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NATIONAL PARK SERVICE CONCESSIONS PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL PARKS

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

TO

REVIEW THE NATIONAL PARK SERVICE CONCESSIONS PROGRAM, INCLUDING IMPLEMENTATION OF THE NATIONAL PARK SERVICE CONCESSIONS MANAGEMENT IMPROVEMENT ACT OF 1998

APRIL 8, 2004

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NATIONAL PARK SERVICE CONCESSIONS PROGRAM

THURSDAY, APRIL 8, 2004

U.S. SENATE,
SUBCOMMITTEE ON NATIONAL PARKS,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:30 p.m. in room SD–366, Dirksen Senate Office Building, Hon. Craig Thomas presiding.

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Senator THOMAS. I think we'll go ahead and begin. Unfortunately, or fortunately, we're going to have a vote here in about 15 minutes, so we'll have to take a little break. But, in any event, we may as well get started and see what we can do.

Certainly, first of all, I want to welcome all of you here, particularly our witnesses, for today's National Parks Subcommittee hearing. The purpose is to conduct an oversight over the National Park Service concession program. We, of course, have been working on this for a good, long time, back in our bill in 1998, and so on, and certainly concessions are very important, not only to visitors, but also to the Park Service and so on.

So, in 1998, we passed the Park Service Concession Management Improvement Act to make—hopefully, to make those programs more businesslike and to bring business operations into it. Our intent was to improve the efficiency and the effectiveness of the concessions, while improving, of course, the quality of the visitor service, which is the basic thrust.

National Park Service and concessioners have worked together to achieve the goal, but we're not quite there, and we'd like to talk a little bit about where we are, how we get further, and what the problems seem to be in getting there. We need to look at the May 2000 Park Service regulations and find out what's working, what needs improvement. For example, the 50-percent rule is a disincentive to performing routine maintenance. If it is, we need to take a look at that. We also need to determine if the threshold level for preferential right of renewal is correct; apparently set, I think, at $500,000. Some believe raising the threshold will create a more equitable playing field for smaller businesses; however, raising it too much, of course, would reduce the healthy competition, which is put into the 1998 Act.

In addition to addressing incentives for maintenance and preferential right of renewal, the purpose of this hearing is to assess how well we're meeting the original goals, any disparity between the act and the May 20 regulations, the status of recommendations made by the Concession Management Advisory Board, the process for evaluating possessory interest, and the number and types of concessions awarded since passage of the 1998 Act, applying the portions of the Federal acquisition regulations to the FAR National Park Service concession contracts. So these are some of the things that we are interested in talking about, and certainly appreciate your being here to talk about them, as well.

So, as I said, we'll have to take a little break here soon, but, nevertheless, we can start. So Mr. Jones and Mr. Cornelssen, welcome.

Mr. Jones, if you'd like to go ahead, why, we can get started.

[The prepared statement of Senator Thomas follows:]

PREPARED STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

I would like to welcome our witnesses and guests to today's hearing on issues concerning the management and operation of concessions by the National Park Service.

The management and operation of concession facilities within units of our National Park System affords us an opportunity to provide and utilize innovative, creative, and contemporary management methods in the way we do business with the private sector, and at the same time serve our park visitors.

Working with private sector businesses is not a bad proposition, nor is it a necessary evil, as a number of folks within the bureaucracy claim. It is quite the opposite! It should be a fundamental commonplace way of operating, managing, and providing quality services to our visitors. The private sector is positioned and tasked to supplement and enhance those services offered by the federal government. The private sector is also in a unique position to contribute a wide array of knowledge, skills, abilities and expertise to assist us; to maintain, operate and manage a variety of park facilities successfully, with a responsible financial return to individual parks, the Park Service and the American taxpayer.

Unfortunately, it appears in places we have gotten bogged down in process.

Out of the almost 50 larger contracts that gross over $3 million, only six have been awarded since the Omnibus Parks bill was signed into law. There are approximately 8 of these contracts in the pipeline, but they have been subject to the review process for so long, the financial information may no longer be valid; they may need to be revised before a prospectus can be issued, in some cases an 8 month process.

In the interim, extensions are issued on a year to year basis, no facility investments have taken place, and the infrastructure continues to deteriorate significantly. In addition, there is apparently a lack of communication with the incumbent concessionaires regarding the current status of these contracts. This is not the way to manage contracts.

According to a recent news story, there was a prospectus issued for a southwestern park where approximately 15 companies expressed interest, but no one actually bid or responded. Apparently the conditions and terms of the prospectus did not provide the incentive to match the investment required. Unfortunately, this is not the first time this has occurred. It is also important to note, that although no one responded, those companies still spent a considerable amount of money to determine the viability of the contract.

IT'S NOT ALL BAD . . .

I am glad to report that it's not all bad. I am very pleased with the work accomplished to date by the Concessions Advisory Board, under Chairman Allen Naille. They have done a great job tackling the issues of depreciation for wear and tear; cross collateralization; sale approval; the fifty percent investment level, and pricing which have been on the table since the first rules and regulations were promulgated.

All of these matters are better settled in a conference room rather than a court room. It is my hope that upon receipt of the Advisory Board's recommendations the Park Service will move forward with an interim rule, while they proceed on the two-

year journey to obtain a final rule. It is time to get on with changes that will place us more on course with efficient private sector practices.

When we passed concession reform, I assumed the Park Service would adopt the best management and contracting practices available to them. I understand the Federal Acquisition Regulations (commonly known as FAR) do not apply in every instance, to concession contracts. However, there are aspects of FAR which would work well suited for the award of concession contracts. The issue of using basic business practices and proven methods is something the Park Service has simply not captured or fully utilized. We are not taking advantage of opportunities to issue prospectuses and contracts that will encourage effective and productive partnerships. The true losers because of this failure are our parks and the visiting public.

Under FAR if you surpass the criteria in the performance of a contract, you often get rewarded for such accomplishments. More importantly, upon the reward of a contract, the agency presents an extensive explanation of why one contractor was chosen over another contractor. Such a program, according to the Department of Defense, contributes to better responses, increased competition, and savings to the government and taxpayer in future contracts. It is a winning solution, there is no down side. The limited use of FAR has been ignored to the detriment of the overall concession program. Keeping interested concessionaires in the dark about what the Park Service is looking for inhibits all future bidders. Why is there such resistance for using a proven government process like FAR?

It is my hope that the Advisory Board would address the use of FAR in their future deliberations, and I encourage the NPS to rethink their position on this issue before the Advisory Board's recommendations are made on this topic.

Last, but not least, on October 22, 2003 I sent a TWO PAGE letter to Director Mainella requesting some answers concerning concessions management and in particular the case of a new contract in Yellowstone National Park.

In March I received a response.

To my right is that response—a multi-volume collection—worthy of special recognition by this committee for its sheer size.

Unfortunately, in terms of being responsive to my inquiry—the content does not match its mass. This may be hard for the public to understand—it certainly was to me—but your document is incomplete and actually raises more questions than it answers.

I'm left to draw one of two conclusions:

One, my questions were not sufficiently focused enough for the Park Service to answer directly. Or two, the Park Service chose not to answer the questions I posed. Either way, I will give the agency another opportunity to satisfy my request completely.

What we do know from the response is that a contract in Yosemite National Park was extended for three years as a result of negotiations on a concession contract in Yellowstone National Park. While the law does not specifically preclude such transactions, there are many who would disagree with the broad interpretation of the Secretary's authority to change the terms and conditions of an existing contract. This scenario raises a number of important and distressing questions that need to be answered so that they aren't repeated in future contracts.

Actions taken by the NPS seem to ignore the existing law which provides that 80% of concession fees generated will remain in the park unit. In this case the extension has a definitive value which will not be realized by the park in which the contract was extended.

Today, under NPS current rules and regulations, cross-collateralization by concessionaires is prohibited. Yet, the NPS has used a form of cross-collateralization in the contract under discussion.

It also appears the NPS failed to extend the new contract terms to the limit allowed by law and then set a franchise fee at 3.5%. The extension of contract terms and a lower franchise fee, if any at all, could have possibly negated the loss of fees to the second park. In addition, it appears a case could be made that the taxpayer may be subsidizing a concessionaire under this complicated and unusual process. I can guarantee no one involved in the original negotiations on concession reform ever envisioned such a scenario.

I can only imagine what the responses to the prospectus would have actually been had the opportunity for an extension of another contract been on the table.

It is not my job to beat you up, I do not like or take any pleasure in such activities. However, as the author of the concessions reform law, I will hold you accountable. As I already stated, I have a number of other questions which may be the subject of another hearing. Today, I am going to revise and refine my request to the Director and Secretary to narrow the scope of my inquiry in order to bring this issue

to a proper and appropriate conclusion. I trust the response to my request will be timely and complete.

I apologize to my colleagues for an unusual lengthy opening statement, but I believe the circumstances dictate we highlight these issues first. Thank you.

STATEMENT OF A. DURAND JONES, DEPUTY DIRECTOR, NATIONAL PARK SERVICE, ACCOMPANIED BY CURT CORNELSSEN, DIRECTOR, HOSPITALITY DIVISION, PRICEWATERHOUSECOOPERS

Mr. JONES. Thank you, Mr. Chairman.

As you stated, the concessions program in the act is definitely a work in progress, and I think we have made some good accomplishments to date, but we definitely have a ways to go. And I'm happy to be here today.

I also have with me Curt Cornelssen, with the firm of PricewaterhouseCoopers, who is one of our private-sector consultants in the concessions program, and he's available to answer questions you may have for him, as well.

As usual, I will try to highlight my testimony, and ask that the entire testimony be submitted for the record.

Mr. Chairman, thank you for the opportunity to update you on the ongoing efforts in implementing the National Park Service Concessions Management Act. We are pleased to report on specific issues you have raised with us, including our success in recent contracting actions, the makeup and work of the Park Service Concessions Management Advisory Board, the process for evaluating possessory interests, and the transition to leasehold surrender interests.

The National Park Service concessions program administers 590 concession contracts in 126 parks. These contracts generate over $800 million in annual revenues. Since the passage of the act in 1998, we have issued 106 concession prospectuses seeking competitive offers, and awarded 255 new contracts under that. And as a point of explanation, the reason for that is, for example, IN awarding the snowmobile contracts at Yellowstone, or horse concessions at Rocky Mountain—we'll issue one prospectus and may award as many as a dozen different contracts under the one prospectus.

We still have approximately 256 contracts under temporary extensions, but we anticipate having 78 prospectuses issued this year, covering an additional 118 other contracts.

Of the 599 concession contracts in 126 parks, 52 currently gross above $3 million. These relatively high-dollar contracts represent over 80 percent of the more than $800 million value in gross revenue, and we do have a couple of charts that illustrate these things that staff will be showing as I run through this.

As a result of a competitive contracting action recently taken, we now have four professional firms under our indefinite-delivery/indefinite-quantities contracting authority to provide us professional assistance, and that level of professional assistance will vary with the nature of the complexity of a given contract. Mr. Cornelssen, as I mentioned, is with PricewaterhouseCoopers, is one of those four firms.

The National Park Service is focused on developing professional and competitive prospectus documents that represent the business opportunities for visitor services that exist in the national parks.

One of the key elements in the bill, which is new in our concessions management, is the role of the Concessions Management Advisory Board, which we have been actually very pleased to see, and we've enjoyed our working relationship with them, because they provide an excellent forum for discussing many issues and, as we're starting to see, I think, resolution of many issues.

The advisory board is composed of seven non-Federal individuals appointed by the Secretary of the Interior, none of whom have a current business interest in a Park Service concession. The professional expertise of each member of the board is described in the statute.

Key issues the advisory board continues to advise us on include issues like the evaluation of the rate-approval program, the Native American Handicraft Sales program. We're currently working with them on the leasehold surrender interest, possessory interest determinations, assignments, sales, transfers, encumbrances/cross-collateralization issues. And we expect on many new issues in the future, including some of the ones you've identified, to seek their help in finding resolution of these issues. We have found their advice to be excellent and, as I said, they provide a wonderful forum for discussing and resolving complex issues.

Concerning the process for evaluating possessory interest and transition from possessory interest to leasehold surrender interest—possessory interest was the term used in concession contracts issued under the 1966 statute to provide a contractual right of compensation to park concessionaires for improvements to facilities they acquired or constructed for use by their businesses. The 1998 statute introduced the concept of leasehold surrender interest, to provide a contractual right of compensation for capital improvements made by concessionaires under a concessions contract.

One of the challenges we currently have, as you know, Mr. Chairman, is the process of going from the current possessory interest to the new concept of leasehold surrender interest. Recently, several concessionaires have requested negotiation with the National Park Service to determine possessory interest value prior to the release of a prospectus. And I know this has been an issue with you, and it has been a huge issue with us, and I want to say, very firmly, we support this process as a way to resolve issues of possessory interest with incumbent concessionaires. That is the ideal way to go and, I think, it can resolve lots of issues that otherwise wouldn't get resolved if we do not have agreement. It is a process that provides more certainty for both the National Park Service and the current concessionaire, and helps provide a clearer offer in the prospectus.

Now, it also has the potential of saving considerable time and money for both the concessionaire and the Park Service by avoiding what has turned out to be very costly and time-consuming arbitrations, with unpredictable outcomes for all parties.

Concerning leasehold surrender interest, we are continuing to focus on the importance of not only establishing initial LSI value, but also tracking the value through the term of the contract. This

will, among other things, probably involve some management revisions, including possible changes to the so-called 50-percent rule. This rule is codified in current Code of Federal Regulations 36 CFR.

Subsequent litigation on the final regulations that we issued upheld the current definition in regulation; however, we have agreed to administratively review this rule to determine ways in which it can be revised to accomplish the broader intent of providing for reasonable compensation and LSI value at the end of the contract term, while maintaining the competitiveness of future contracts.

And I also agree with your comments, Mr. Chairman, that the rule needs to be looked at to see if we can make sure that we're providing fair treatment to concessionaires, but also getting the improvements we definitely need for the visiting public in these facilities.

Working with the advisory board, an LSI work group was established to look at this issue, along with several other regulatory issues we agreed to meet on. This work group, made up of representatives of large and small concessionaires, interest groups, and key congressional staff, has met four times in the last 16 months to help clarify the LSI value through the contract term. This goal is to provide an approach consistent with a law that is fair, simple, and clear to administer, and can be applied consistently with certainty through the term of the contract.

Although LSI is not a concept found in the private sector, its resulting value would essentially be equivalent to debt owed the concessionaire by the National Park Service. In short, the United States is ultimately deferring debt contractually owed to a third party; thus, it's an issue we must take very seriously, and be very thorough with, in our analysis. Consequently, developing a sound method to monitor capital improvements, as well as preventative maintenance, in order to be able to clearly define LSI throughout the contract term is critical for both the concessionaire and the Park Service.

It's also our understanding that the work group plans to make its final recommendations on their ideas of regulatory changes in the near future. Once the full board has taken action, we will evaluate that recommendation and move expeditiously with regulatory policy or programmatic changes to implement it.

Other issues being addressed by the work group are cross-collateralization, where a concessionaire could pledge collateral from one contract for a loan to pay for capital projects in another park. Again, these are regulations that we agree need to be looked at, and we're working through the advisory board to develop new proposals for public review and comment.

Now, preferential renewal—this is my last point—all incumbents with a satisfactory rating, grossing no more than $500,000 annually, and all outfitters and guides with a satisfactory rating, continue to enjoy a preference in renewal of their contracts if they were responsive to the requirements of a prospectus and are willing to meet the terms of a better offer, if submitted.

While concessionaires in this category may account for over 80 percent of the total contracts, all of these operations combined ac-

count for less than 6 percent of the total gross revenue of all of Park Service concessions. We believe that the preferential renewal exception in the law, as written, creates a reasonable balance between providing for competition and assuring that visitor services are provided in all of our park areas where these services are necessary and appropriate.

At this point, I will conclude my statement, Mr. Chairman, and thank you for giving me the time. I'll be available to answer any questions you have.

[The prepared statement of Mr. Jones follows:]

PREPARED STATEMENT OF A. DURAND JONES, DEPUTY DIRECTOR, NATIONAL PARK SERVICE

Mr. Chairman, thank you for the opportunity to update you on the ongoing efforts and accomplishments by the National Park Service (NPS) in implementing the National Park Service Concession Management Improvement Act, Title IV of the National Parks Omnibus Management Act of 1998 (Public Law 105-391). We are pleased to report on specific issues you asked about, including our success in recent contracting actions; the makeup and work of the National Park Service Concessions Management Advisory Board; the process for valuing possessory interest and the transition to leasehold surrender interest; incentives for preventive maintenance; management issues relating to regulations and any needed regulatory changes; and the issue of preferential renewal of concession contracts.

CONTRACT ACTIONS SINCE PASSAGE OF 1998 LAW

The National Park Service concession program administers 590 concession contracts in 126 parks. These contracts generate over $818 million in annual revenues. Since the passage of P.L. 105-391, we have issued 106 concession prospectuses seeking competitive offers, and awarded 255 new contracts. Of these new contracts, 229 (90 percent) have been competitively awarded to incumbent concessioners. We still have approximately 256 contracts under temporary extensions, but we anticipate having 78 prospectuses issued this year covering 118 of these extended and other contracts.

