may terminate only those concession permits that are under a 5-year duration or where gross receipts will amount to less than \$100,000.

#### E. DISPUTES

Any dispute, or claim, concerning a concessioner's contract which is not disposed of by agreement shall be decided by the Regional Director, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the concessioner. The decision of the Regional Director shall be final and conclusive, unless, within 30 days from the date of receipt of such copy, the Concessioner mails or otherwise furnishes to the Regional Director a written notification of appeal addressed to the Director.

When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board of Contract Appeals may in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue. Only contract appeals where a concession contract contains a disputes clause fall within the purview of the Board of Contract Appeals pursuant to 43 CFR 4.101. Issues concerning contracts without a disputes clause and permits may be appealed to the Director.

The Washington Office will assist the Regional Directors, on request, in the handling of any appeal *which* may be taken to them. Any requests for such assistance by the Washington Office should be accompanied by a complete file of pertinent information and comments to enable giving full consideration to all justifications and data submitted by the concessioner.

#### F. SALE AND TRANSFER OF OWNERSHIP INTERESTS

##### 1. Law

See Chapter 5., paragraph A of this Guideline.

##### 2. Regulation

See Chapter 5, paragraph B of this Guideline.

3. Policy Management Policies Manual, Chapter

VIII

Concessioners or entities holding an ownership interest in a concession may sell their interest, or part of their interest, to another entity as long as the appropriate National Park Service requirements are met and approvals granted prior to the transfer. Transfers of interest that occur without meeting National Park Service requirements constitute a material breach of the contract and are cause for immediate termination.

Debt incurred for purchase or the purchase price paid for a concession will not be used as justification for: (1) a rate increase beyond the point of reasonable comparability pursuant to Section 3(c) of P.L. 89-249; (2) a waiver or reduction of franchise fees; or (3) a claim that a reasonable opportunity to realize a profit pursuant to Section 3(b) of P.L. 89-249 is being denied.

The purpose of the National Park Service program of review and approval of transfers of interest is to ensure that the concessioner will be in a legal, managerial and financial position to meet the terms of the contract and provide the appropriate services to the public. As such, the same care should be taken and tests made in a transfer of interest as are performed in an evaluation of offers in response to a National Park Service solicitation.

4. Procedures

a. INTRODUCTION

Concessions are operated in National Park Service (NPS) areas pursuant to contractual agreements between concessioners and the NPS. These agreements, defining the rights and responsibilities of each party, can only be transferred to prospective concessioners with the approval of the Director, or his designated representative.

Standard contract language has been expanded to reflect regulations which tighten the review process and specify the procedures and criteria used. This document is meant to supplement these two sources. However, in any proposed transaction, both the applicable authorization and 36 C.F.R. Part 51.7 should be studied.

Changes in any one of the owners of the business constitutes a change in ownership according to the contract and requires NPS approval. This

action is required regardless of the number of owners associated with the organization.

As a practical matter, the Park Service cannot be involved with minor changes in ownership. Hence, the regulations require different procedures for changes involving a controlling interest from those involving less than controlling interest. We try to concentrate on those changes which might have a material affect upon the concessioner's management or financial policy.

b. BUSINESS STRUCTURES

For purposes of this section, there are three basic types of business structures and the Park Service routinely contracts with each of the three types.

- Sole proprietorship
- Partnership
- Corporation

A sole proprietorship is the simplest form of business organization. The business has no existence apart from its owner. The liabilities are the owner's personal liabilities and the proprietary interests end on death. The owner undertakes the risks of business to the extent of all assets, whether used in the business or personally owned.

A partnership is the relationship existing between two or more persons who join together to carry on a business. Each person contributes money, property, labor or skill, and expects to share in the profits and losses of the business. A partnership agreement is usually necessary to define the rights and responsibilities of each partner, as well as the division of profits. The existence of the partnership is not separate from the owners, and like a sole proprietor, a legal action against the business can be expanded to the owners.

