

## § 51.71

### **§ 51.71 What is the process to be followed if there is a dispute between the prior concessioner and the Director as to the value of possessory interest?**

Unless other procedures are agreed to by the concessioner and the Director, in the event that a concessioner under a possessory interest concession contract is awarded a new concession contract and there is a dispute between the concessioner and the Director as to the value of such possessory interest, or, a dispute as to the allocation of an established overall possessory interest value on a unit by unit basis, the value and/or allocation will be established by arbitration in accordance with the terms and conditions of this part. The arbitration procedures are described in § 51.51.

### **§ 51.72 If a new concessioner is awarded the contract, what is the relationship between leasehold surrender interest and possessory interest?**

If a new concessioner is awarded a leasehold surrender interest concession contract and is required to pay a prior concessioner for possessory interest in real property improvements, the new concessioner will have a leasehold surrender interest in the real property improvements under the terms of its new concession contract. The initial value of the leasehold surrender interest (instead of initial construction cost) will be the value of the possessory interest as of the expiration or other termination of the 1965 Act possessory interest concession contract. This leasehold surrender interest will apply even if the related possessory interest real property improvements are not capital improvements as defined in this part. In the event a new concessioner obtains a leasehold surrender interest in only a portion of a structure as a result of the acquisition of a possessory interest from a prior concessioner, depreciation for purposes of leasehold surrender interest value will apply only to the portion of the structure to which the possessory interest applied.

## 36 CFR Ch. I (7-1-11 Edition)

### **Subpart I—Concession Contract Provisions**

#### **§ 51.73 What is the term of a concession contract?**

A concession contract will generally be awarded for a term of 10 years or less unless the Director determines that the contract terms and conditions, including the required construction of capital improvements, warrant a longer term. It is the policy of the Director under these requirements that the term of concession contracts should be as short as is prudent, taking into account the financial requirements of the concession contract, resource protection and visitor needs, and other factors the Director may deem appropriate. In no event will a concession contract have a term of more than 20 years (unless extended in accordance with this part).

#### **§ 51.74 When may a concession contract be terminated by the Director?**

Concession contracts will contain appropriate provisions for suspension of operations under a concession contract and for termination of a concession contract by the Director for default, including, without limitation, unsatisfactory performance, or termination when necessary to achieve the purposes of the 1998 Act. The purposes of the 1998 Act include, but are not limited to, protecting, conserving, and preserving park area resources and providing necessary and appropriate visitor services in park areas.

#### **§ 51.75 May the Director segment or split concession contracts?**

The Director may not segment or otherwise split visitor services authorized or required under a single concession contract into separate concession contracts if the purpose of such action is to establish a concession contract with anticipated annual gross receipts of less than \$500,000.

## National Park Service, Interior

## §51.79

### **§51.76 May the Director include in a concession contract or otherwise grant a concessioner a preferential right to provide new or additional visitor services?**

The Director may not include a provision in a concession contract or otherwise grant a concessioner a preferential right to provide new or additional visitor services under the terms of a concession contract or otherwise. For the purpose of this section, a “preferential right to new or additional services” means a right of a concessioner to a preference (in the nature of a right of first refusal or otherwise) to provide new or additional visitor services in a park area beyond those already provided by the concessioner under the terms of a concession contract. A concession contract may be amended to authorize the concessioner to provide minor additional visitor services that are a reasonable extension of the existing services. A concessioner that is allocated park area entrance, user days or similar resource use allocations for the purposes of a concession contract will not obtain any contractual or other rights to continuation of a particular allocation level pursuant to the terms of a concession contract or otherwise. Such allocations will be made, withdrawn and/or adjusted by the Director from time to time in furtherance of the purposes of this part.

### **§51.77 Will a concession contract provide a concessioner an exclusive right to provide visitor services?**

Concession contracts will not provide in any manner an exclusive right to provide all or certain types of visitor services in a park area. The Director may limit the number of concession contracts to be awarded for the conduct of visitor services in a particular park area in furtherance of the purposes described in this part.

### **§51.78 Will a concession contract require a franchise fee and will the franchise fee be subject to adjustment?**

(a) Concession contracts will provide for payment to the government of a franchise fee or other monetary consideration as determined by the Director upon consideration of the probable

value to the concessioner of the privileges granted by the contract involved. This probable value will be based upon a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving park areas and of providing necessary and appropriate visitor services at reasonable rates.

(b) The franchise fee contained in a concession contract with a term of 5 years or less may not be adjusted during the term of the contract. Concession contracts with a term of more than 5 years will contain a provision that provides for adjustment of the contract’s established franchise fee at the request of the concessioner or the Director. An adjustment will occur if the concessioner and the Director mutually determine that extraordinary, unanticipated changes occurred after the effective date of the contract that have affected or will significantly affect the probable value of the privileges granted by the contract. The concession contract will provide for arbitration if the Director and a concessioner cannot agree upon an appropriate adjustment to the franchise fee that reflects the extraordinary, unanticipated changes determined by the concessioner and the Director.

### **§51.79 May the Director waive payment of a franchise fee or other payments?**

The Director may not waive the concessioner’s payment of a franchise fee or other payments or consideration required by a concession contract, except that a franchise fee may be waived in part by the Director pursuant to administrative guidelines that may allow for a partial franchise fee waiver in recognition of exceptional performance by a concessioner under the terms of a concession contract. A concessioner will have no right to require the partial waiver of a franchise fee under this authority or under any related administrative guidelines.