We continue to make progress towards replacing the number of expired and expiring contracts with new competitive opportunities and contract awards under the terms of P.L. 105-391. Shortly after enactment, the NPS contracted with professional firms in the financial and hospitality industry to provide us with a review of the NPS concession program, among other assistance. We have since divided concession contracts into two categories: those with gross receipts totaling over $3 million annually, and those with less than $3 million. Of the 590 concession contracts in 126 parks, approximately 52 currently gross above $3 million. These relatively high-dollar contracts represent about 80 percent of the more than $818 million concession revenues generated annually service-wide. Due to the complexity of these over-$3 million operations, NPS has by policy required that all prospectuses developed for soliciting new contracts be prepared with the assistance of our outside contracting firms.

As the result of a competitive contracting action recently taken, we now have four professional firms under our Indefinite Delivery/Indefinite Quantities (IDIQ) contracting authority that are available to us for professional assistance—not only for the over-$3 million category, but for all contracting actions. Working with these firms (PricewaterhouseCoopers, Economic Research Associates, Booz Allen Hamilton, and Dombush Associates) and their subcontractors, the NPS has focused on developing professional and competitive prospectus documents that present the business opportunities for visitor services that exist in the national parks. All contracting actions over $3 million receive both regional and Washington office approval before their release. Of the 52 operations currently grossing over $3 million in revenues, five are operating under newly awarded contracts, 17 have not yet reached their original expiration date, and 30 are currently operating under contractual or regulatory extensions (that is, their original expiration date has passed). To date, we have awarded five of these contracts, at Crater Lake, Glen Canyon, Denali, Glacier Bay, and Yellowstone. We have released prospectuses for two others—Mount Rushmore and Carlsbad—and we anticipate releasing eight additional prospectuses this year at Lake Mead, Death Valley, Olympic, Golden Gate, Grand Tetons, and Rocky Mountain. Finally, preparation has begun this year under the new IDIQ con-

tracting authority for the development of seven prospectuses proposed for release in FY 2005.

COMPOSITION AND ROLE OF THE ADVISORY BOARD

P.L. 105-391 established the National Park Service Concessions Management Advisory Board. The role of the Advisory Board is to advise the Secretary and the National Park Service on matters relating to the management of concessions, including policies and procedures, and ways to make National Park Service concession programs more cost-effective, efficient, and less burdensome. The Board also makes recommendations to the Secretary regarding the timeliness of reviews of concessioner rates and charges to the public; the nature and scope of products that qualify as Indian, Alaska Native, and native Hawaiian handicrafts; and the allocation of concession fees.

The Advisory Board is comprised of seven non-Federal individuals appointed by the Secretary of the Interior, none of whom have a current business interest in any NPS concession. The statute specifies that appointees represent various aspects of the concessions industry or have a particular expertise related to concessions.

Key issues that the Advisory Board continues to advise us on are:

(1) The concessioner evaluation and rate approval programs;
(2) The Indian, Alaska Native, and Native Hawaiian handicrafts program, including the development of handicraft regulations (which were published in the Federal Register on March 25, 2004, for public comment);
(3) Leasehold surrender interest;
(4) Assignments, sales and transfers; and
(5) Encumbrances/cross-collateralization issues.

Accomplishments of the Advisory Board to date include:

- Recommended the establishment of, and subsequently participated as members in, an evaluation and rate approval task force to review the rate approval process;
- Established a native handicraft work group that made recommendations for the recently published proposed rulemaking regarding native handicrafts;
- Recommended the need for ongoing asset management support, which has resulted in the establishment of a permanent asset manager position in the concessions program;
- Supported implementation of training programs, including the contract with Northern Arizona University for hospitality certification,-as well as training programs for prospectus development offered to the public;
- Established a work group to look at regulatory and process issues regarding the tracking of leasehold surrender interest, cross-collateralization of contracts, and other program issues, in order to make a recommendation from the Advisory Board to the National Park Service;
- Established a work group to review comments received by the National Park Service on proposed regulations regarding commercial use authorizations (CUAs); and
- Assisted in the simplification of the contract language for small concession contracts (Category III contracts).

The Advisory Board meets three times annually. Its next meeting will be early this summer (2004). As in the past, the Advisory Board will hold all but one of its public meetings in the field so smaller concessioners and others will have a better opportunity to attend. Once a year it meets here in Washington, D.C., which occurred this year in early March.

PROCESS FOR VALUING POSSESSORY INTEREST/TRANSITION FROM POSSESSORY INTEREST TO LEASEHOLD SURRENDER INTEREST

Possessory interest (PI) was the term used in concession contracts issued under the previous concession law, P.L. 89-249, to provide a contractual right of compensation to park concessioners for improvements to facilities they acquired or constructed for use by their businesses. Individual contract language defines the method by which PI is valued, and provides for a value determination process similar to arbitration—in most cases binding, but in some cases advisory to the Secretary of the Interior—to settle differences either between the previous concessioner and a new concessioner, or between the United States and the new concessioner.

P.L. 105-391 introduced the concept of leasehold surrender interest (LSI) to provide a contractual right of compensation for capital improvements made by concessioners under a concessions contract. The value of LSI in a capital improvement is the amount equal to the initial value of the construction cost of the capital improve-

ment, adjusted by changes in the Consumer Price Index, minus depreciation of the capital improvement. In a "Special Rule for Existing Possessory Interest," P.L. 105-391 also provided that a concessioner that obtained a PI under the terms of a concessions contract is entitled to receive compensation for such PI improvements as provided in the concessions contract. This amount carries over into a new concession contract as the initial value of such LSI.

In practice, we have seen both binding value determination processes and negotiations between the current and new concessioner establish the ending PI value (and, hence, the initial LSI value). For example, binding value determination processes were used at Grand Canyon and Yellowstone, and the negotiations between a current and new concessioner were used at Crater Lake. Both processes required NPS review and approval pursuant to regulations.

Recently, several concessioners have requested a negotiation with the NPS to determine PI value *prior* to the release of a prospectus. One successful negotiation was recently completed for Trail Ridge Store at Rocky Mountain National Park. Several others are in process. The NPS is looking at requests for similar mutual negotiations in other areas. Although existing concession contracts do not provide for the NPS to require negotiations, we can choose to enter into such negotiations if requested by the current concessioner.

We are supportive of this process whenever possible. It helps to provide more certainty for both the NPS and current concessioner, and helps provide a clearer offer in the prospectus. It also has the potential of saving time and money for both the concessioner and the NPS by avoiding costly and time-consuming arbitrations with unpredictable outcomes.

The NPS has been successful in negotiating with a current concessioner on the value of PI in the following cases: Katmailand at Katmai; Glacier Bay Park Concessions; Estey Corporation at Oregon Caves and at Crater Lake; Marinas of the Future, Franca Foods, and Jamaica Bay Riding Academy, all at Gateway; Trail Ridge at Rocky Mountain; Grand Teton Lodge; Carlsbad Caverns; and Death Valley. Other negotiations have been requested by concessioners, but have not yet been consummated.

LEASEHOLD SURRENDER INTEREST

The NPS is continuing to focus on the importance of not only establishing initial LSI value, but also *tracking* the value of LSI through the term of the contract. This will, among other things, probably involve some management revisions, including possible changes in the so-called 50 percent rule. This rule, codified in regulations at 36 CFR § 51.51 states, in part, that "Major Rehabilitation means a planned, comprehensive rehabilitation of an existing structure . . . the construction cost of which exceeds fifty percent of the pre-rehabilitation value of the structure."

Although subsequent litigation on the final regulations upheld this definition, the NPS has agreed to administratively review this rule to determine ways in which it can be revised to accomplish the broader intent of providing for reasonable compensation in LSI value at the end of the contract term, while maintaining the competitiveness of future contracts.

P.L. 105-391 provides for LSI when a concessioner "constructs" a capital improvement. It defines capital improvement as "a structure, fixture, or non-removable equipment." The law does not suggest that the repair or maintenance of an existing structure results in LSI. However, in developing the "50 percent rule", the NPS considered that providing LSI for the major rehabilitation of an existing structure is permissible, and considered that such major rehabilitation is tantamount to the construction of a new structure in which LSI may be obtained. However, the National Park Service has agreed to look at better ways to credit and depreciate capital improvements to better define over the term of a concession contract the value of LSI.

Working with the Advisory Board, an LSI work group was established to look at this issue, along with several other regulatory issues that the NPS agreed to meet on. This work group, made up of representatives from both large and small concessioners, key interest groups, and key Congressional staff, has met four times in the past 16 months in part to help define clarity in LSI value assignment through the contract term. The goal is to provide an approach consistent with law that is fair, clear and simple to administer, and able to be applied consistently and with certainty through the term of a concession contract.

Although LSI is not a concept found in the private sector, its resulting value would be.essentially equivalent to debt owed the concessioner by the NPS. In short, the United States is ultimately deferring debt contractually owed to a third party. Although LSI value, by contract terms, will most often be acquired by any subsequent new concessioner to a contract, nonetheless, LSI represents an obligation of

the United States to provide compensation to a concessioner. Consequently, developing a sound method to monitor capital improvements, as well as preventive maintenance, in order to be able to define clearly LSI value throughout the contract term, is critical for both the concessioner and the NPS.

The LSI work group agreed on draft recommendations in 2003, but upon preparation of the final recommendation package, one of the group members expressed new concerns regarding the agreement. Consequently, the Advisory Board asked that the work group meet again to address these concerns. It is our understanding that the work group plans to make its final recommendation to the Advisory Board in the near future. Once the full board has taken final action, the NPS will evaluate the recommendation and, if it is accepted, determine what programmatic, policy, or regulatory changes would be required to implement it.

Contractually requiring sound preventative maintenance and repair practices, as well as addressing the construction cost of capital improvements, keeps park assets and facilities in good condition, helps provide better visitor services, and contributes towards keeping a concession operation competitive for future contracts. The duties of the newly created permanent asset manager will include coordinating a "centralized, real-time" system using the NPS asset management system to oversee a concessioner's contractual responsibilities and track the conditions of concessioner-managed assets.

MANAGEMENT CHALLENGES IDENTIFIED/REGULATION CHANGES

Other issues being addressed by the work group are cross-collateralization (to allow for a concessioner to pledge collateral from one contract for a loan to pay for capital projects in another park), and sale and transfer of contracts (regarding the level at which the NPS needs to approve transfers, particularly upstream ownership in corporate reorganizations). In both of these cases, we recognize the need to simplify and expedite the review process. The focus of our review is on the aspects of a transaction that would have managerial and financial implications on the underlying operation, the effect or impact a transaction would have on providing quality visitor services, the protection of park resources, and the fiduciary responsibility and accountability of the NPS for concession operations and government assets.

Transition issues between a current and new concessioner, mostly operational in nature, also take resources and careful timing to avoid the interruption of quality visitor services. With the assistance of our outside contractors, and working with current NPS concessioners, we have been looking at actions we can initiate to ease any future transitions between concessioners in those instances where an incumbent concessioner either chooses not to bid, or is not chosen as the new concessioner. We are attempting to allow sufficient time between the selection of a new concessioner and the award of a new contract to allow time for these transition issues to be settled. This requires careful timing of the release of a prospectus prior to an expected award date. As each new contract is issued, we are reviewing "lessons learned" to the preparation of future contracting actions.

PREFERENTIAL RENEWAL

P.L. 103-391 placed an emphasis on competition for concessions contracts in our national parks. We believe having competition in the renewal of these contracts has been and continues to be a healthy step, and one that benefits the concessioner, the visitor, and the NPS.

However, all incumbents with a satisfactory rating grossing no more than $500,000 annually, and all outfitters and guides with a satisfactory rating (of which 21 gross more than $500,000) continue to enjoy a preference in the renewal of their contracts, if they are responsive to the requirements of a prospectus and are willing to meet the terms of a better offer if submitted. While concessioners in this category may account for over 80 percent of the total NPS contracts, all of these operations combined account for less than 6 percent of the total gross revenues of all NPS concessioners. We believe that the preferential renewal exception in the law as written creates a reasonable balance between providing for competition and assuring that visitor services are provided in all of our park areas where these services are necessary and appropriate.

Mr. Chairman, that concludes my statement. I would be happy to respond to any questions you or the other members of the subcommittee may have.

Senator THOMAS. Mr. Cornelssen, do you have a statement?

Mr. CORNELSSEN. No, sir. I'll just—I'll be available to answer any questions you may have, Mr. Chairman.

Senator THOMAS. Well, maybe the thing to do is to have a little recess, and I'll be right back after voting.

[Recess.]

Senator THOMAS. Thank you for waiting. Darn voting is always interrupting what we're doing around here.

[Laughter.]

Senator THOMAS. In any event, thank you very much for your statement.

You indicated, I think, that you anticipate doing eight additional concessions this year.

Mr. JONES. Yes, sir.

Senator THOMAS. You only did four or five since the law was passed. How do you propose eight in the remaining time?

Mr. JONES. Well, of course, since the law was passed, it took us 18 months to develop the regulations, and then we went through a period of litigation that delayed jump-starting the process. But we actually have lots of contracts in process. We see no problems—most of those eight are very close to being issued any time now.

They've been in the works for everywhere from 1 to 2 years. We also, at this point, look very good, as far as getting hopefully all, but, if not, almost all, of the backlog of contracts done by the end of next year.

Senator THOMAS. That will be an increased time.

Mr. JONES. Yes.

Senator THOMAS. Less than you've been doing it in the past. I'm talking about the large contracts.

Mr. JONES. Yes, the large contracts, but also the small ones, as well. As I mentioned earlier, it's definitely a learning process—as we go through each one, we do an internal review. We've also, in some contracts, already—especially smaller contracts—gone through one process of streamlining, how we award them and what's required of concessionaires. And so it will continue to evolve as we are——

Senator THOMAS. How long have you had these eight contracts under review?

Mr. JONES. The eight contracts, the concept of review—I would prefer to say "development," because it's eight different answers, because some of the contracts—like at Grand Canyon and Yellowstone, where we literally have hundreds of old buildings that require condition assessments and appraisals to resolve possessory interest issues—that is a process, in itself, that can take months. Once all the data comes into Washington from our consultants, the review process, depending on the contract, usually takes between 2 and 6 months.

Senator THOMAS. Who does the—you talked about consultants; who actually does the evaluations and the appraisals and so on?

Mr. JONES. The appraisals are done through subcontractors.

Let me actually turn to Mr. Cornelssen, because we're not doing the appraisals in-house as a government appraisal. We're contracting through private firms and our consultants to do them for us.

Mr. CORNELSSEN. Yes, Mr. Chairman. We actually——

PricewaterhouseCoopers has been helping the Park Service, sort of, as a—I guess I would say, as a prime contractor to put together

the—do the due diligence and to put together the whole package for the prospectus.

And, actually, what Mr. Jones was indicating is correct. In the case of Yellowstone, for instance, on the condition assessments, because of the seasonal nature of the operation there, in fact, it took years, not even just months, to get the condition assessments done, because it's hard to condition-assess assets while there are visitors staying in those assets, and, of course, that's when you can get to them. So it's—some of these contracts have taken quite a long time.

Mr. JONES. And if I could quickly just supplement his comment by also pointing out that the process that we have had to go through now is not indicative of how it should go in the next round, when the current contracts are up. And by that, I mean the process of converting from possessory interest to leaseholder surrender interest is probably the most time-consuming element, especially where there are lots of structures that have to be evaluated. But that is a one-time snapshot as to where we are now, we'll do the conversion, and then have a process in place so it should be much easier when the next round of contracts is up, in 10 or 15 years.

Senator THOMAS. Is there an acceptable agreement on the values before the prospectus is let out?

Mr. JONES. There should be. And as we have discussed together on numerous occasions, we have had a couple of instances that have gone to arbitration. We have, since then, put the word out to concessionaires that we are open and willing to negotiate possessory interest, because there is no doubt it is the—I think, the ideal situation for all parties to have a known situation, which means a resolved issue. In the last few months, we have had several successful ones—Jackson Lake Lodge, Trail Ridge Store, Rocky Mountain National Park, with——

Senator THOMAS. Jackson Lake Lodge isn't completed, though, is it?

Mr. JONES. The agreement on possessory interest is totally resolved. We have reached agreement. We have signed a contract amendment on that value. That prospectus had been put on hold to give us time to try to resolve it before we issued the prospectus. Now that it's resolved, the prospectus will be out shortly.

Senator THOMAS. I guess I don't quite understand that. The prospectus ought to go out to prospective bidders; did it not?

Mr. JONES. Yes.

Senator THOMAS. Well, you've already made an agreement with the purchaser, and now you're coming up with the prospectus.

Mr. JONES. Oh, the agreement was on the value of the possessory interest.

Senator THOMAS. I understand. That's the problem, though, isn't it? If you're going to bid—if all of us in this room are going to bid on something in the prospectus, we need to know the value before we do it, don't we?