A corporation is a separate legal entity entirely independent from its owners (usually stockholders). Evidence of ownership is a share of capital stock. These shares may be transferred from owner to owner without affecting the day-to-day operation of the business. Using the share as the basis of ownership allows flexibility in the number of owners in case of transfer, and in the ability to raise additional capital. A corporation is under the direction of a Board of Directors who are elected by the stockholders. They, in turn, appoint the operating officers who run the business on a day-to-day basis.

A corporation may own the stock of another corporation. This type of ownership allows for a parent-subsidiary relationship between companies. It is also possible to have a corporation without stockholders but in this case, the bylaws will have to establish the method of electing the Board of Directors.

A corporation is established or "incorporated" by a state which issues the article of incorporation. Each state differs in its laws and regulations and the corporation's by-laws must reflect these documents.

c. TYPES OF TRANSFERS

For purposes of this section, there are two types of transfers of concession ownership.

(1) Asset Purchase

In an asset purchase, the assets of an existing concessioner are purchased by another entity and when approved by the Service that entity is given the right to operate. Included in the purchase are the possessory interest assets. The Service shall require the proposed concessioner as a condition to the approval to assume all liabilities due the government. This shall include but is not limited to franchise fees, utilities, etc.

In an asset purchase, a new concessioner will allocate the purchase price to the assets acquired. However, in no event should the assets be revalued at greater than their fair market value. Such value is best arrived at through a professional appraisal. Any amounts which are in excess of the fair value of the assets acquired should be reflected by a concessioner as an intangible asset, usually goodwill. Generally, as a condition to the transfer, the Service will require a concessioner to submit an Opening Balance Sheet accompanied by a Schedule of Possessory Interest Assets Claimed. (See Chapter 24, paragraph E.)

(2) Stock Purchase

The transfer of ownership of a corporation may be accomplished by purchase of the voting stock of the concession. While the owners of the corporation change, the entity with which the NPS has contracted has not. The "books" of the corporation do not change because the corporation itself is not a party to the transaction. However, as management policy can change, the NPS nonetheless considers this a transfer requiring approval.

Under certain circumstances after a stock purchase, a corporation may choose to reorganize. At the time of such reorganization, a corporation may also elect to adjust its books to reflect the stock purchase and revalue its assets. Generally, as a condition to the stock purchase, the owners should be advised in writing that any reorganization in the future with a revaluation of assets will require approval by the Service.

With both an asset purchase and a stock purchase, it is the responsibility of the Service to insure that the values placed on the fixed (possessory interest) assets be no greater than the fair value. Such amounts

are a contingent liability payable by the Government should the operations be discontinued.

Payment for the assets or stock can take many forms and generally are not a factor in approval of the transfer. Some types of payment, such as stock, may postpone the tax liability of the seller and, hence, become a major factor in the negotiations between buyer and seller.

Assets outside park boundaries may be sold without NPS approval, even though carried on concession books. However, if the assets are necessary for satisfactory operation within the park, service will suffer and the conditions of the contract may not be met.

d. CONTROLLING INTEREST

Existing concessioners may transfer controlling interest to others only upon receiving prior written approval. Since the Service is concerned with changes in the management of a concession, it has issued regulations which define "controlling interest". See 36 CFR S51.7(b).

As most of the concessioner's are closely held corporations, the majority of transfers will usually be either minor stock transfers or total (100%) stock transfers. There have been very few transfers which would be considered controlling interest transfers involving less than 50% stock ownership.

e. REVIEW DOCUMENTS

Prior to approving a transfer of a controlling interest, the Service should receive and review various transfer documents which include but are not limited as follows:

(1) All instruments used to implement the transfer:

- (a) The sales agreement
- (b) Any security or warranty agreements
- (c) Loan documents
- (d) Articles of Incorporation and by-laws of buyer

corporation

(e) Corporate resolution authorizing the proposed transaction.