**§ 51.80 How will the Director establish franchise fees for multiple outfitter and guide concession contracts in the same park area?**

If the Director awards more than one outfitter and guide concession contract that authorizes or requires the concessioners to provide the same or similar visitor services at the same approximate location or utilizing the same resource within a single park area, the Director will establish franchise fees for those concession contracts that are comparable. In establishing these comparable franchise fees, the Director will take into account, as appropriate, variations in the nature and type of visitor services authorized by particular concession contracts, including, but not limited to, length of the visitor experience, type of equipment utilized, relative expense levels, and other relevant factors. The terms and conditions of an existing concession contract will not be subject to modification or open to renegotiation by the Director because of the award of a new concession contract at the same approximate location or utilizing the same resource.

**§ 51.81 May the Director include “special account” provisions in concession contracts?**

(a) The Director may not include in concession contracts “special account” provisions, that is, contract provisions which require or authorize a concessioner to undertake with a specified percentage of the concessioner’s gross receipts the construction of real property improvements, including, without limitation, capital improvements on park lands. The construction of capital improvements will be undertaken only pursuant to the leasehold surrender interest provisions of this part and the applicable concession contract.

(b) Concession contracts may contain provisions that require the concessioner to set aside a percentage of its gross receipts or other funds in a repair and maintenance reserve to be used at the direction of the Director solely for maintenance and repair of real property improvements located in park areas and utilized by the concessioner in its operations. Repair and maintenance reserve funds may not be ex-

pendent to construct real property improvements, including, without limitation, capital improvements. Repair and maintenance reserve provisions may not be included in concession contracts in lieu of a franchise fee, and funds from the reserves will be expended only for the repair and maintenance of real property improvements assigned to the concessioner by the Director for use in its operations.

(c) A concession contract must require the concessioner to maintain in good condition through a comprehensive repair and maintenance program all of the concessioner’s personal property used in the performance of the concession contract and all real property improvements, including, without limitation, capital improvements, and government personal property, assigned to the concessioner by a concession contract.

**§ 51.82 Are a concessioner’s rates required to be reasonable and subject to approval by the Director?**

(a) Concession contracts will permit the concessioner to set reasonable and appropriate rates and charges for visitor services provided to the public, subject to approval by the Director.

(b) Unless otherwise provided in a concession contract, the reasonableness of a concessioner’s rates and charges to the public will be determined primarily by comparison with those rates and charges for facilities and services of comparable character under similar conditions, with due consideration of the following factors and other factors deemed relevant by the Director: Length of season; peakloads; average percentage of occupancy; accessibility; availability and costs of labor and materials; and types of patronage. Such rates and charges may not exceed the market rates and charges for comparable facilities, goods, and services, after taking these factors into consideration.

**§ 51.83 Sale of Native Handicrafts.**

(a) Where authorized by an applicable concession contract, concessioners are encouraged to sell authentic native handicrafts appropriately labeled or denoted as authentic that reflect the cultural, historical, and geographic

characteristics of the related park area. To further this objective, concession contracts will contain a provision that exempts the revenue of a concessioner derived from the sale of appropriately labeled or denoted authentic native handicrafts from the concession contract's franchise fee.

(b) The sale of products as authentic native handicrafts is further regulated under the Indian Arts and Crafts Act, Public Law 101-644, as amended.

(c) *Definitions.* (1) *Alaska Native* means any citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metalakatla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any person so defined either or both of whose adoptive parents are not Alaska Natives. It also includes, in the absence of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Alaska native village or native groups of which he or she claims to be a member and whose father or mother is (or, if deceased, was) regarded as an Alaska Native by any village or group.

(2) *Arts and crafts objects* means art works and crafts that are in a traditional or non-traditional style or medium.

(3) *Authentic native handicrafts* means arts and crafts objects created by a United States Indian, Alaska Native, Native Samoan or Native Hawaiian that are made with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual object.

(4) *Native Hawaiian* means any individual who is a descendant of the aboriginal people that, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(5) *United States Indian* means any individual that is a member of an Indian tribe as defined in 18 U.S.C. 1159(c)(3).

[72 FR 32190, June 12, 2007]

## Subpart J—Assignment or Encumbrance of Concession Contracts

### § 51.84 What special terms must I know to understand this part?

To understand this subpart specifically and this part in general you must refer to these definitions, applicable in the singular or plural, whenever the terms are used in this part.

A *controlling interest in a concession contract* means an interest, beneficial or otherwise, that permits the exercise of managerial authority over a concessioner's performance under the terms of the concession contract and/or decisions regarding the rights and liabilities of the concessioner.

A *controlling interest in a concessioner* means, in the case of corporate concessioners, an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the concessioner or related entities that permits the exercise of managerial authority over the actions and operations of the concessioner. A "controlling interest" in a concessioner also means, in the case of corporate concessioners, an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the concessioner or related entities to permit the election of a majority of the Board of Directors of the concessioner. The term "controlling interest" in a concessioner, in the instance of a partnership, limited partnership, joint venture, other business organization or individual entrepreneurship, means ownership or beneficial ownership of the assets of the concessioner that permits the exercise of managerial authority over the actions and operations of the concessioner.

*Rights to operate and/or manage* under a concession contract means any arrangement where the concessioner employs or contracts with a third party to operate and/or manage the performance of a concession contract (or any portion thereof). This does not apply to arrangements with an individual employee.

*Subconcessioner* means a third party that, with the approval of the Director, has been granted by a concessioner rights to operate under a concession