Mr. JONES. Yes, and that's what we did.

Senator THOMAS. Yes, but that isn't what you've done in the past.

Mr. JONES. No, and I agree. Now, ultimately, the decision as to whether we reach agreement with a concessionaire on possessory interest is somewhat up to the concessionaire.

We have put the word out that we agree we are willing and should negotiate those before we do a prospectus, but a concessionaire has a legal right, under the old term of the old contracts—and many times I'm talking about contracts issued in the 1960's—that if they wish to, they may go to arbitration. We cannot impose negotiation on them. We are willing to do it. Now——

Senator THOMAS. I don't understand that at all. You're talking now to the owner, and to establish that value, you have to have that done before the rest of us bid, or we don't know what we're going to have to pay.

Mr. JONES. I agree with that, Senator.

Senator THOMAS. But then how can you go to a prospectus unless you've already gotten to that agreement?

Mr. JONES. If we are trying to get to that agreement now——and that is a change from how we were doing things a couple of years ago——

Senator THOMAS. I hope so.

Mr. JONES [continuing]. And so we're headed in the right direction.

But, on the other hand, agreement involves agreement by two parties. I cannot make a concessionaire reach an agreement with us. So under the current law, and under their current old contracts, ultimately it's their decision if they wish to negotiate with us or go to arbitration. We would prefer to negotiate——

Senator THOMAS. I'm not talking about that. I'm talking about when you do it. You can't go in and go ahead and put out the prospectus and get the bids and get the sale, and then come back again under arbitration and have to change it, and have to change the fees and everything else.

Mr. JONES. Well, one of the——

Senator THOMAS. We've been through that before, and I wrote you a letter about that and asked for some information.

Mr. JONES. Yes, sir.

Senator THOMAS. The information I got is over there in that box. You see all those things? Which isn't exactly what I had in mind, but I think it's very important, and that's part of the problem we've had with trying to get moving on Jackson Lake Lodge; they don't want to get into the Hamilton Stores thing again.

Mr. JONES. I agree. And, in fact, I do think that that is a success story. One of the challenges we have right now, however, is that a concessionaire, up until a new contract award, is under no requirement to tell us what they think their possessory interest is. So we may know. And if we know, and they would like to negotiate with us, we would be happy to resolve it.

Senator THOMAS. You're the one that decides what it is, right?

Mr. JONES. We have an opinion. But under the contract, we are not always the one that decides.

Senator THOMAS. Who decides?

Mr. JONES. If a concessionaire chooses to go to binding arbitration a three-judge panel decides.

Senator THOMAS. Absolutely. That's right. But the concessionaire doesn't decide.

Mr. JONES. No.

Senator THOMAS. Okay. So you have a process that you can go through. And I guess the question is, What's the sequence of this thing that makes it work properly? I hope you're in that sequence now.

Mr. JONES. I believe we are. What makes it work properly is—what you have said, Senator—as we are getting the condition assessments done from Pricewaterhouse and our other consultants, we develop our opinion of what we think the possessory interest is. The ideal sequence that we totally agree with is when we sit down with the incumbent concessionaire, find out what their opinion is, and discuss what the differences are and see if we can reach complete agreement, which we did in Jackson Lake Lodge, for example. And then we issue the prospectus. There is no doubt that that is the ideal way for it to work.

Senator THOMAS. Well, it hasn't always worked that way, so we need to make sure that it does.

There are 30 park operations that are under various extensions. How are you going to address those?

Mr. JONES. We do expect to be able to have those, if not all, substantially done by the next year, and so of the 30 different contracts under extensions that you referred to, it's really 30 different answers as to when each one expires, but we're hoping to get them done before the expiration of their extensions.

Senator THOMAS. Does the Park Service consider franchise fees an important criteria in selecting the concessionaires?

Mr. JONES. The franchise fees are one of the criteria. Pursuant to the statute, it is not—and we agree with that—it is not to be ranked as high as the other four primary criteria. So, for example, in a prospectus there can be points awarded for everywhere from five to seven different criteria. Those points total everywhere from 25 to 27 points. A franchise fee is four out of those 27. So it is important, but it is definitely not the deciding criteria. We certainly have awarded contracts where the person who bids the highest franchise fee is not the winner of the contract. So that is not the primary criteria.

Senator THOMAS. So you have different franchise fees for different concessionaires.

Mr. JONES. Pursuant to the statute, we set a minimum required franchise fee under the prospectus to be considered a responsive bid. And bidders are allowed to bid that up, if you will, at their choice. And that is one of the criteria, along with economically sound businesses. Are they able to perform? What's their previous experience and ability of running businesses of this nature, and their ability to protect park resources and proposals they may submit on environmental management systems?

Senator THOMAS. Just—this is kind of theoretical, I guess—the franchise fee has a great deal to do with the revenue that comes to the park.

Mr. JONES. Yes, sir.

Senator THOMAS. If someone was not a business that's suitable and doesn't meet these other criteria, why would you consider them as a franchise, as one of the contestants?

Mr. JONES. I'm sorry, I didn't——

Senator THOMAS. You're saying things like not being able to have a profitable business, not being financially sound, and so on.

Mr. JONES. Yes.

Senator THOMAS. If that's the case, why would you even consider them as the concessionaire?

Mr. JONES. If a firm does not meet one of the criteria—say, they do not have—demonstrate the capital resources to be able to perform the requirements of the contract, that would be considered a nonresponsive bid, and they would not be considered.

Senator THOMAS. It's a little puzzling to me. Then why do you charge franchise fees?

Mr. JONES. Well, we set the minimum franchise fee——

Senator THOMAS. I know. But in fairness, it seems like most people would expect the same franchise fee, wouldn't you think?

Mr. JONES. The businesses are not all the same.

Senator THOMAS. Well, of course they're not, but the larger ones, the ones that are over $3 million are pretty much the same.

Mr. JONES. I would respectfully disagree with that, and I would cite a couple of examples, some of them from your part of the world, places like Glacier and Yellowstone with very short seasons. They are very different than a park like the Grand Canyon that is a year-round operation, or a park like Everglades that's a year-round operation. So there are—because of either remoteness or, especially looking at places like Alaska, incredibly short seasons—substantial differences from business to business. Also, we have to assess the economic ability for a concessionaire to perform concession operations—and, again, Yellowstone is a wonderful example, where they have this wonderful, but huge, complex of very old structures to maintain, which is a challenge for a concessionaire, and certainly a more costly place to do business than a concession with brand-new facilities that would be much more efficient to maintain. And those are factors that affect franchise fees.

Senator THOMAS. Those facilities belong to the park.

Mr. JONES. Yes, sir.

Senator THOMAS. It's a little different.

We'll hear, from today's witnesses, some of them, about the sheer amount of paperwork in the small business concessions and so on, the extraordinary expense that goes with the renewal process. What do you think about that, and what are you doing to lighten that——

Mr. JONES. About a year ago, we, for the very smallest concessionaires, developed a streamlined process that reduced the amount of paperwork. We think, for many of the smaller concessionaires, we still need to do more in that area, and that's one of those issues that we are going to be talking with our advisory board to get some guidance as to how to do it. Certainly, I would agree with the concern that we should not have the smallest concessionaires go through the same burden that the very large concessionaires have to go through.

Senator THOMAS. I would think so.

Most of these contracts that you have are the small contracts.

Mr. JONES. Very much so, yes, sir.

Senator THOMAS. What do you think about that $500,000 limitation or level? Do you think that ought to be expanded somewhat?

Mr. JONES. No, Senator. We think the $500,000 cap makes sense, we think it works. We think that—you know, right now, 90 percent of the concession contracts we've awarded to date are going to incumbent concessionaires. We think the basic concept of the act, which has, for larger concessionaires, competition, we're seeing, we think, very good-quality bids, very thoughtful bids that, in the end, are going to be providing better services for the public. So we think it's a process that does work, and think the $500,000 cap is the correct one.

Senator THOMAS. How long has that been that way?

Mr. JONES. It was part of the 1998 statute.

Senator THOMAS. You mentioned several times the—getting your advisory committee's involvement. How long has that been in place?

Mr. JONES. It was provided for in the statute, so they have been in place—in fact, I have to turn to Allen Naille.

When were you first established?

Mr. NAILLE. 1999.

Mr. JONES. 1999, after the regulations were developed. And we have been throwing a variety of issues—I believe he is one of your witnesses today, and can talk in more details—but it's a process we're very excited about and we think works and has tremendous potential.

An example I would throw out is one of the issues we're looking at, how to amend the regulations, the advisory board is a very useful tool as a forum to discuss issues since they are a FACA—Federal Advisory Board Committee Act—sanctioned organization, so they are allowed to bring in concessionaires to bring individual specific opinions to the process, which makes it work much better.

Senator THOMAS. So it's 4 years, and you haven't gotten the regulations yet in place.

Mr. JONES. The original regulations were in place, have been challenged in court, and we have prevailed in court.

However, we do agree that some of the regulations need to be changed. We've been working with the advisory board in, for example, changing the 50-percent rule and seeking their advice on that. We, frankly, thought we had agreement last June as to what a package should look like. That turned out to be a false hope, because we were ready last summer to begin work on the formal regulations. The advisory board is continuing their work, and we are expecting and hoping for them to get some recommendations to us very soon.

Senator THOMAS. It just, I guess, seems like it takes an awfully long time to make some changes. The changes, many of them, have not ever been made yet, since the 1998 law, and that's 5 years.

Mr. JONES. Yes, sir.

Senator THOMAS. It's not a brand-new issue, either. You know? Doing leasing, doing concessions basically is done much in the private sector. How many people in the Park Service do you have with a business background?

Mr. JONES. Not enough. We are, in that area, doing two things. For example, when I was at Rocky Mountain National Park, as the superintendent, and the job of the concession specialist of that park was open, I actually recruited and hired a new graduate, who had

just received her MBA degree, and she's one of the rising stars in the concessions program nationally. Other parks, like Grand Canyon and Golden Gate, have followed a similar path.

For our existing workforce—and, again, this is a place where the advisory board has been very helpful to us—we have established a concessions training program for our existing employees, through Northern Arizona University, where employees can do a 2-year training program to develop their skills and improve their knowledge and abilities to work and understand business issues. Some of it's on campus, some of it is done through the Internet and remote learning. And that's a step that we're very encouraged is helping to improve the skill level of our employees.

Senator THOMAS. You mentioned employees in the park level. What about at the Park Service level, at the top? Who do you have—it would seem to me that that's where you would start, with people that are into this kind of business experience.

Mr. JONES. I completely agree with you, Senator. The position of the head of our concessions program, Cindy Orlando, just recently left and has moved to Hawaii as superintendent of Hawaii Volcanoes. We're in the process now of recruiting to fill that job. A major criteria that we're looking for in candidates is a business or hospitality or hotel or restaurant background that can help us in that area.

Senator THOMAS. Okay.

Mr. Cornelssen, you, in your business, of course, work with businesses.

Mr. CORNELSSEN. Yes, sir.

Senator THOMAS. And what's your impression of how your advice and your counsel being put into place in the Park Service? Now, if this is a tough question for you to answer, you'll have to say, "Oh, yes."

[Laughter.]

Senator THOMAS. But it seems like there's quite a little bit of agency bureaucratic resistance to doing what logically is done in the private sector.

Mr. CORNELSSEN. Well, I think that the goals and objectives obviously are different in the Park Service than they are in, for example, the industry I work in, the hospitality industry. We're very much focused on bottom line and return on investment. The Park Service, obviously, the mission is a little different than that. Although, certainly when it comes to looking at concessions, the business aspects are important to the Park Service, in terms of quality operation and quality services for the visitor.

I would say that change is coming. It may not come as fast as maybe I would like it or others would like it, but we have seen a lot of change, both cultural change and actual process change, within the Park Service. And I think one of the things that early on we were successful doing with the Park Service is to create, sort of, a corporateness when it came to these large contracts, to say, for the large contracts, that those really have to be managed on a more corporate basis; and that, for the smaller contracts, those need to more simplified. And I think that approach is philosophically ingrained within the Park Service at this point. You'll hear people in the Park Service talk about the "big 50," which are the

largest 50 contracts, plus or minus maybe two or three. I think that's a significant change.

And I think the other thing that has happened as you—and I would ask you to quiz the concessionaires on this—is, as you see the new prospectuses coming out I think you see a much more businesslike document and a much more businesslike process than what was perhaps done in the past.

Senator THOMAS. What do you consider to be the largest single issue facing the concessions program?

Mr. CORNELSSEN. I would say—if you had asked me, you know, 2 or 3 years ago, I might have said contracting, but I think the train has left the station on that, and it is moving; and I know it's been slow, but there has been a lot of change in that area. But really contract oversight. Once the new contracts and the procedures are in place, it's on the ground where the rubber meets the road, ensuring that the expertise and the support is there, that's necessary to, day to day, provide the asset management and the contract oversight at the park level. And I think that's probably the biggest issue facing the agency right now in concessions.

Senator THOMAS. Mr. Jones, the Congress has suggested the Park Service adopt portions of the Federal Acquisition Regulations that pertain in how and why one bidder should be selected over another. Why doesn't the Park Service involve themselves in that FAR regulation?

Mr. JONES. If I can separate your question into two issues, it has been our position, the position of the Justice Department, and certainly consistent with the input we've received from the Congress, that the FAR rules do not apply to concessions contracting. Separating that issue, however, there are concepts and ideas that are in the FAR process—for example, notifying the bidders after an award is done as to why we selected the bidders, so that all the bidders can learn from the process—I think, is a concept that we agree with. And so what we're looking at is what ideas and thoughts and processes that we've learned from FAR that could be applied to the concessions program. We think some of these can be done by policy; others might require regulatory changes.

Senator THOMAS. What do you think about the FAR program?

Mr. CORNELSSEN. Again, I'd have to say I'm not an expert on the FAR, but I think in terms of what Mr. Jones has indicated, in terms of some of the concepts of the FAR, in terms of how the selection debriefing process works and those types of things, might be good concepts that would be applicable to Park Service concession contracts.

Senator THOMAS. What is your role? How do you participate in this thing?

Mr. CORNELSSEN. We have, kind of—we actually have two different contracts with the Park Service. It's a two-tiered role. One contract, which Mr. Jones alluded to, is our contract where we actually get involved in helping to structure each individual concession contract, park by park.

The other contract we have is more of a corporate business advisory contract, where we're helping to provide process change and corporate policies—not policy, maybe—corporate procedures, business procedures. And a sort of a two-tier process. It's change at the

corporate level and change at the contract-by-contract level. You can see immediate progress when you're talking about dealing at the park level, where you're working on a specific contract. At the corporate level, it takes more time, because literally it has to—you know, you're creating a whole new programmatic change for the agency. But that's really been our role for the past 2 or 3 years. And our contracts were just renewed within the past year.

Senator THOMAS. What do you think about the roll-out provision, as prescribed in FAR, that permits the public and the concessionaires the opportunity to learn more about the bids to better meet the standards.

Mr. JONES. The concept of getting concessioners and bidders feedback, I think, is an excellent one that we need to look at, and we need to have some provision for.

Similarly, I think one of the issues we need to take a serious look at is having a better and clearer process for someone who did not receive the winning bid to appeal that decision. And so those are two concepts that are embedded in FAR that we are looking at, and we agree something needs to be done, and it's something we'll be talking with Mr. Naille, and his advisory board, about in the very near future.

Senator THOMAS. Well, that's good. I hope you can get the advisory committee more involved more quickly. That's what they're for, is to bring in its expertise from the business community. And, quite frankly, it shouldn't take 5 or 6 years to be able to respond to some of those things. And if the advisory committee can't move faster than that, that's also a problem. And then once you get it, then it has to move, I think, as well.

If I sound a little impatient, I think I am, because there ought to be changes that could happen. The things you're doing are not terribly unique to the business community. And that, of course, was the reason that we had an advisory committee, to be able to use the expertise of these people to participate. And I know you'll say you are, but it has taken an awfully long time to have much impact. Would you disagree with that?

Mr. JONES. Actually, I completely agree with you, it's taken far too long.

Senator THOMAS. So it's—I guess that's—you know, there's a lot of things to talk about. And I appreciate what you do, and I know it's difficult. But I do think we need to take a look at the smaller concessionaires, having a little less paperwork, a little less regulation for those people to go into. They act like—at least tell me they have about as much work to do as the larger ones, in terms of the paperwork. That's too bad. I think we also need to continue to move toward the business approach to—this is a business, a big business, and should be handled in a businesslike way. And I know that's your goal.

Mr. JONES. It is our goal, Senator.

Senator THOMAS. And I appreciate your doing that. So we need to stay in touch. And, frankly, just as aside, when we ask a question about something, we don't need to get 50 pounds of papers, because that doesn't answer the question. We need to have the question answered. And so we'll be following up the letter that we talked about, because there was some bad experience in the Yel-

lowstone operation, and some things were done there that I just—it's difficult to imagine they could be, in terms of the fees, in terms of the time, in terms of the changes that were made there. And so I presume that we won't expect that to happen anymore.