(2) An opinion of Counsel from buyer to the effect that the transaction is lawful under all applicable Federal and State laws.

(3) A narrative description of the proposed transaction and the operational plans for conducting the operation.

(4) A statement as to the existence or nonexistence of any litigation questioning the validity of the proposed transaction.

(5) A description of the management qualifications and experience.

(6) Personal financial statements of the key owners together with the latest corporate financial statements.

(7) A listing of claimed possessory interest assets allocating the purchase price to such assets and including supporting documentation.

(8) Third party personal and business references.

(9) Letters of commitment from prospective lenders.

(10) Such other information as the Director may require.

In reviewing the documents, the same care should be taken in reviewing a transfer of a controlling interest as the Service takes in reviewing the documents received from prospective concessioners responding to the Service's Prospectus/Fact Sheet requirements seeking a new concessioner or renewing a contract with an existing concessioner. See Chapter 8 on Evaluation of Offers.

f. APPROVAL DOCUMENTS

(1) Asset Purchase

Approval must be given in writing for any transfer of ownership that is considered to be a controlling interest. The approving official should be the one delegated the authority over the authorization as follows:

Permits under 5 years in duration and which gross less than \$100,000 are the responsibility of the Superintendent

Permits of 5 years or more and grossing \$100,000 or more and all contracts are the responsibility of the Regional Director.

The approval document for a purchase of assets will consist of the 3-part Assignment, Acceptance, and Approval document, executed by the seller, buyer and NPS official. An effective date for the transaction must be indicated in the documentation. The Assignment and Acceptance portion con-

tain an attestation line for corporations. Concessioners should be advised that these lines have to be fully executed by the appropriate corporate offices before the contract can be considered legal and binding.

Conditions placed on the sale should be listed in the appropriate part of the document so that the conditions become a part of the agreement. As an alternative, conditions may be included in a letter and tied in with the Assignment, Acceptance and Approval document. A sample Assignment, Acceptance, and Approval document is included as Exhibit 1.

(2) Stock Purchase

The approval document for a stock purchase should consist of a letter to the current concessioner with a copy to the proposed purchaser. A space should be provided for the signature of both parties with instructions to return the document after execution. An effective date for the transfer will be indicated in the letter.

The letter will include an approval statement and list any conditions to this approval. Signatures by the parties involved will signify their acceptance of the conditions. The letter should also include a brief summary of the transaction and any points that need clarification or emphasis.

A sample conditional stock approval letter and subsequent approval letter are included as Exhibits 2 and 3.

g. APPROVAL CONDITIONS

When approving a transfer, the following language will be included as a condition to our approval:

"The transfer of ownership is approved on the condition that debt incurred for purchase or the purchase price paid for the concession will not be used in the future as justification for:

- a. A rate increase beyond the point of reasonable comparability pursuant to Section 3(c) of P.L. 89-249;
- b. A waiver or reduction of franchise fee;
- c. A claim that a reasonable opportunity to realize a profit pursuant to Section 3(b) of P.L. 89-249 is being denied."

In addition, the Service will include in the approval document such other conditions as are deemed appropriate. These conditions will vary

depending on the circumstances. Such conditions are included in the sample approval documents shown in Exhibits 1 and 2.

h. TRANSFER OF NONCONTROLLING INTEREST

Prior to a transfer of a noncontrolling interest, the concessioner must notify the Director in writing and include information as to why it is not a controlling interest. The concessioner must also submit identification of the transferee. The Director will review the notification and if in agreement advise the concessioner in writing. Failure to notify the Director of any proposed transfer of a noncontrolling interest may make the proposed transfer null and void and constitute a material breach of the Contract or Permit.

The Park Service retains the right not to approve a proposed transfer regardless of the size of the interest.