Mr. JONES. Well, I think across the board, Senator, what we're trying to do in the whole process, for example, of now going to negotiations with the concessionaires on possessory interest, is really something that has evolved in the aftermath of what we learned from Yellowstone. And so we certainly have had some missteps on occasion, but I would agree—and I hope I understand your question—that we need to learn from our experiences, and not just stay stuck in one particular mode of operation. We need to continue to grow. And I totally agree we need to be much more businesslike in how we address some of these issues.

Senator THOMAS. Well, we look forward to working with you and helping you move in that direction, and I thank both of you.

We'll have our second panel now, Mr. Allen Naille, chairman of the Concession Management Advisory Board, from Flagstaff, Arizona; Mr. Mike Welch, who is Xanterra—I can't say that since you changed your name—Parks and—Hospitality Association; Janet White, who's president of the White Sands Concessions, from New Mexico; and Susie Verkamp, president, Verkamp's, in New Mexico.

Okay, Mr. Naille, can we start with you?

Mr. NAILLE. Yes, sir.

Senator THOMAS. Oh, by the way, all of your statements will be complete in the record, and if you want to kind of summarize them, why, that would be great.

STATEMENT OF RICHARD ALLEN NAILLE, II, CHAIRPERSON, NATIONAL PARK SERVICE CONCESSIONS MANAGEMENT ADVISORY BOARD, FLAGSTAFF, AZ

Mr. NAILLE. Thank you, Mr. Chairman.

My name is Allen Naille, and I am the chairperson for the National Park Service Concession Management Advisory Board, and I ask that my written statement be put into the record.

Senator THOMAS. It will be.

Mr. NAILLE. I should also mention that, among other things, I also chair the Grand Canyon National Park Foundation, and was, for 25 years, the CEO and president of Fred Harvey, otherwise known as AMFAC, now known as Xanterra Corporation.

Senator THOMAS. Great.

Mr. NAILLE. I'll skip through the intro part of my talk and go straight to some recommendations that this board has given to the Park Service. We have met 11 times over the years in official capacity. That information is available in full minutes and summarized statements. I would also say that working groups have been formed from day one on various topics, and they have met probably 20 times over that same amount of time. Some of those work groups have dealt with small contract issues, Native American handicraft issues, LSI issues, and we continue to put working groups together as part of this advisory board to basically cut to the chase on various issues that we and the Park Service and the congressional staff feel appropriate.

Five recommendations that I am bringing forward today to just let you know that we have worked on over the last few years. Numerous recommendations have been made over that time period, but these were the more important ones. One was to establish a non-appropriated fund instrumentality, or a NAFI. And it was our desire to take franchise-fee money and—that is set aside for in-park use, and use that money in a NAFI program so they can earn interest and develop a more focused or advanced form of funding source for the Park Service.

This, interestingly, was done as part of a original search by the board and recommendations that we received from Congress on looking at asset management, and looked at the Department of Defense and its asset management operations, and came up with this as a side piece that we still think is valuable. We've talked to the Park Service about doing experimental projects in this. And while that has not been done, we still have hopes that it—maybe this summer, we'll get one of these projects off and running in the field to see where—to see how it can work, because it works very well for the Department of Defense.

Another one is to adopt a corporate strategy for NPS concession contracts. You've heard a lot of discussion already this morning, so I think I'll skip through that. I feel that the Park Service is moving in a positive direction on working on contracts. I think if there's any kind of a serious problem, it's that it gets caught up in its own bureaucracy, maybe, because it just takes too long once it gets started. I think you alluded to that, sir. And I think that once this backlog is out of the way, and at least there is a forward motion on it, that in the future these contracts should roll over with a little more consistency. And I also would say, with the expertise that Pricewaterhouse has brought in setting up the contract program for the Park Service, it should work smoothly.

A third area of recommendation was the establishment of an associate director for partnerships and business practices. This recommendation calls for the creation of a concession program position requiring an individual with proven and significant private-sector hospitality-oriented asset management and financial management expertise and experience. The current concession program management function is folded into the associate director; administration, business practice, and work force development position, which is overloaded with responsibility and does not require private-sector hospitality asset-management experience.

The fourth major recommendation that we made refers to accountability, and that is that we feel that there is so much decentralization in the Park Service that the superintendent is in control of their particular unit, and we feel that, in many cases, that superintendent is not qualified to oversee the concession-management program that's totally under their control. And it is our suggestion that those superintendents go through a very extensive training program in the hospitality concession-management program, so that they know what they're managing. And they also would pick up what we consider to be a stepchild function of the concession-management role, and put more emphasis on that role, along with law enforcement interpretation and other issues of resource management in the park.

The last major area that we made recommendations on is the creation of a concession-management rate-approval procedure. The first part of this is to set standards. The second part is to develop a user guide. And the third part of that is to run a program using tested programs, such as the Park Service's Core Menu process. All of these enable a speedy concession-management operation on the part of the Park Service approval process so that things move in a timely fashion, and the concessionaire isn't waiting to find out what their rates are going to be for next year, or even during the year.

The Park Service has many things at its disposal that they can run these programs with, and they are working through Pricewaterhouse right at the moment on a very extensive standards program. And once that's in place, that not only helps the Park Service, but I think that'll be a great boon to the visitor to the parks, also. They'll know what they're getting into on arrival.

I would like to switch focus now to the working group on LSI, since we've talked about that this morning. And I need to make some clarifications, in that the first time we were asked to take a look at the LSI issue was January of last year. A working group was put together, and I personally led that working group. You've already heard that it was made up of people from the Park Service, from the concession world, congressional staffers were involved, and continue to be involved, both from the House and the Senate, in that working group. I, personally, think that's been one of the more effective working groups that we've had. And hopefully when we finalize the issues on this, regulations will change.

You need to know that there have been some problems, in that we thought, in June, which I considered 6 months not too bad in completing the task, that we had a finalization to the issues on changing the regulations; except that, at that time, I thought we were going to do a director's orders, and now we're going to do a full regulation change. Issues like you talked about, sir, on the 50-percent rule, we've worked on that. Those issues are going to go away, and we will make these changes.

We also had everything—all of the issues that I felt were brought to our attention by the concessionaires and by the Park Service had reached agreement in June, except for depreciation. And the whole depreciation issue was worked on during the summer. And actually, at our meetings in Florida this fall, I—when the final program on depreciation was presented, I had some concerns about that, and felt that probably the concessionaires weren't going to be too excited about where that was going at the time, so I asked for comments from concessionaires to be sent back in 2 weeks, and it basically took about 4 months before we got those comments back.

So the working group met again in early March, and we went through depreciation, once again, and clarified all the previous issues under LSI that we had differences of opinions, and cleared all of that up. We are now working on a final depreciation program, and that should finalize everything ready for board recommendation to the Park Service, and change in regulations. So that should all be taken care of soon.

And we will—because of our public-meeting requirements, we've been trying to find an avenue where we can do this by some sem-

blance of a conference call, and I think we have found a solution to that problem. So we will—it is my desire to get this cleaned up before the summer begins.

[The prepared statement of Mr. Naille follows:]

PREPARED STATEMENT OF RICHARD ALLEN NAILLE, II, CHAIRPERSON, NATIONAL PARK SERVICE CONCESSIONS MANAGEMENT ADVISORY BOARD

Mr. Chairman and Members of the Committee, I appreciate the opportunity to testify before you today regarding the National Park Service Concessions Program. My name is Allen Naille, and I am the Chairperson of the NPS Concessions Management Advisory Board.

The NPS Concession Management Advisory Board was originally chartered on November 13, 1999. The Board's purpose is to advise the Secretary of the Interior and the National Park Service on matters relating to management of concessions in the National Park System. The Board's areas of responsibility center on policies and procedures intended to improve NPS Concession Program standards. efficiency, and costeffectiveness. Since its inception, the Board has met a total of 11 times, and has made progress in a variety of concession-related areas.

The Board's seven members are appointed by the Secretary of the Interior, may not be employed by the Federal Government or a concessioner. may not have an interest in a NPS concession operation. and should represent various components of the NPS concessions industry. A Board membership list has been attached as an exhibit to this testimony.

Over the next few minutes, I would like to outline the major recommendations that the Board has made over the past three years. I will then focus on the Board's working group on leasehold surrender interest. Lastly. I will provide the Committee with suggestions for improving the effectiveness of the Board.

Each year, the Board presents a report summarizing its recommendations to the Secretary of the Interior. Rather than attempt to address all of our reports over the past 11 meetings. I would like to focus on five specific recommendations. These include:

1. Establishment of a Non-Appropriated Fund Instrumentality ("NAFI").

This recommendation calls for the implementation of new tools and procedures to account and manage concession franchise fee funds. The Department of Defense and other Federal agencies currently use NAFIs to provide efficient revenue management and a mechanism for front-funding major capital projects. Since its very first meeting in 2000, the Board has recommended implementation of a three-year pilot study to test the NAFI concept for use in the NPS.

2. Adopt a corporate strategy for NPS concession contracts.

This recommendation calls for:

a. Execution of the concession contract rollover strategy developed by NPS business advisor, PricewaterhouseCoopers LLP;

b. Expanded use of contract expertise to assist NPS in effectively negotiating and administering concession contracts;

c. Implementation of a corporate approach on major concession contracts and a more decentralized approach on smaller contracts.

3. Establishment of an Associate Director for Partnerships and Business Practices.

This recommendation calls for the creation of a Concession Program position requiring an individual with proven and significant private-sector, hospitality-oriented asset management and financial management expertise and experience. This individual will allow the NPS Concession Program to more effectively carry out its fiscal and program responsibilities. and be on an equal playing field with concessioners. The current Concession Program management function is folded into the Associate Director—Administration, Business Practices. and Workforce Development position. which is overloaded with responsibility and does not require private-sector hospitality asset management experience.

4. Place full responsibility for park concession management directly on park superintendents.

This recommendation calls for full superintendent accountability for park concession operations. Superintendents should be provided with comprehensive concession-related training opportunities. Further, park superintendent concession management performance should be measured using guest input surveys, concessioner

input, and site inspection teams to evaluate the quality of concessioner products, services, and facilities.

5. Creation of concession management rate approval procedures.

This recommendation calls for the assessment of relationships between asset classifications and rate approvals, the determination of best practices for rate approval. and development of standards and rate approval recommendations. In essence, the NPS should develop a "user guide" for Park visitors, which should detail all concession assets at each Park and inform visitors of the assets, amenities, and level of quality. In addition, expanded use of the tested Core Menu Pricing concept in concession restaurant operations is recommended, as is development and testing of a Core Menu Pricing concept for retail and lodging operations.

While the Concession Program has made significant progress in many of these areas, much work remains. The Concession Management Advisory Board urges the National Park Service to seriously consider implementation of the Board's past recommendations. and continues to work toward the development of new recommendations.

Next. I'd like to focus on the Board's involvement in a working group to address concessioner investments in real property, and the related security interests provided by the Law.

A Concession Management Advisory Board Working Group was established in January of 2003 to provide a forum for discussion of the issues surrounding the management and crediting of leasehold surrender interest or LSI, Comprised of Board members, NPS employees, representatives of the concessioner community, the NPS' business advisor, PricewaterhouseCoopers LLP, and senior Congressional staff, the LSI Working Group was able to:

- Develop private sector "best practice corollaries" for NPS asset management and facility investments;
- Propose several options for the treatment of LSI crediting and management of depreciation; and,
- Provide recommendations related to LSI crediting and the associated management of physical depreciation.

As I understand it. The Board's final recommendation will be incorporated into a document that will serve to amend the existing NPS Regulations. Upon approval, these new regulations will be incorporated into all new concession contracts, ensuring a higher standard of NPS asset management.

The LSI Working Group is one example of how the Concession Management Advisory Board has positively impacted the National Park Service, its assets, and, ultimately, its visitors.

Lastly, I'd like to address some ways that the Board could more effectively assist the NPS in enhancing its Concessions Program.

First, much of the emphasis over the past three years has been focused on the rollover of concession contracts. While the board recognizes the importance of continuing this effort, we also have a growing concern about the need for more effective contract oversight. known in the private sector as (hospitality) asset management. More specifically. through our deliberations on LSI, we realized that the NPS is ill-equipped to handle the, complexity associated with effective financial, operational. and facility-related contract oversight. The board feels that we can add significant value in assisting the NPS to enhance its capabilities in this area.

Secondly, as I understand it, per Public Law 105-391, the NPS is required to provide Congress with a report regarding LSI in 2005; and the LSI issue will subsequently be revisited in 2007. The Board feels it can assist the NPS and the concession community in these endeavors.

Lastly, on a more specific note, the Board would like to request a more official relationship with the NPS outside business advisor. While we have had informal access to these professionals in the past. we would like express authorization from the NPS.

The Board intends to continue to positively affect the NPS Concession Program. thereby helping to preserve some of our Nation's most treasured places for generations to come.

Mr. Chairman, thank you once again for the opportunity to testify. I would be happy to answer any questions that you or the Committee members may have.

Senator THOMAS. Good. Fine, sir. Thank you very much.

Mr. Welch.

STATEMENT OF MICHAEL F. WELCH, NATIONAL PARK HOSPITALITY ASSOCIATION AND VICE PRESIDENT, FINANCE, XANTERRA PARKS & RESORTS

Mr. WELCH. Mr. Chairman, my name is Mike Welch, and I am pleased to be here, part of your oversight hearing on concession issues facing our national parks. Thank you for submitting my written testimony for the record.

Senator THOMAS. You bet.

Mr. WELCH. As a representative of the National Park Hospitality Association that represents most of the visitor services provided by the private sector in our national parks, I have a keen interest in improving the regulations and processes that govern our national park businesses.

I am the chief financial officer of Xanterra Parks and Resorts, which operates both large and small concession businesses throughout the National Park System. I am also a certified public accountant. I have been a member of the working group that Director Mainella established over a year ago to explore possible solutions to the problems concessionaires have voiced concerning the existing regulations.

The three key areas I would like to address today are, one, the cooperative and productive atmosphere in which these issues are being addressed; two, leasehold surrender interests and the correct method of measuring depreciation; and, three, cross-collateralization of multiple concession contracts as security for a single loan.

First, I would like to commend the cooperative process that has been underway to solve the problems we've been discussing. As we talked earlier, there was much disagreement after the regulations were published that resulted in very expensive and time-consuming litigation. But in early 2003, Director Mainella established a cooperative and productive atmosphere to resolve the remaining issues by establishing the working group we've heard about that included all the key constituencies. This has been extremely productive.

Second, one of the key issues when valuing a leasehold surrender interest at contract termination is the method of measuring depreciation. As outlined in the statute, NPHA believes that the correct way to measure depreciation is to assess the degree of physical deterioration or physical improvement which occurs during the contract term. By doing this, those who employ good maintenance practices are rewarded with an increase in their leasehold surrender interest value, and those who perform poor maintenance practices are penalized in their LSI value.

There has been much discussion during the working-group meetings over an NPS proposal that an alternative method of measuring depreciation should be used. This has been termed "scheduled depreciation." Under this method, each component of each building would be assigned an estimated useful life when that component is placed in service. Then each year, an element of each component would be deemed to depreciate so that, at the end of the scheduled life of each component, it would have no LSI value, even though the asset might still be functioning well and providing service.

Our policy concern with this approach, aside from the fact that we don't believe it is consistent with the statute, is that it does not provide any incentive for concessioners to take good care of park facilities, since the LSI value of each component will be zero at the end of its scheduled life, regardless of whether the concessionaire performed effective maintenance practices or performed no maintenance at all.

Finally, another provision of the regulations that is proving to be extremely cumbersome, and not in keeping with normal business practices, concerns the ability of concessionaires with multiple concession contracts to bundle them together in order to secure a single loan. This process of spreading the costs of financing and the risks associated with a single loan across multiple concession contracts is called "cross-collateralization." It is common throughout the business community and was permitted under the previous statute. However, the regulations now appear to prevent this, even though we have agreed with the NPS and its advisors in our working-group discussions that this is a normal business practice and a desirable method to lower the cost of financing, thereby allowing concessionaires more funds to invest in park facilities or pay higher franchise fees. The inability to cross-collateralize concession contracts is preventing my company from executing a successful and desirable refinancing at this very time.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Welch follows:]

PREPARED STATEMENT OF MICHAEL F. WELCH, NATIONAL PARK HOSPITALITY ASSOCIATION, AND VICE PRESIDENT, FINANCE, XANTERRA PARKS & RESORTS

Mr. Chairman, I am pleased to have been invited to your important oversight hearing on concession issues facing our National Parks. I hereby submit my written testimony for the record. As a representative of the National Park Hospitality Association ("NPHA") that represents most of the visitor services provided by the private sector in our national parks, I have a keen interest in improving the regulations and processes that govern our National Park concession businesses.

I am the chief financial officer of Xanterra Parks & Resorts, which operates both large and small commercial enterprises that benefit park visitors. I am also a Certified Public Accountant. I have been a member of the working group that Director Mainella established over a year ago to explore possible solutions to the problems concessioners have voiced concerning the existing Regulations. Having lived and worked in Yosemite National Park for over 15 years while serving as the chief financial officer for the primary concessioner there, I have developed a personal sense of the necessary balance between preservation and use, the composition and importance of park communities, and what makes our National Parks special.

I. INTRODUCTION

The primary purpose of participation in these hearings is to bring the Committee up-to-date on efforts to reconcile problems that have emerged in the wake of the passage of the National Parks Omnibus Management Act of 1998 (the "1998 Act"). Although generally these relate to the regulations and form contracts that the National Park Service ("NPS") has promulgated to interpret and implement the 1998 Act, there are other important issues that deal with the administration of concessions contracts generally that should be brought to your attention and are identified below.

The regulations (the "Regulations") are embodied in 36 C.F.R. Part 51, and the three separate form contracts that the NPS has drafted (the "Standard Contracts") were adopted by the agency and published in the federal register on May 4, 2000, and July 19, 2000. To the best of our knowledge, one of the Standard Contract forms has formed the basis for each prospectus issued by the NPS under the 1998 Act.

It is no secret that the debate leading up to the passage of the 1998 Act was spirited. For our industry these debates amounted to nothing less than a battle for the

survival of a viable concession program in the parks. Although much of the debate centered on whether concessioners who had faithfully performed under their prior contracts should be entitled to retain the preferential renewal rights they enjoyed under the application of the prior law, many other issues had a potentially devastating impact on the ability of concessioners to earn a reasonable return on their operations and investments. Some, we felt, would force many prospective bidders for contracts, including incumbents, to examine whether they could undertake the potential risks inherent in bidding on a concession opportunity. These risks could impair their non-concession businesses, to the extent the NPS sought rights that went beyond the contracts, or could simply arise from the uncertainty associated with ambiguous regulations and contract terms. The result was that the 1998 Act included compromises on many of these issues.

The central trade-off that resulted in administration and concession industry support for Sen. Thomas' bill, and its ultimate passage, concerned the decision to terminate the preferential right of renewal for larger contracts, but preserve (in modified form) the right of the concessioner to receive a modest positive return on its invested capital by replacing the previous concept of possessory interest with a new valuation formula called leasehold surrender interest ("LSI"). LSI was designed to fix the compensation for the concessioner's investment in park improvements at cost as adjusted for changes in the consumer price index ("CPI") and changes in physical depreciation, thereby decreasing the uncertainty and potential for disputes concerning the valuation of these interests. Although Sen. Thomas moved a long way toward the position of the prior administration and sponsors of competing legislation in crafting the final compromise, the resulting Regulations and Standard Contracts contain restrictions on concession contracts and concessioners that the prior administration had argued for in the debates, but were excluded from the actual statute.

As a consequence, there remain provisions of these important documents that are not in accordance with either the explicit provisions or the intent of the 1998 Act. The NPHA and certain of our members found it necessary to challenge some of these provisions in court, resulting in over 2 years of expensive litigation that culminated in a Supreme Court argument on one issue. Although the decisions of the courts and certain representations of the NPS made during the proceedings have clarified some of the matters challenged by the NPHA, other matters in dispute were not decided by the courts, either because the courts did not find them "ripe" for review, or because the NPHA did not raise them in the litigation due to their sheer number. Now that the litigation has concluded, it is appropriate to complete the remaining task of aligning the NPS regulations and contracting procedures with the court decisions and the intent of Congress in passing the 1998 Act.

It is both evident and noteworthy that the NPHA and its members enjoy a much better relationship with the NPS since Fran Mainella has assumed the Director's role and assembled her staff. It has been refreshing for our members to hear that public access to our parks and the provision of quality services to park visitors is a priority of the NPS and that the NPS considers its partnership with concessioners to be among its most important strategic relationships. It is also a positive step that the NPS has engaged professional consultants (e.g. PricewaterhouseCoopers) to help in assessing its business relationships. While the NPS has an impressive staff dedicated to the protection of park resources, many—including members of this subcommittee and the NPS itself—have acknowledged that not all NPS concession employees have the necessary business and financial backgrounds to adequately deal with the agency's commercial relationships.

The NPHA is confident that Director Mainella and other senior NPS leaders are committed as a matter of policy to attempt to solve the problems created by the Regulations and Standard Contracts.In that regard, through the auspices of a task force assembled by the National Park Service Concessions Management Advisory Board (the "Board"), there have been five "working group" meetings and several LSI subcommittee meetings among various constituencies to identify some of the more important issues and try to devise a framework for resolving them.

Although the NPHA has participated in these meetings with the goal of achieving reasonable regulations, in the final analysis, solutions need to be crafted that comply with the law, create reasonable certainty among concessioners, reflect standard business practices, encourage the improvement of visitor services (including operations and facilities), increase administrative efficiency, and reduce bureaucracy and wasteful disputes between the government and its contractors. We believe that the senior levels of the NPS embrace these goals as well.

Unfortunately, we believe that some of the proposed solutions do not achieve these goals. Because of this, we are continuing to identify problems in the process. In that regard, the encouragement of this subcommittee to address these issues promptly, and to facilitate legislative fixes where the regulatory and contracting

process has failed, would be most welcome. We regard achieving these important solutions quickly as critical to the success of the NPS and its concession program. We believe the collaborative process initiated by Director Mainella is the appropriate vehicle for finalizing these regulatory changes in the near future.

II. KEY CHALLENGES

A. As indicated above, several of the issues that were the subject of litigation between NPS and NPHA were not fully resolved by the courts. Accordingly, Director Mainella is working with NPHA and other interested parties to attempt to cooperatively resolve these issues and others of importance. The key areas currently being discussed are: (a) award and measurement of leasehold surrender interests; (b) cross-collateralization of concessioner financing arrangements across multiple contracts; (c) NPS oversight of transactions that affect the ownership of companies that hold concession contracts(as opposed to transactions that only involve the concession contracts themselves); and (d) improvement and simplification of the rate approval process.

B. Leasehold Surrender Interests ("LSI")

The key element of these discussions, and that of greatest interest to both NPS and concessioners,is how LSI is handled under 1998 Act contracts. As you know, LSI was conceived in order to provide concessioners with investment protection in concession facilities and thus attract bidders to National Park contract opportunities. However, concessioners believe there are several critical areas where changes to existing regulations and contract provisions are necessary. Because all the provisions of the Regulations relating to LSI are interconnected, we believe a significant number of those Regulations require revisions to conform them to the law (including but not limited to the matters resolved in the litigation) and improve the administration of concession contracts in this area. Conforming changes would also need to be made to the Standard Contract forms.

The primary LSI-related issues are:

a. Definition of Capital Improvements, including the 50% rule

While certain sections of the Regulations correctly call for Generally Accepted Accounting Principles ("GAAP") to be used as the benchmark to determine whether capital costs should be accorded LSI treatment, there are provisions in §§ 51.51 that are contrary to GAAP, such as the rejection of building materials for capital improvement eligibility except (1) when initially installed as part of a structure or (2) when the "50% Rule" is met. Thus, for example, the conversion of a dormitory to guest lodging, though potentially costing millions of dollars, would not necessarily be considered a capital improvement eligible for LSI treatment. In that case, only if the conversion cost represented at least 50% of the pre-conversion replacement cost value would LSI treatment be accorded to the conversion. This limitation,not found in the 1998 Act, has been termed the "50% Rule". Thus, common and sorely needed renovations, rehabilitations, and other capital improvement projects in our National Parks often would not qualify for LSI treatment under the existing regulations and standard contract provisions even though we believe the 1998 Act intended that they should qualify for LSI treatment. Fortunately, the discussions of the task force convened by the Board indicate that both NPS and the concessioners are in agreement that the 50% Rule should be eliminated.

b. Prevailing cost ceiling

The Regulations also purport to restrict the LSI values to "amounts that are no higher than those prevailing in the locality of the project", which is not a requirement of the 1998 Act. This means the NPS could set LSI values on the basis of lower construction costs in metropolitan communities outside the National Parks, even though the cost of construction in remote park areas is generally much higher. NPHA believes the litigation established that this limitation only pertains to a comparison with other in-park projects, which of course are already subject to strict regulation by the NPS. Thus the limitation in the Regulations appears moot. Since concessioners have no incentive to "overpay" for a project in the hopes of receiving LSI that will only grow by CPI, this restriction will only serve to impose a needless administrative burden for each project and could create confusion and disagreement between the parties. It should be eliminated.

c. LSI consistency and problem resolution

In our on-going discussions, NPS has stated that there should only be occasional or isolated instances where an LSI determination needs to occur. On the other hand, NPHA believes these instances will occur on a more routine basis as capital invest-

ment generally occurs throughout a contract term. Since a consistent approach across all contracts would be desirable, NPHA believes that a framework should be set up to resolve these instances simply and efficiently. Possibly a nationally recognized accounting firm such as Price-waterhouseCoopers, acting both in a dual role as NPS' asset manager and as an independent financial expert, could serve to confirm that the costs presented by the concessioners are correctly capitalized under GAAP and thus entitled to LSI. These checks could be performed on an annual basis or, to save costs and maximize efficiency, only at times when the NPS disagrees with a concessioner's treatment of a specific item. This process could lead to long-term consistency and stability so that both NPS and concessioners would benefit from having a simple set of procedures that would be used to evaluate these critical on-going decisions for both parties.

d. Measurement of Depreciation

Just like the preceding 1965 statute, the 1998 Act requires that, when measuring the depreciation related to a capital improvement for which LSI was awarded, a physical standard of depreciation be used. In other words, it requires measurement of the observed deterioration of the facilities during the contract term. In contrast, much discussion within the working group has centered on an NPS proposal that a "*scheduled*" form of depreciation be the measurement tool. Conceptually, this means an amortizing schedule similar to what is used for tax or financial reporting purposes. The NPS proposal is that each and every asset be broken down into its individual components at the time it is placed in service and an estimated useful life assigned to each component for purposes of "counting depreciation in the LSI calculation. Besides being extremely cumbersome and therefore costly, this method would lead to a substantially different result than the statute requires. This same distinction formed the basis of the debate in Congress over possessory interest that was resolved when Sen. Thomas incorporated a concept that included physical depreciation, in the same manner as the prior law, as a portion of the LSI formula. The NPHA strongly objects to scheduled depreciation on several grounds.

1. First and foremost, changing the LSI formula from physical depreciation to scheduled depreciation would generally have a significant and negative impact to the return on investment that concessioners would receive. This formula constitutes a critical consideration for concessioners in the bidding process, particularly for "capital-hungry" parks. Since businesses require minimum market returns to be attracted to concession opportunities, lowering the compensation received at the end of a contract would likely require a significant reduction, or even elimination of, franchise fees to the government and over time probably require more government appropriations to directly fund park facilities. None of these impacts appear to be in the best interests of the United States or the visiting public.

2. Second, scheduled depreciation doesn't provide an incentive to the concessioner to maintain the asset in good physical condition. Since under this scenario the asset will become fully depreciated at the end of a specific period of time (the "scheduled" life) no matter how well (or how poorly) the concessioner takes care of the asset during its service life, the concessioner will watch its LSI value march downward toward zero irrespective of the level of care devoted to it. NPHA considers this to bean unwise policy since, at a time when there is so much written about the condition of our National Park facilities, we should be trying to upgrade the condition of the assets by providing incentives for concessioners to maintain them in top-notch condition. If two concessioners spend the same amount of money to place an asset into service, but one spends its maintenance funds throughout the contract term to keep the asset is good physical condition while the other concessioner spends little or no money to maintain the asset, both concessioners will wind up with little or no LSI value at the end of the "scheduled" life of the asset. However, the first concessioner will have spent significant maintenance funds so that the asset can continue to fulfill its function in providing services to park visitors while the second concessioner has "milked" the system and left the NPS with a run-down asset worth little or no value. Unfortunately, the second type of concessioner is likely to become more prevalent throughout the parks since they can purportedly afford to bid higher franchise fees.

3. Third, estimating a useful life when an asset is placed in service will almost always turn out to be wrong. This result will be compounded when trying to estimate the service life of each individual component that makes up the overall asset. These variances are caused by weather conditions, materials that last longer (or shorter) than the manufacturer or engineering estimates, preventative maintenance procedures performed (or not performed) over the useful life by the owner/operator, and normal human error. Therefore, it seems futile to think that one can accurately estimate the useful life of an asset and all of its components within acceptable

bounds of precision for purposes of a contractual LSI measurement, even if it were in accordance with the law. The concept of "scheduled physical depreciation" is inherently contradictory.

4. Fourth, there is a major administrative burden associated with a scheduled depreciation framework that will also lead to increased costs for both concessioners and the NPS, a burden that we believe will not translate to improved facilities or services in the parks.

Providing concessioners with an economic incentive to maintain and upgrade park facilities over the contract term is desirable. This can be accomplished, as Congress intended, by using physical depreciation at the end of the contract as the measurement basis for determining LSI value.

C. Cross-collateralization of Concession Contracts

1. Cross-collateralization means the use of multiple assets or contracts to provide security for a single or separate loans made by a single lender for the purchase or other investment in (or to provide working capital for) those or other assets. It reduces a borrower's financing costs through the more efficient use of assets by allowing a lender to diversify its collateral and reduce its risk.

2. NPHA, NPS, and PricewaterhouseCoopers have had many discussions over the financial benefit to the concession system of allowing concessioners with multiple contracts to finance them through a "bundled" approach, thereby lowering the cost of borrowing to the concessioners. All parties appear to be in agreement that this is desirable. However, although not prohibited by the 1998 Act, NPHA believes that Section 51.87 of the Regulations and its tight restrictions on the use of proceeds from loans secured by LSI may prevent this. NPS originally proposed issuing a Director's Order that would clarify that this is permissible, but since the Regulations would override this Order and likely render it invalid, NPHA believes this should be clarified and memorialized in an amended Regulation. The amended Regulation should eliminate restrictions on the use of proceeds from a loan secured by LSI.

D. Shareholder Level Transactions

1. This issue is also of critical importance to any concessioner that is part of an affiliated group of companies, or that engages in businesses other than National Park concessions.

2. Although it may be understandable for the NPS to want as broad approval rights as possible over transactions involving changes in ownership of concessioners and their owners, Congress recognized that regulating shareholder behavior would reduce bidding interest and create substantial risks to affiliated organizations. Thus the 1998 Act regulates only the movement and encumbrances of contracts themselves, but not shareholder behavior. NPS and NPHA have been working to clarify under what conditions approval by NPS is necessary. There is agreement that clarification is advisable and the NPHA is optimistic that the NPS will ultimately agree on a solution that complies with the law. Again,NPS originally proposed to clarify this guidance through a Director's Order, whereas the NPHA believes that the Regulations need to be amended to remove the sections that exceed the scope of NPS authority under the 1998 Act.

E. Rate Simplification

1. The statute requires that the rate approval process "shall be as prompt and as unburdensome to the concessioner as possible". Some progress is being made in this area, most notably the food service core menu" concept. This concept provides that a key list of items should be included in a concessioner's menu and reviewed by NPS to ensure that they are priced appropriately. For all other menu offerings, the concessioner would have the flexibility to design the offering and establish a reasonable price. This would allow for more variety and innovation in menus since there would be no administrative overhead outside the core menu requirements.

2. Simplification is underway in pricing retail products through a 2-year test period of an "open market declaration" concept. This greatly minimizes NPS review of pricing for gift and souvenir products by relying on market conditions to establish prices (versus the previously required percentage markup method that varied for each class of merchandise). It also simplifies the process for tracking freight costs and allows concessioners to use industry-standard merchandise pricing techniques. Traditional NPS pricing reviews are still completed for grocery and convenience items.

3. Very preliminary discussions have begun on how this "core" concept might be applied to lodging, but nothing firm has been determined. The NPHA has long argued that the current "comparability" approach could be dramatically improved. If a "core" concept can be implemented that would permit non-core lodging units to

better reflect market conditions, both the NPS and concessioners would benefit, and bureaucracy can be virtually eliminated in this contentious area.

NPHA wants to ensure that the changes to the Regulations or the Standard Contracts discussed above are made in a clear, permanent, and enforceable manner through modification of the Regulations and Standard Contract language, rather than through a less permanent solution such as a Director's Order. Employing a Director's Order in the face of published Regulations that reach an inconsistent result would at best create ambiguity and confusion, but would more likely be invalid as being a policy position that is inconsistent with the published regulations. Moreover, a Director's Order can be easily modified by the NPS without notice and formal rulemaking and thus may only be a temporary accommodation. Since our membership and their banks could not fully rely upon a Director's Order in the face of contrary regulations and standard form contracts, this could not be a permanent solution.However, a Director's Order might be used as a very short-term temporary solution if there were a full commitment on the part of the NPS to quickly implement the permanent solutions via regulation.Although the NPHA acknowledges that modification of the Regulations will entail additional time and effort, it is critical that the published Regulations in the Code of Federal Regulations are clear, workable, well-reasoned, and in compliance with the law. Therefore, we are opposed to efforts to solve any of these issues through Director's Orders where they have already been addressed by the Regulations.