Included below are examples showing transfers of noncontrolling interests:

(1) The Board of Directors of XYZ Corporation, Inc. decided that the "Z" portion of the company's name carried connotations unacceptable to some members of the public. The name was changed to XY Corporation, Inc.

(2) John Smith, a sole proprietor, became aware of certain tax advantages related to subchapter "S" corporations. Thus, John Smith incorporated his business under the name of Recreation World, Inc.

(3) When a need for additional funds to develop facilities contracted for by XY Corporation Inc., was identified, some of the original stockholders could not raise the money. Thus, those that could subscribed to more than originally planned. No new stockholders were brought in, but the ratio of holdings was changed.

(4) Upon the death of Mr. Smith of the Smith and Jones partnership, the probate courts awarded Mrs. Smith his interest in the business. A new partnership agreement was executed making Mrs. Smith and Mr. Jones partners in the business.

(5) Shortly after conclusion of an extended process of securing a new contract for Recreation World, Inc., one of the stockholders offered the primary stockholder all of his shares. The offer was accepted and John Smith became the only stockholder. Some time later, Mr. Smith requested approval to give some of his stock to his children.

(6) Joe Brown is in his mid 80's and wants to bring his son into the ownership of his business. The son has been employed in the business as the manager for several years.

(7) John Smith bought all of the outstanding stock in Recreation World, Inc., and then sold the assets to IT Corporation, Inc., another corporation in which Mr. Smith and his family continue to maintain majority stockholdings.

i. SOLICITOR INVOLVEMENT

Concessioners are required to provide to the National Park Service all documents proposed to implement sales and transfers. The buyers and sellers are usually represented throughout the entire transaction by lawyers who draw up the necessary documents. For this reason, it is most important that the Regional Solicitors be consulted on all proposed sales and transfers from the time of the initial request by the concessioners up until the actual improvement.

S A M P L E

ASSIGNMENT, ACCEPTANCE AND APPROVAL DOCUMENT

ASSIGNMENT

For value received, XYZ Company, Inc., a Nevada corporation does hereby assign, and set over, subject to the approval of the Secretary of the Interior, as of \_\_\_\_\_ (Date) \_\_\_\_\_ to ABC Company, Inc., a corporation organized under the laws of the State of Arizona all its right, title and interest in and under that certain Concession Contract No. 9900020000 entered into between the Secretary of the Interior and XYZ Company, Inc.,

as of \_\_\_\_\_ (Date) \_\_\_\_\_ granting the right to operate a concession at the Black Canyon site, Blank National Park.

Executed in quadruple at \_\_\_\_\_ this \_\_\_\_\_ day of  
19 \_\_\_\_\_

ATTEST: XYZ Company, Inc.

BY \_\_\_\_\_ BY

TITLE \_\_\_\_\_ TITLE

ACCEPTANCE

The undersigned, the Assignee named in the above and foregoing Assignment hereby accepts the same and agrees, subject to the approval of the Secretary of the Interior, to carry out fully and to perform all of the obligations imposed upon said XYZ Company, Inc., by the terms and provisions of the concession contract referred to, from and after the date of approval by the Secretary. The undersigned further agrees to the following conditions:

1. Within 60 days of the date of approval of the Assignment, an audited balance sheet, as of the effective date of the Assignment on which an unqualified opinion has been expressed by an independent licensed or Certified Public Accountant, will be submitted for the approval of the Secretary. This balance sheet must be accompanied by a "Schedule of Assets in which the Concessioner Claims Possessory Interest." The schedule must include the description of the asset, the date initially acquired, depreciation method and life, cost, accumulated depreciation, and net book value.

2. Assets acquired by ABC Company, Inc., from XYZ Company, Inc., will be recorded at an amount which will not exceed fair value. ABC Company, Inc., must provide in detail the basis for valuation including appraisals.

3. To assume all obligations to the National Park Service incurred prior to the effective date of the assignment if XYZ Company, Inc., fails to pay them, including franchise fees, utilities, etc.