There are other improvements that could be made to the Regulations and the Standard Contracts to resolve inconsistencies with the law, ambiguities in the language, or unnecessary administrative requirements. Although not addressed here or currently under discussion with the NPS, addressing these could further enhance the NPS concession program and attract more competitors for concession opportunities.

Thank you for the opportunity to participate in this important hearing.

Senator THOMAS. Thank you, sir.

Ms. White.

STATEMENT OF JANET WHITE, PRESIDENT, WHITE SANDS CONCESSIONS, WHITE SANDS, NM

Ms. WHITE. Thank you, Mr. Chairman. I appreciate the opportunity to testify before your committee today.

My name is Janet T. White. I am the president and co-owner of White Sands Concessions at White Sands National Monument, New Mexico. I am here to testify on behalf of myself and other small single-operation concessionaires as to the effects of P.L. 105-391, known as the National Parks Omnibus Management Act of 1998. I will refer to it as "the '98 Act" or "this act."

I started at White Sands Gift Shop 23 years ago as a sales clerk. I worked my way up to manager, and purchased this business in 1998, 1 month before this act was passed. Section 403 of this act states, in paragraph 1, "Such competitive process shall include simplified procedures for small, individually owned concession contracts."

Small, single-operation concessions, such as mine, which grosses around $650,000, do not have in-house attorneys, staff accountants, in-house environmental management experts, nor do we have employees who can respond to the onerous, paper-generating requirements found in our current prospectus.

There is, I believe, a whole new industry of former National Park Service employees and consultants who are willing to assist small, single-operation concessions prepare responses to their prospectuses for a fee or for a percentage of the business. Fees I have been quoted are far beyond my ability to afford, and that is not right. It is not right to have to pay to be able to respond to a National Park Service prospectus.

There are no simplified procedures for me, or for other small, single-operation businesses, as are called for in the act. This would appear to be in violation of section 403 and is an issue that I call on this committee to address. What I have, as a small, single-operation concessionaire, is experience. Twenty-three years of proudly providing excellent service and interpretation of White Sands has earned my satisfactory ratings and compliments of visitors and the National Park Service. I believe that you are aware that the Park Service can remove an unsatisfactory concessionaire anytime they choose. My health and safety ratings are admirable.

Now along comes the National Park Service with a desire to change the use of my operation into National Park Service administrative offices, and require me to build a new concession in which to operate. The Park Service is using this act to eliminate those of us who cannot ante up new buildings because the Park Service wants office space and doesn't want to pay for it out of their budget.

The Park Service has used this act as a shield to exclude me from the section 106 process required by the National Historic Preservation Act. This act, the '98 Act, "embolds" the National Park Service to create a pay-to-play system. Some of the prospectuses generated after the '98 Act are so expensive that no one bids on them, even if they benefit from the economies of scale, unlike small, single-operation concessions.

The prospectus generated for White Sands National Monument should have been entitled "Small Business Need Not Apply," because of the capital improvements, plus the demolition costs, plus the money necessary to prepare a responsive bid make it impossible for me to compete. This is wholly contrary to the '98 Act. I am certain the authors of the '98 Act did not anticipate that Park Service units would use this act to eliminate small, single-operation concessions by burying them under voluminous prospectuses that require voluminous responses.

I am also positive this act did not anticipate that National Park Service, lacking in general management plans, environmental management plans, commercial services plans, would go against their own controlling documents—or master plans, in our case—in order to try and convert concessions into their offices.

In 1996, the superintendent wanted to use a 1987 concession addition for a Park Service theater. He implemented a capital account wherein White Sands Concessions deposited franchise fees to help pay for future concession improvements.

In 2000, his successor had a different idea. He did not want to change the footprint of the buildings in the White Sands Historic District. He required that we turn over the capital account moneys to the Park Service to be used for other projects.

In 2002, the next superintendent had the most radical idea yet. After all the capital account moneys were spent—and on what, we are not sure—he implemented this prospectus, which includes a new concession and tearing down the 1987 concession addition the Park Service coveted for their theater in 1996.

One could get whiplash from the opposing views of successive superintendents. It is impossible to make plans essential to small business based on the Park Service's ever-changing ideas.

Had these superintendents followed the master plan or produced a general management plan, perhaps I would be able to compete. But because of the lack of following planning documents and laws, such as NEPA, section 106 of the National Historic Preservation Act, I am prohibited from fair competition.

The '98 Act was enacted to ensure competition and diversity, and not place small, single-operation concessions on the fast track to the endangered species list. This committee has the power to enforce section 403 of this act, whereby the process shall include simplified procedures for small, individually owned contracts. I implore this Committee to take action on section 403 before it is too late.

Another urgent appeal to this subcommittee is that parks not in compliance with 1978 National Parks and Recreation Act be required to obey that law prior to the issuance of any concession's prospectus. If they do not obey the 1978 Act, a law requiring parks to have plans, the result is chaos, waste, and abuse. The human toll exacted by the National Park Service actions as a result of their misuse of this act is unconscionable.

Thank you to all those who wrote to their Senators and Congressmen asking that this day happened. Thank you, again, Mr. Chairman, for giving me the opportunity to tell my story. I will answer any of your questions, because, in the allotted time, I could only cover the tip of the iceberg.

Senator THOMAS. Thank you very much.

Ms. Verkamp.

STATEMENT OF SUSIE VERKAMP, PRESIDENT, VERKAMP'S, INC., EL PRADO, NM

Ms. VERKAMP. Thank you, Mr. Chairman and members of the committee. I really appreciate the opportunity to come here today and your willingness to provide oversight and attention to our concerns.

I did submit a longer testimony, which I would like entered.

Senator THOMAS. It will be in the record.

Ms. VERKAMP. Thank you.

My name is Susie Verkamp, and I am president of Verkamp's.

We are the oldest continuously run family operated concession in the National Park System. Our business is a gift shop on the South Rim of the Grand Canyon, located in a building which my grandfather built in 1906, and it was also the place where I was born and raised.

Over the past century, we've maintained the highest level of service to the visiting public, while providing high-quality Native American handicrafts and souvenirs.

I'm testifying today on behalf of my family, but also other small concessionaires.

I'd like to focus my remarks on three main areas in regard to the '98 Act, issues of fairness, inconsistencies, and also the potential loss of one historic legacy of the national parks, which is the small, locally-owned, family-operated concession.

We have a well-proven history of positive collaboration with the Park Service. We've worked with 25 different superintendents, and have seen the coming and going of 15 National Park Service direc-

tors. Really, we'd like to continue that for another century, if possible.

From our point of view, unfortunately we know that the intention of the act was just to improve some of the abuses that occurred here and there, and, you know, to solve some problems that existed. But from our point of view, there's been, sort of, a widening gap between the original positive intent of the act and some of the actual implementation.

For example, one of the intentions was to increase competition. But the bidding process discriminates against small operators. I'd like to—I can sort of reiterate what Janet said, is that the process just requires enormous amounts of time, money, and effort, which we have to manage along with—juggling that with the everyday business of our operations—keeps us in a prolonged sense of uncertainty. Because the process has been, sort of, plugged up and slow, we've been operating on short-term extensions now for 7 years. And it really is difficult to plan, you know, for the future of your business if you don't even really know if you're going to have one.

I think another challenge that's been really significant is that the requirements and the definition of the selection factors and the format of the prospectus are constantly changing, so we're—we sort of have a moving target, in terms of how we prepare to respond. And we really have to track and respond to all these details, because many of the bids have been decided over very minute differences between the bidders. So it's not something we can just hope that we're going to be able to respond to well.

Another one of the goals of the acts, as I understand it, was to increase revenues. We currently pay almost double the franchise fee of our competitors within the park, but we can imagine a scenario in which this competitor offers a higher fee than us and wins the contract, even though consideration of the fee is supposed to, by the law, be subordinate to other factors, such as environmental stewardship. They could then turn around, in the next contract negotiation, and roll our operation into their overall fee, and the result would be that the park would receive less, not more, income than they currently receive from us. Not to mention that the higher-percentage fees established during this extra legal bidding wars significantly impact our right to a reasonable profit. We're very concerned about the role that the fee has played in some of the other parks.

We also feel that we're subject to regulations that really should apply only to much larger operations. You know, we basically have one main building; it's an historic structure. We're very committed to maintaining it. And we even participated in a complete renovation back in 1989, right after we signed a 10-year contract, in order to really bring that building back to its historic condition.

We recently learned that there could be a very complex computerized maintenance management system put in place. And while we realize that has value for managing the whole system, it could well be overkill for us, and buying the software necessary to implement that could be a big expense. So there's these constantly changing potential requirements.

I think the other main concern is that there's been a lot of inconsistency. In different regions, different parks have gone about de-

veloping the prospectuses in different ways, and that's—I'd like to reinforce. I think Chairman Naille addressed that also, the issue of inconsistency.

And, finally, I guess the very last thing is just that I feel that there really is the potential loss here of, you know, kind of a unique American institution, which is the small, family owned operation. We're really involved in our community. Our history is interwoven with the history of the region, and there's a lot of contributions that we make to the local economy, including local jobs, well-paying, you know, good jobs. And we feel like this could be lost if we were out-competed and a larger corporate entity were—replaced us.

Thank you.

[The prepared statement of Ms. Verkamp follows:]

PREPARED STATEMENT OF SUSIE VERKAMP, PRESIDENT, VERKAMP'S, INC., EL PRADO, NM

Thank you, Mr. Chairman and members of the committee. I truly appreciate the opportunity to testify before you today.

My name is Susie Verkamp. I am President of Verkamp's, Inc., the oldest continuously run family-owned concession operation in the National Park system. Our business is a gift shop on the South Rim of the Grand Canyon, located in a building which was built by my grandfather in 1906—13 years before the area became a National Park. Over the past century we have maintained the highest level of service to the visiting public while providing high quality Native American crafts and souvenirs for sale.

I am here on behalf of my family and other small, family-owned, single site concessioners to testify about the effects on us of Public Law 105-391 (the "1998 Act") and to explain why the earned preferential right of renewal that was eliminated by the 1998 Act should be restored to small concessioners.

I was born and raised in Grand Canyon, living in our family residence above the store. Needless to say, I have a great love for the Canyon, a firm commitment to its protection and preservation, and a growing awareness of what a privilege it has been for our family to live and work there for nearly a century. Our pioneer family history is completely interwoven with the economic, social and cultural history of northern Arizona and Grand Canyon National Park. We are one of the cultural resources the park professes to protect, and yet, we are at great risk of extinction.

We have a well proven history of collaborative partnership with the Park Service. Our family has witnessed the coming and going of fifteen National Park Service directors and twenty-five park superintendents. We have managed to survive and flourish through depressions, recessions, world wars and the constantly changing American political landscape.

Over the years, we have responded to, and been compliant with, a myriad of legal, legislative, administrative, and regulatory requirements and constraints. But I can honestly state that we have never felt more at risk of losing our livelihood and the opportunity to serve the public than we do today.

The last of our five long term contracts was signed under the conditions of the 1965 National Park Concessions Policy Act, Public Law 89-249 and expired on December 31, 1997. We have been operating under short term extensions of that contract for the past seven years. The 1965 Act stated that "the Secretary . . . shall take such action as may be appropriate to *encourage and enable* private persons and corporations . . . to provide and operate facilities and services which he deems desirable for the accommodation of visitors." But these days we are feeling not encouraged and enabled, but rather, *dis-couraged and dis-abled*, and that is why I am here before you today.

My grandfather began his business under an arrangement with the U.S. Forest Service, when Grand Canyon was still a Forest Reserve, created in 1893. The Forest Service was issuing permits rather freely during that time and competition was unregulated. The Yellowstone Act of 1872 also allowed the leasing of parcels of land, but after the National Park Service was established in 1916, the first director Stephen Mather and his assistant Horace Albright decided that such unrestrained competition did not enhance, but actually reduced the pleasure of the visitor's experience of the parks.

To avoid the destruction of the parks caused by the allocation of too much land and unrestrained competition, they introduced the concept of an authorized prime concessioner and promoted the concept of the preferential right of renewal. In addition to Stephen Mather and Horace Albright, other visionary park service leaders, numerous review commissions, citizen advisory panels and departmental policy studies recognized the destructive affects of too much unregulated competition in the newly developing national parks and determined that continuity and quality of service would be best served by concessioners with an established record of satisfactory performance.

Thus, there is a certain irony that the preferential right of renewal was taken away in the 1998 Act with the expressed purpose of increasing competition and improving the quality of services, when the visionary founders of the National Park Service themselves saw certain dangers inherent in such a free for all approach. Indeed, the preferential right was not something cooked up by profit hungry concessioners or designed to eliminate fair competition, but rather, a way of insuring the best possible services from experienced providers.

We believe that the original intent of the preference right is consistent with the goal stated in the first line of the 1998 Act: "to provide for improved management and increased accountability". The Act, according to my understanding, also sought to professionalize procedures, increase competition, address maintenance backlogs, and raise revenues.

From our point of view, there is a widening gap between the original intent of the 1998 Act and its actual implementation in the nation's parks. For example, one of the stated intents of the 1998 Act was to increase competition for concessions contracts and improve visitor services. But because the bidding process created under the Act so clearly discriminates against small operators, the end result likely will be the gobbling up of small businesses by a few large corporate entities that will essentially have a monopoly on park concessions.

Another goal was to increase revenue to the parks. We currently pay almost double the franchise fee of our competitors within the park. We can imagine a scenario in which this competitor offers a higher fee than us and wins the contract, even though consideration of the fee is supposed to be subordinate to other factors, such as environmental stewardship of the park's resources. They could then turn around in their next contract negotiation and roll our operation into their overall fee. The result would be that the park would receive less, not more, income than they currently receive from us. Not to mention the fact that higher percentage fees established during the extralegal bidding wars significantly impact our right to a reasonable profit.

Additionally, while the Act sought to improve visitor services, the legal and administrative quagmire created by the new law and constantly changing regulations have placed significant burdens on small concessioners, which have impacted their ability to provide quality services.

For example, the numerous and varying regulations have caused ongoing delays in the issuance of prospectuses. We have been operating on extensions for seven years. As any business person can tell you, it is very difficult to plan for your future when you are not even sure if there will be one. The level of stress and uncertainty this creates for ourselves, our employees, our vendors, and even our communities should not be ignored.

It is almost impossible to anticipate the exact requirements or format that will appear in a prospectus. There has been a great deal of inconsistency in how the 1998 Act and the bidding process have been implemented in different parks and different parts of the country. The current process, rather than being clear and predictable, has become more like a park by park version of "let's make a deal."

Moreover, the complexity of the bidding process requires enormous amounts of time, money and effort. Unlike large corporations who have entire departments dedicated to financial analysis, environmental management, legal research, and marketing/prospectus response, we have to juggle the day to day maintenance of our operations with all the demands of the bidding process. We have been told for the past three years that our prospectus will be out within months, but we are still waiting. We fear that the prospectus will appear in the midst of our busy season. Our appraisals and financial analyses have to be constantly updated. We struggle with decisions over maintenance projects, not knowing if we will be able to recover our costs should we fail to win a contract.

Another major difficulty in preparing to respond to the prospectuses is that the requirements, definitions of selection factors and format are constantly changing, often in response to private contractors who advise park officials, yet stand to gain from the changes. Much of this maneuvering goes on behind the scene, unofficially, without public knowledge.

For example, even though we are a small organization, environmental ethics have always been an integral part of our philosophy and actions. Over the last several years we have spent large amounts of staff time in formalizing our environmental programs and bringing them to the highest certifiable standards, at significant expense and with great pride at what we have accomplished. And yet only last month I was told by a person with decision-making authority from the national concessions office that the international certification which we have worked so hard to accomplish "may not be necessary". This in spite of the fact that the international certification (known as ISO14001) we have achieved is being adopted by most Federal agencies in response to Presidential Executive Order 13148.

If we had been discouraged from pursuing the highest measurable standards, and been outbid by a large corporation who had such a system in place, we could have been at risk when our response was evaluated. This is a very significant issue because one third of the points to be earned in a response are related to environmental issues, and many bids have been decided on minute differences between bidders. Evaluations of responses to the requirements are very subjective and based on the interpretation of the reviewers. It should be noted that a private consulting firm, who has developed their own certification process as an alternative to the ISO14001 process and marketed it to national concessions staff will provide guidance to the evaluation committees.

In addition to constantly changing regulations, we also are subject to regulations that should only apply to much larger operators. For example, we recently learned that the NPS is using a computerized maintenance management system for their inventory of park buildings. While we see the value of such a system for managing the system as a whole, we are worried that this could translate into a prospectus requirement that we purchase and use software costing thousands of dollars. Our building is on the National Historic Register, and it was also our family home. We did not need a computerized system or a capital project requirement to completely restore the building in 1989, at our own cost, shortly after our last 10 year contract was signed. None of this restoration was aimed at enhancing sales or increasing our leasehold surrender interest but was directed at preserving our history through careful replication of structural details. These regulations impose a significant financial burden on small operations making it extremely difficult to operate our businesses effectively and, at the same time, compete with large operations that do not face similar financial constraints.