4. Within 60 days after approval of the transfer, a copy of an itemized Bill of Sale covering all transferred assets will be provided to the National Park Service.

5. Any debt to be incurred for the purchase or the purchase price paid for the concession will not be used in the future as justification for:

a. A rate increase beyond the point of reasonable comparability pursuant to Section 3(c) of P.L. 89-249.

b. A waiver or reduction of franchise fees.

c. A claim that a reasonable opportunity to realize a profit pursuant to Section 3(b) of P.L. 89-249 is being denied.

ATTEST: ABC COMPANY, INC.

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

BY:

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

TITLE

APPROVAL

The foregoing Assignment and Acceptance are hereby approved and Concession Contract No..9900020000 therein referred to is hereby transferred from XYZ Company, Inc., to ABC Company, Inc., effective as of \_\_\_\_\_ (Date) \_\_\_\_\_ subject to the satisfactory performance of the conditions as provided in the Acceptance.

Dated at San Francisco, California, this 20 day of March 19 \_\_\_\_\_

SECRETARY OF THE INTERIOR

\_\_\_\_\_  
BY Regional Director, Western Region  
National Park Service

# United States Department of the Interior

NATIONAL PARK SERVICE WASHINGTON, D.C. 20240

IN REPLY REFER TO:

S A M P L E

## CONDITIONAL STOCK SALE APPROVAL LETTER

May 25, 19

Mr. James Smith  
**XYZ Company, Inc.**  
New York, New York

Dear Mr. Concessioner:

Your letter of May 2, 19\_\_\_, to Superintendent Green submitting certain documents and requesting approval of the sale of 100 percent of the stock of XYZ Company, Inc., to ABC Company, Inc., a wholly-owned subsidiary of X Corporation, has been reviewed. In this connection, we are providing the following comments.

1. As requested, this is to advise that XYZ Company, Inc., has operated in a satisfactory manner and has adhered to all terms and conditions of the concession contract, as amended. This should not be construed as relieving XYZ Company, Inc., of payment of its franchise fee for calendar year 19 - , and utility charges which may be due, if any, and other monies owing to the United States. Payment of such fees when due and owing is a condition precedent to our approval of the sale of stock. The concession contract, as amended, is still in full force and effect, including our previous approval of the loan agreement dated June 24, 19 , between XYZ Company, Inc., and the First National Bank of New York.

2. In addition, as a result of the bank's expressed concern in the event of default, this is to advise that parties holding an approved mortgage or other instrument of indebtedness on the possessory interest of the concessioner succeed to the possessory interest of the concessioner in concessioner's improvements upon default, all pursuant to Section 13 of the concession contract. Further, termination of the concession contract by the Secretary will result in the purchase of concessioner's possessory interest pursuant to Section 12 of the concession contract.

3. It is our understanding that ABC Company, Inc., will purchase 100 percent of the capital stock thereof.

4. According to the stock purchase agreement, it is our understanding, and a condition of our approval, that the purchaser intends, at least for the time being, to continue the corporate identity of XYZ Company, Inc., and follow the normal procedures whereby the books and records of XYZ Company, Inc., will be continued, and that no revaluation of assets will be involved. If at some point of time in the future the purchaser plans to dissolve the corporation, assign the operation, and revalue the assets to properly reflect the purchase price, it must be understood that our prior approval of the transaction will be required. Furthermore, if such an event should occur, the Service will not recognize any revaluation of possessory interest which is in excess of the fair market or appraised value.

5. In addition, Mr. (Proposed new concessioner's) letter of December 1, 19\_\_\_\_, indicates that the purchaser intends to place special emphasis on improved services and increased visitor usage of facilities on a year-round basis as well as future expansion projects.

In this regard, it must be understood that the concession contract, as amended, is still in full force and any proposed building and improvement program by the purchaser beyond the scope of said contract cannot be considered by the Service until such time as the Service has reviewed the proposal(s) pursuant to its usual administrative and environmental protection procedures.