Losing small, family-owned concessioners would result in great disservice to the parks, park visitors, and local communities. There are many ways in which we contribute to the well-being of our community that will vanish should we be outbid by a large corporation.

For instance, our company employs 12 people. We have always offered a competitive wage and benefit package, and we have always hired locally. We did not lay off any employees during the economic aftermath of September 11, 2001 even though our business dropped off significantly. We shared the burden of our losses with our employees by keeping them employed. This concern for our employees is in stark contrast to a recent case in which a large corporation outbid a family based operation and cut the work force by 35% within months of taking over. Are these the desired results of increased competition?

Another example: In the 1950's my aunt worked tirelessly in cooperation with Senator Carl Hayden to obtain legislation and funding for a high school in the park. It is the only high school located within park boundaries in the nation. The school relies upon county taxes for a significant part of its budget. A recent Court of Appeals ruling said that concessioners would no longer be required to pay property taxes because property ownership rights are merely possessory. Our large corporate competitor in the park has chosen to take advantage of the ruling. This will cost the county about $580,000/year. The company has also filed a claim to be reimbursed by the school district for prior taxation to the tune of about $2.5 million. My siblings and I all attended the school from first grade through graduation and feel a strong obligation to continue supporting it. For us, there is more to life than the bottom line.

In sum, the 1998 Act, as applied, will lead to the extinction of small business like ours and result in a great disservice to the parks, park visitors and local communities. Accordingly, we are asking Congress to restore the preferential right of renewal to our small businesses so that we may continue to provide quality services to visitors of our nation's parks and contribute to our local communities.

Senator THOMAS. Thank you very much. I appreciate all of you being here.

Mr. Naille, what is your general impression of the implementation and the rate of implementation, and the willingness to implement the recommendations that come from your group?

Mr. NAILLE. Mr. Chairman, I would say, for the most part, the Park Service has been very receptive to what goes on in the way of our recommendations. We try to run those meetings in—what I would call an arena of communication, in that we sit at a table in the round and we talk about ideas and concepts. And I would tell you that it isn't like the board sits there and comes up with ideas. The Park Service sits there and comes up with ideas. And it's the board's desire to encourage that type of development on the part of the Park Service, where they come up with ideas, and they implement those ideas.

So I would, therefore, have to say, for the most part, I think they're very positive about them. They've been resistant to some things. The NAFI issue is one that we keep pushing, and I doubt that we ever give up on that particular area of desire. But, you know, you heard some today, that there is a major problem in the Park Service, in that they don't have what I would call the correct business expertise, internally.

To be honest with you, I think—when the public law was put together, I think there was a desire on Congress's part to look at an outside asset-management organization of some sort to take over the function. And I would tell you that I have major problems with that, being involved with Park Service activities from the other side, the hotel side of it, for almost 30 years of my life. The Park Service has a mission that's different than any other organization in the Government, and that's to preserve and protect. And I would question an outside organization taking over.

However, what we, as a board, have found over the last few years is, organizations—and the bidding process holds, but I'll just say that Pricewaterhouse is an organization that they hired, and they bring tremendous business expertise to the Park Service that's missing, internally.

And the desire on the part of the Park Service to utilize that avenue, I think, is all important.

Senator THOMAS. Okay. Well, I don't think there's overwhelming interest in having outside management of the whole proposition, because there are differences, but I think there is a strong feeling that this is a business function within the parks, and needs to be managed in a businesslike way.

Mr. NAILLE. Exactly.

Senator THOMAS. And the park has to be receptive to doing that.

Mr. Welch, the depreciation thing you talked about.

Mr. WELCH. Yes.

Senator THOMAS. I guess that the fact is—why does it take—it takes 50 percent of the value of refurbishing in order to get some depreciation benefits, is that it?

Mr. WELCH. The 50-percent rule.

Senator THOMAS. Yes.

Mr. WELCH. Well, the 50-percent rule is separate from the depreciation argument; but the 50-percent rule, as it currently is stated in regulations, says that if you don't spend at least 50 percent of

the replacement cost of the building, then you're not entitled to leasehold surrender interest.

So you could spend 40 percent—that might be a million or two-million dollars—but you would not be awarded leasehold surrender interest in that case.

Senator THOMAS. It basically has to do with depreciation, then, doesn't it? Values.

Mr. WELCH. Yes, the net number is definitely the result of both the initial leasehold surrender interest and the ultimate depreciation.

Senator THOMAS. Tell me a little about the cross-——

Mr. WELCH. Collateralization?

Senator THOMAS [continuing]. Collateralization.

Mr. WELCH. Yes.

Senator THOMAS. I presume that originally it was designed to limit the amount of activities one company could have in the total Park Service. Is that true?

Mr. WELCH. Not that I'm aware of, but—I couldn't say what the original intent necessarily was. But I think the intent was to not expose, overly expose, one park at the expense of either another park building-improvement program or a non-national park building program, because many of the companies that operate in the national parks have non-national park interests, as well. And, generally, those companies are not going to have loans specifically related to just a single-park contract or just their national park operations; they're going to go to a lender or a group of lenders and get an overall consolidated loan that would be partially secured by park assets and partially secured by non-park assets, which is typical.

Senator THOMAS. Yes. I think there are people who believe that if there wasn't some limitation, that you'd end up over—after all, with one concessionaire having all the major—I don't know that that's the relationship. That's interesting.

Ms. White, what would you think—now, is part of your problem because you exceed the $500,000 gross?

Ms. WHITE. That's part of it, Senator Thomas.

Senator THOMAS. I mean, are you treated differently than if you had less than $500,000?

Ms. WHITE. Well, this prospectus would witness to the fact that it's very time-consuming—the expertise involved in order to respond to this, is—it's just daunting.

Senator THOMAS. Somebody help me with that. Is this different than if it were below $500,000?

Mr. NAILLE. Yes.

Senator THOMAS. So you don't fall in the category of——

Ms. WHITE. I'm at $650,000. I am $150,000 above.

Senator THOMAS. I see, okay.

So you, then, are dealing with the same sort of regulations and so on as a $3 million operation.

Ms. WHITE. Right.

Senator THOMAS. I see.

Ms. WHITE. And I am a small, single-location operation. And the law, itself, talked about a simplified version to respond. And if this is simplified——

Senator THOMAS. What would be your suggestion as to how it should be changed?

Ms. WHITE. Let me ask you a question, first, if I may, sir. What should be changed? Are you talking about the process or the——

Senator THOMAS. Your situation. What would you see that ought to be changed to eliminate or reduce your problem?

Ms. WHITE. Okay. My first suggestion would be that—in my particular case, that the park come in compliance, and have a plan that they're going to follow. What I testified to, this going back and forth, is very detrimental to a small business.

Senator THOMAS. So consistency over time.

Ms. WHITE. Consistency by having a general management plan. Those plans are—I believe, are there for a reason, and it's to keep the park on a pathway so that the resources are protected, and not getting off on tangents and empire-building that can occur. You have a plan, and one superintendent starts it, then the next guy will follow up until it's finished, and so on. It's just common sense. So I would say, have plans. Require that these plans be in place before the Park Service can put out a prospectus. That way, anybody who bids, they're all on the same page, we're all headed in the same direction.

Senator THOMAS. Okay. Sounds good.

Ms. WHITE. I have a whole laundry list. Is that enough?

Senator THOMAS. You can submit it in your statement.

Ms. WHITE. Okay. Be happy to.

Senator THOMAS. Ms. Verkamp, what would be your suggestion? Now, I understand you're probably the same situation, you're over the $500,000, but still relatively small.

Ms. VERKAMP. Well, I think this hearing is a positive development, because I think one of the things that I have felt has been really needed all along is some oversight as to what has occurred since the law was in place. So I would hope that continuing oversight would continue. I'm not sure whether it's possible to raise that threshold on the preferential right, but I find that there are some ironies, as I pointed out in my statement, that the preferential right in the early days of the park, was put in place to—by some of the early leaders, Mather and Albright, to discourage what they saw as the negative effects of unregulated competition. Then there's an irony that the law was put in place to encourage competition, and yet the end result may be different. So I'm not sure—of course, we'd like to see that threshold raised, and I'm not sure if it's possible for there to be regulatory reform without that occurring, because then it would come into conflict with the actual statute.

I think the issue of consistency is very important, because the Park Service has said, over and over, they want a system that's fair, simple, consistent, and I think that's really not what we have in place now.

Senator THOMAS. So consistency under several superintendents and so on would be good.

Ms. VERKAMP. Right. And I think the issue—one of the issues that—where there's a little bit of a discrimination against us, I think, is that we just have one site, and we can't—you know, whereas the issues of cross-collateralization and stuff may be—

that's a large concern for some of the larger operators. For us, we don't really have that advantage to take a loss on our business outside the park and maybe use the collateral here for something else. We just have that one site, that one operation that our livelihood depends on. We lose that, we lose it all.

Senator THOMAS. I understand.

Mr. Naille, have you all ever talked about this $500,000 limit? As time goes by, should that be changed, or is that an issue?

Mr. NAILLE. The only thing we ever talked about was reviewing the contract for the $500,000 or less, which I'm going to—I can't remember—ten pages, something like that, a lot smaller than this document. So that's part of the issue on it. Whether or not that should be changed, I heard Randy Jones' comments, and I have heard the statement that maybe we should go to two million or something like that on a concept. I don't know what that magic number is.

You know, if you get to two million, is somebody going to want it at three million? I don't honestly know where to draw the line, myself. The ones that hurt are like Ms. White's, that is so close over the threshold there, that it's almost—I knew when she held that book up—I thought, "Oh, wow."

Senator THOMAS. Well, it is kind of difficult, because, on the one hand, obviously you want to treat those smaller ones differently; on the other hand, this is—the parks are public arenas, and when you get into meaningful businesses, why, people ought to have an opportunity to deal with it. It isn't somebody's——

Mr. NAILLE. I might add, sir, that we have not looked at numbers of contracts in those dollar ranges. I assume that the Park Service has, and that would be one way to analyze it, is to look how many are in that basic range, and work that number backward from that.

Senator THOMAS. There might also be a way to reduce the paperwork without that.

Well, I appreciate your being here. As I said, all of us, and, I guess, I particularly am interested in the concession aspect of the parks, and—because they are an important part of it. But we do need to continue to work at it, and I appreciate your input and thank you all for being here. If you have any other suggestions, please let us know.

The committee's adjourned.

[Whereupon, at 4:10 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

WHITE SANDS CONCESSIONS, INC.,
Alamagordo, NM, April 21, 2004.

Hon. CRAIG THOMAS,
Chairman, Subcommittee on National Parks, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR SENATOR THOMAS: Thank you for the opportunity to answer the follow-up questions you sent. I was grateful to get the opportunity to testify before your subcommittee hearing and I thank you for your courtesy and your interest in my plight.

I would like to make you aware that the response to the prospectus released for White Sands National Monument is due June 18, 2004. I have very little time left as a concessionaire. The current prospectus requires capital investments of over $550,000, money I do not have and cannot get. The capital investment in this prospectus essentially provides office space for the National Park Service. It is a huge, unnecessary undertaking which does not comply with the park's planning documents.

As a small concessionaire that grosses about $650,000, I cannot compete for my business.

That said, I will be glad to answer your specific questions.

Question 1 asked at what level should the preferential right of first refusal (PRFR) be set.

My answer is $3,000,000. Here is why. That is the level the NPS chooses to use outside consultants in preparing a prospectus. In a way, however, that question is a little difficult because ANY raising of that level would cover us, whether $1,000,000, $2,000,000 or $5,000,000.

I feel compelled to add, that in my case, even if I had PRFR I still could not match this specific prospectus because the NPS chose to load it up with "goodies", or what a PricewaterhouseCoopers representative termed "wish list items", referring to what superintendents want built by concessionaires that have nothing to do with concessions.

So, raising that level MAY deter the NPS from producing prospectuses that the incumbent cannot afford, or it may not. Either way, it is too late for me unless the subcommittee can help me.

Question 2(a). I would wish that the NPS be required to follow THEIR own rules for concessions. Again, in my case, the NPS came up with new capital improvements that violate their own planning document, the 1976 Final Master Plan. They also, in my opinion, did not follow the letter and spirit of NEPA. The NPS Director's Order 12 requires that that NEPA be followed. In my case, I do not believe it was.

Since 1990 or so, White Sands National Monument has a sad history of skipping the NEPA process. They take a piece-meal approach on all their projects, whether concession-related or not. That is a real concern for me because the latest scheme is about to put me out of business.

I would also ask that when the NPS begins a Capital Account (CA) for Concession Improvements, as White Sands National Monument (WSNM) did, they be required to follow through and use the money for its intended purpose.

In my case, a CA was set up in 1996 through 2001, through which I kept up my end by contributing to the CA. In 2001 superintendent did not want new construction in the upcoming prospectus. I was told to turn those monies over, which I did.

Then, in 2002, yet another superintendent came up with the current prospectus which I have described to you.

This one is double the original cost estimations and of course, those CA monies are no longer available for me or any concessionaire to use. So, I would ask that the NPS not be allowed to pull this kind of switch-a-roo on concessionaires.

Had the NPS kept its word, perhaps I would be able to compete for this current prospectus. But, with the CA monies long spent on other things by the NPS, I cannot compete.

As I mentioned, WSNM has a history of doing such things. In 1997, WSNM had the approval to build a modular office building that was temporary. They created a categorical exclusion (CE) document for this 1997 building because it was termed a temporary building. However, with that CE, WSNM built a permanent office building so large in scale that it was repeatedly criticized by a NPS report called a Cultural Landscape Inventory. Clearly, the NPS and WSNM should have done an Environmental Impact Statement for their 1997 Administration building. Yet, they did not.

That is just one example of bending the rules, skirting around the laws that takes place here.

I just feel like the NPS should have to follow their own planning documents, or change them as the 1978 National Parks and Recreation Act requires. As you know, that Act requires all NPS units to have an up-to-date General Management Plan (GMP).

So, I ask that your committee, in its oversight capacity, see if the NPS is doing what it is supposed to regarding these capital improvements. I know I have the proof that they are not.

Part (b) of question 2 is easy to answer. If that PRFR is raised to some number, the incumbent concessionaire still has to be deemed satisfactory by the NPS. Also, all of those covered would be single location small businesses, like mine. All of us put service first. It is our livelihood, it is our life. To do otherwise would hurt our business.

In fact, the time and money required to prepare a prospectus response is the biggest barrier to good service I can think of I am not an absentee owner. I watch the day-to-day operations of my business first-hand. The huge prospectus and huge required response would do more damage than anything. The man-hours involved would require me to spend less time in the store and more time on the computer.

Customer service will be aided by owners spending time running their business rather than spending time trying to defend it from the burdensome process now in place.

I cannot tell you the heartache I have suffered over that last year and a half over this NPS fiasco. I have still, in the midst of all this, put customers first. However, the level of exhaustion I have as a result of this process has taken a mighty toll.

Again, thank you for this chance to convey my answers and share my concerns. It is clear that the NPS does not consider mine to be a small business. The prospectus issued on February 18, 2004, and due on June 18, 2004, should have been entitled "Small Business Need Not Apply". The phone book sized document, not including two CD-ROMs, amounts to a small business disqualifier.

Sincerely,

JANET T. WHITE,
President.

RESPONSES OF MICHAEL F. WELCH TO QUESTIONS FROM SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

Question 1. The National Park Hospitality Association and several concessioners have reported disparities between the 1998 Act and the May 2000 Park Service Regulations. For that reason, they have asked that the regulations be changed.

Question 1a. What do you consider the most obvious disparity between the law and the regulations?

Answer. We have identified many disparities between the 1998 Act and how it is being administered through the Regulations and Contract forms. It is important to recognize that many of the provisions interact with each other and thus changes to one section would in many cases necessitate changes to others. Although we hope that all disparities are ultimately addressed, we believe there are three critical issues that most affect the concessions program.

1. The first critical issue relates to encumbering leasehold surrender interests and ensuring that concessioners can access the financial markets for loans at a reasonable cost. For example, Section 405 (a) (2) of the statute states "A leasehold sur-

render interest may be pledged as security for financing of a capital improvement or the acquisition of a concessions contract when approved by the Secretary pursuant to this title". Section 51.87 of the regulations adds the qualifier, that the LSI to be encumbered be "in the applicable park area". This restriction, found in the regulations, but not the statute, will have a chilling effect on competition if not revised.

First, a concessioner with operations in several parks is prohibited under the current rule from wrapping all of its LSI into a single collateral package. Creating separate loans for each park secured by each park's LSI will significantly raise financing costs, and therefore lower the amount a concessioner is able to bid to renew its existing contracts. Second, lenders won't finance the buyout of new contracts on the basis of prospective LSI alone, but they also require historical financial results. Since these are rarely available to anyone but the incumbent, cross-collateralization is essential to securing contingent financing for new contracts. My company has spent literally millions of dollars on legal fees trying to structure a debt agreement that complies with the current regulations. We remain hopeful that we can gain National Park Service approval in the very near future.