6. Pursuant to Article VII under the Articles of Incorporation of ABC Company, Inc., the term of existence for the corporation is twenty-five (25) years from March 15, 1961. We trust that the renewal provision therein will be exercised as the concession contract runs through December 31, 1998.

7. Our review of the proposed transaction indicates that ABC Company, Inc., through its parent, X Corporation, is financially and managerially competent to operate the XYZ Company, Inc., concession operations subject to the submission of the following:

(1) a resolution of the Board of Directors of X Corporation stating that in consideration of the Secretary's approval of the stock purchase, it will assure that ABC Company, Inc., and XYZ Company, Inc., will receive the financial support needed to conduct all aspects of its operations on a sound basis, both managerially and financially, including, but not limited to a guarantee by X Corporation, Inc., of timely payment of all indebtedness of XYZ Company, Inc., and ABC Company, Inc., (including the indebtedness created by the purchase of XYZ Company, Inc., stock by ABC Company, Inc.):  
(2) an opinion of counsel of the X Corporation stating that the transaction, including the sale of stock and related agreements submitted to this office

(including the Agreement labeled "Exhibit B" to the

April 26, 19 , stock purchase agreement) are valid, binding and enforce-

able according to applicable Federal and State laws and that the execution of this letter by the X Corporation, together with passage of the corporate resolution mentioned above, are legally effective and sufficient actions to establish the corporate obligations described in paragraph 7(1) above. In this regard, Assistant General Counsel Smith's letter of January 29, 19\_, submitted by the X Corporation did not sufficiently address that issue: (3) execution of this letter by necessary authorized official(s) of the X Corporation in the space provided below which shall attest to the undertaking by that corporation to assure financial and managerial support of ABC Company, Inc., and XYZ Company, Inc., as described in paragraph 7(1) hereof, and agreement to the other conditions and understandings stated herein, all in consideration of the Secretary's approval of the stock purchase discussed above.

8. Within 90 days of the date of acceptance of this letter, ABC Company, Inc., will submit a balance sheet showing its assets, liabilities and equity as of the date of this letter.

9. Any debt to be incurred for the purchase or the purchase price paid for the concession will not be used in the future as justification for:

a. A rate increase beyond the point of reasonable comparability pursuant to Section 3(c) of P.L. 89-249.

b. A waiver or reduction of franchise fees.

a. A claim that a reasonable opportunity to realize a profit pursuant to Section 3(b) of P.L. 89-249 is being denied.

We have provided Mr. (Proposed Concessioner) with a copy of this letter which may be considered as conditional approval of the stock transaction described above. Upon submission of the documents specified above in acceptable form and return of this letter executed by the appropriate authorized officials of the several corporations involved indicating their acceptance of the conditions and understandings stated herein, we will provide our immediate response and/or acceptance of the proposed action in writing.

The three additional copies of the letter are for the use of the corporations indicated below. After all signatures have been obtained, please return the original of this letter and all other documents to this office.

Sincerely yours,

Director



S A M P L E

STOCK SALE APPROVAL LETTER

June 1, 19

Mr. John Jones  
Vice President X  
Corporation  
Phoenix, Arizona

Dear Mr. Jones:

This is to acknowledge the receipt of your letter, which you hand delivered on May 28 to this Office, dated May 25, 19 , signed by Mr. James Smith of XYZ Company, Inc., Mr. Paul Brown of ABC Company, Inc., and yourself representing the X Corporation, along with other requested documents. We have completed our review and find them acceptable.

You are hereby notified that the sale of 100% of the stock of XYZ Company, Inc., to ABC Company, Inc., is hereby approved and effective as of June 1, 19 , subject to the conditions set forth in our May 25, 19 , letter agreement referenced above.

We wish you the very best as new owners of the XYZ Company, Inc.

Sincerely yours,

Regional Director  
Region