2. The second critical issue concerns the identification of expenditures that are entitled to Leasehold Surrender Interest and the measurement of Leasehold Surrender Interest value. To summarize, we believe the 1998 Act clearly provides that all capital improvement expenditures made to park facilities by concessioners are entitled to LSI credit. As you know, virtually all businesses identify capital costs by reference to Generally Accepted Accounting Principles ("GAAP"). However, the NPS has interpreted the language governing LSI credit far differently. Based on our discussions in the "working group" so far, this could result in a very labor intensive and costly tracking method. The purpose of creating LSI was to simplify how credit was to be given for making capital commitments in the parks and reduce the potential for disputes. Instead, the Regulations make the system much more complicated and increase the potential for disputes. I have included edited excerpts from my written testimony submitted at the hearing below.

The primary LSI-related issues are:

a. Definition of Capital Improvements, including the 50% rule

While certain sections of the Regulations correctly take their guidance from GAAP as the benchmark to determine whether capital costs should be accorded LSI treatment, there are provisions in Section 51.51 that are contrary to GAAP, such as the rejection of building materials for capital improvement eligibility except (1) when initially installed as part of a structure or (2) when the "50% Rule" is met. Thus, for example, the conversion of a dormitory to guest lodging, though potentially costing millions of dollars, would not necessarily be considered a capital improvement eligible for LSI treatment. In that case, only if the conversion cost represented at least 50% of the pre-conversion replacement cost value would LSI treatment be accorded to the conversion. This limitation, not found in the 1998 Act, has been termed the "50% Rule". Thus, common—and sorely needed—renovations, rehabilitations, and other capital improvement projects in our national parks often would not qualify for LSI treatment under the existing regulations and standard contract provisions even though we believe the 1998 Act intended that they should qualify for LSI treatment.

b. Prevailing cost ceiling

The Regulations also purport to restrict the LSI values to "amounts that are no higher than those prevailing in the locality of the project", which is not a requirement of the 1998 Act. This means the NPS could set LSI values on the basis of lower construction costs in metropolitan communities outside the national parks, even though the cost of construction in remote park areas is generally much higher. NPHA believes the litigation established that this limitation only pertains to a comparison with other in-park projects, which of course are already subject to strict regulation by the NPS. Thus the limitation in the Regulations appears moot. Since concessioners have no incentive to "overpay" for a project in the hopes of receiving LSI that will only grow by CPI, this restriction will only serve to impose a needless administrative burden for each project and could create confusion and disagreement between the parties. It should be eliminated.

c. LSI consistency and problem resolution

In our on-going discussions, NPS has stated that there should only be occasional or isolated instances where an LSI determination needs to, occur. On the other hand, NPHA believes these instances will occur on a more routine basis as capital investment generally occurs throughout a contract term. Since a consistent approach across all contracts would be desirable, NPHA believes that a framework

should be set up to resolve these instances simply and efficiently. Possibly a nationally recognized accounting firm such as PricewaterhouseCoopers, acting both in a dual role as NPS' asset manager and as an independent financial expert, could serve to confirm that the costs presented by the concessioners are correctly capitalized under GAAP and thus entitled to LSI. These checks could be performed on an annual basis or, to save costs and maximize efficiency, only at times when the NPS disagrees with a concessioner's treatment of a specific item. This process could lead to long-term consistency and stability so that both NPS and concessioners would benefit from having a simple set of procedures that would be used to evaluate these critical on-going decisions for both parties.

d. Measurement of Depreciation

Just like the preceding 1965 statute, the 1998 Act requires that, when measuring the depreciation related to a capital improvement for which LSI was awarded, a physical standard of depreciation be used. In other words, it requires measurement of the observed deterioration of the facilities during the contract term. In contrast, much discussion within the working group has centered on an NPS proposal that a "scheduled" form of depreciation be the measurement tool. Conceptually, this means an amortizing schedule similar to what is used for tax or financial reporting purposes. The NPS proposal is that each and every asset be broken down into its individual components at the time it is placed in service and an estimated useful life assigned to each component for purposes of "counting" depreciation in the LSI calculation. Besides being extremely cumbersome and therefore costly, this method would lead to a substantially different result than the statute requires. This same distinction formed the basis of the debate in Congress over possessory interest that was resolved when Sen. Thomas incorporated a concept that included physical depreciation, in the same manner as the prior law, as a portion of the LSI formula. The NPHA strongly objects to scheduled depreciation on several grounds.

- First and foremost, changing the LSI formula from physical depreciation to scheduled depreciation would generally have a significant and negative impact to the return on investment that concessioners would receive. This formula constitutes a critical consideration for concessioners in the bidding process, particularly for "capital-hungry" parks. Since businesses require minimum market returns to be attracted to concession opportunities, lowering the compensation received at the end of a contract would likely require a significant reduction, or even elimination of, franchise fees to the government and over time probably require more government appropriations to directly fund park facilities. None of these impacts appear to be in the best interests of the United States or the visiting public.
- Second, scheduled depreciation doesn't provide an incentive to the concessioner to maintain the asset in good physical condition. Since under this scenario the asset will become fully depreciated at the end of a specific period of time (the "scheduled" life) no matter how well (or how poorly) the concessioner takes care of the asset during its service life, the concessioner will watch its LSI value march downward toward zero irrespective of the level of care devoted to it. NPHA considers this to be an unwise policy since, at a time when there is so much written about the condition of our national park facilities, we should be trying to upgrade the condition of the assets by providing incentives for concessioners to maintain them in top-notch condition. If two concessioners spend the same amount of money to place an asset into service, but one spends its maintenance funds throughout the contract term to keep the asset in good physical condition while the other concessioner spends little or no money to maintain the asset, both concessioners will wind up with little or no LSI value at the end of the "scheduled" life of the asset. However, the first concessioner will have spent significant maintenance funds so that the asset can continue to fulfill its function in providing services to park visitors while the second concessioner has "milked" the system and left the NPS with a run-down asset with little or no value. Unfortunately, the second type of concessioner is likely to become more prevalent throughout the parks since they can bid higher franchise fees than more responsible operators.
- Third, estimating a useful life when an asset is placed in service will almost always turn out to be wrong. This result will be compounded when trying to estimate the service life of each individual component that makes up the overall asset. These variances are caused by weather conditions, materials that last longer (or shorter) than the manufacturer or engineering estimates, preventative maintenance procedures performed (or not performed) over the useful life by the owner/operator, and normal human error. Therefore, it seems futile to think that one can accurately estimate the useful life of all the components of

an asset within acceptable bounds of precision for purposes of a contractual LSI measurement, even if it were in accordance with the law. The concept of "scheduled physical depreciation" is inherently contradictory.

- Fourth, there is a major administrative burden associated with a scheduled depreciation framework that will also lead to increased costs for both concessioners and the NPS, a burden that we believe will not translate to improved facilities or services in the parks.

We strongly believe that depreciation can be measured in a fair and straightforward manner without unneeded procedural steps. In particular, as noted above concerning the administrative burden associated with attempting to measure scheduled depreciation using a component-by-component basis would be just as burdensome to do so when measuring physical depreciation. Instead, the evaluation should look at the level of physical depreciation of each building or other improvement as a whole as compared to the level of physical depreciation at the beginning of the contract to determine the amount of depreciation deduction to be taken. Providing concessioners with an economic incentive to maintain and upgrade park facilities over the contract term is desirable. This must be accomplished, as Congress intended, by using physical depreciation at the end of the contract as the measurement basis for determining LSI value. However, once that conclusion is reached, it is equally critical to focus on how physical depreciation will be determined for purposes of arriving at an LSI value at the end of each contract. It is relatively simple (even though appraisals would still be required) to measure physical depreciation on a building level basis since the initial cost of acquisition at contract inception can be readily allocated among buildings and other improvements, but would be much more difficult and costly to allocate among the myriad of building components. We encourage the NPS to follow the more straightforward and efficient method of a "unit by unit" assessment as was done under prior law, rather than the needlessly complicated "component by component" approach.

3. The third item of critical importance concerns NPS approval of shareholder transactions. This issue is also of critical importance to any concessioner that is part of an affiliated group of companies, or that engages in businesses other than national park concessions.

Although it may be understandable for the NPS to want as broad approval rights as possible over transactions involving changes in ownership of concessioners and their owners, Congress recognized that regulating shareholder behavior would reduce bidding interest and create substantial risks to affiliated organizations. Thus the 1998 Act regulates only the movement and encumbrances of contracts themselves, but not shareholder behavior.

Question 1b. Have you expressed your concerns to the Concessions Management Advisory Board and the National Park Service?

Answer. Yes, we have. In addition, when Director Mainella established the "working group" during early 2003 to address the most critical difficulties concessioners have voiced concerning the Regulations, she included in this group members of the Concessions Management Advisory Board, including Chairman Naille, as well as appropriate members of the senior NPS staff.

The discussions of the working group indicate that both NPS and the concessioners are in agreement that the "50% Rule" will be eliminated.

NPS and the working group have also been working to clarify under what conditions approval of shareholder transactions by NPS is necessary. There is agreement that clarification is advisable and we are optimistic that the NPS will ultimately agree on a solution that complies with the law. NPS originally proposed to clarify this guidance through a Director's Order, whereas we believe that the Regulations need to be amended to remove the sections that exceed the scope of NPS authority under the 1998 Act.

Question 1c. Has any progress been made in the past year to address these concerns?

Answer. Although we have had some productive discussions within the working group and believe that some of the key issues can potentially be resolved by this group, we have not yet reached agreement on any of the key issues identified above.

Question 2. What are the two or three most important skills for an NPS Concessions Program manager to possess?

Answer. Because the Concessions Program Manager only has an indirect reporting relationship with field level staff, success requires considerable skill at building relationships. We also believe that this person must share the NPS' commitment to a strong private concessions program within the parks where concessioners are regarded as business partners for the public benefit.

A degree of business acumen is essential to understanding, and therefore being able to manage, private enterprises in the national parks. In particular, in an environment where the government is looking to the private concessioners to invest in park facilities and maintain them for the public benefit, it is imperative that a Concessions Program Manager has a basic understanding of accounting principles and a firm understanding of how investment decisions are made (including the importance of return on investment), as well as how businesses attract capital from the financial markets to make those investments possible.

The financial consultants that NPS has engaged to help with the concession bid process and other matters bring specialized expertise (some more so than others), but in general not much experience with national parks. Financial skills would therefore be very useful to a Concessions Program Manager to effectively evaluate the consultants' work.

Question 3. In what key areas has the NPS been successful in implementing the 1998 Act? In what areas has the agency been unsuccessful in this regard?

Answer. NPS has placed a great deal of emphasis on promoting environmental best practices in concession operations. Although my company, and others, embraced recycling and similar measures early on, there's no doubt that many concessioners are now focused on integrating environmental protection into every aspect of their business.

We also think progress has been made toward simplifying the pricing function as required by the 1998 Act, by taking a variety of goods and services out of the traditional comparability analysis. This includes the "core menu" concept for food and beverage items and the "open market declaration" concept for retail items. More work can and should be done in this arena to simplify the lodging rate approvals.

We believe the 1998 Act was designed to increase competition in the National Park system, while still treating previous and future investments made by concessioners in park facilities in a manner that can provide a concessioner with a modest return on those investments. To date, our experience in trying to apply the Regulations to real-world situations has been inefficient, expensive, and not in accordance with normal business practices. We would like to see the Regulations and standard contract language rewritten in the near future so they conform to the 1998 Act.

RESPONSES OF RICHARD ALLEN NAILLE, II TO QUESTIONS FROM SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

Question 1. Since being chartered in 2000, the Concessions Management Advisory Board ("CMAB") has met eight times and issued two annual reports containing recommendations for improving concession management.

Question 1a. Has the National Park Service ("NPS") implemented any of your recommendations for improving the concessions program?

Answer. Respectfully, I must tell you that the CMAB has met a total of 11 times since its inception. Four of these meetings were held in Washington, DC. The remaining seven were held in the field (at or near an NPS unit). In addition, we have issued three reports, each of which includes minutes from each CMAB meeting and an executive summary of the year's CMAB activities and recommendations.

The NPS is presently working on all of our recommendations except two: Associate Director of Partnerships and Business Practices, and a pilot version of a Non-Appropriated Fund Instrumentality ("NAFI"), which is considered a best practice within the federal government for managing fee- and concession-related revenue. We do hope for a positive move on the NAFI concept in the near future.

Question 1b. Following implementation, did the recommendations produce the desired results?

Answer. Results have been slow but positive. The best part is that the NPS is moving forward. The inclusion of PricewaterhouseCoopers ("PwC") has been a significant positive step.

Question 2. What do you consider the single greatest issue facing the National Park Service Concession Program ("NPSCP")?

Answer. The single greatest issue facing the NPSCP is the lack of internal management accountability from superintendents to concession chiefs. There is too much decentralization down to the superintendents, who do not seem to honor previous superintendents' agreements, GMPs, etc.

This problem is endemic to many government organizations, and is not new to the NPS. It has been a problem for at least 20-30 years. Constant movement of superintendents has resulted in inconsistent follow-through on projects and programs. In addition, new superintendents do not always adhere to policies and procedures developed by their predecessors.

Further, superintendents and local park concession management personnel really have no concrete reporting relationship to the Chief of Concessions in Washington, D.C. Things only happen when there is a "friendship" between the parties. In a business organizational structure, there are straight-line and dotted-line reporting relationships; and corporate offices set rules for the field. Within the NPS, the opposite appears to be true.

Part of our intention for the creation of the Associate Director of Partnerships and Business Practices was to provide the NPS with someone that would spearhead the development of new and proper business practices for the agency. The person chosen to fill this position would have substantial private-sector management experience, and would help the NPS to internalize asset and contract management expertise.

In addition, other federal government organizations such as the Department of Defense have effectively used the NAFI to establish a virtual corporate structure for the management and accounting of non-appropriated fund revenues.

However, the NPS has chosen not to create the Associate Director of Partnerships and Business Practices position. They have also not yet moved ahead with a pilot NAFI. Both of these initiatives would help improve the NPSCP oversight issue. Therefore, the lack of accountability within the NPSCP will remain the program's greatest issue for the foreseeable future.

RESPONSES OF SUSIE VERKAMP TO QUESTIONS FROM SENATOR THOMAS

Queston 1. Ms. Verkamp, you mentioned several instances in which your smaller business can offer benefits to the park visitor that larger companies cannot. Aside from increasing the $500,000 threshold for preferential right of renewal, what other suggestions would you make for ensuring the "value added" of the small concessioner is adequately reflected in the prospectus and review process?

Answer. There should be some way to reflect and give credit in the prospectus and review process for the role that small park concessioners play in the life of the park community itself and in the surrounding local economy. Many local concessioners are highly valued and respected members of the community, serving on school boards, donating to charities, participating in service organizations, and most importantly, providing an historical continuity that cannot be provided by the NPS staff, who by their nature as civil servants move into and out of different parks as their career paths dictate. Local history and local culture and local aesthetics are best shared with visitors by "locals".

Large corporate concessioners generally have no historical ties to the parks and, therefore, can offer no history to visitors of the parks. Additionally, large corporate concessioners frequently lack ties to local business communities. Consequently, large operations tend to hire seasonal employees who are offered no continuity or benefits, which makes it difficult to attract and retain qualified, experienced employees to provide visitor services. Some account should be made for decisions made on factors other than the bottom line.

To ensure that the "value added" by the small concessioner is adequately reflected in the prospectus and review process, I suggest adding several evaluation criteria that specifically address the potential bidders' relation to the local economy and community, the longevity of staff, improvements to the park property over and above those required by the prior contracts, and comments from visitors regarding the service received. In addition, the NPS should consider the bidders' capability to interpret the park's culture and history, particularly in light of the fact that a majority of visitors to the parks currently identify their main interests as history and culture.

When people visit the national parks they are looking for an experience that is different from a trip to their local shopping mall. They enjoy the unique historic and aesthetic qualities of the parks. While it is hard to quantify the "character" of the parks that makes them such a beloved part of the American cultural experience, a process that doesn't take these intangible qualities into account could to lead to the "Walmart-ization" of our national parks.

Question 2. If the threshold for the preferential right of renewal were raised to $6 million, a fraction of the existing 600+ concessioners would be required to compete for contracts. What incentives would there be for companies, with a preferential right of renewal, to provide the highest quality possible in visitor services?

Answer. The most obvious incentive is that our operations represent our livelihood. If we don't do the best possible job, we lose customers and the good reputation we have worked so hard to earn. Providing the highest quality visitor services is, quite simply, good for business. Moreover, as long term residents of our local communities, we do not want to lose the respect of our friends and neighbors by running

a shoddy operation. It is hard to quantify the pride and commitment to excellence that many small operators have, but the annual evaluations performed by the NIPS provide clear evidence of a job well done. (Or not, as the case may be.)

In addition to earning a profit and maintaining a good business reputation, small concessioners must provide quality services or risk losing their contract. The NPS has always had the authority to terminate unsatisfactory concessioners, including concessioners with a preferential right of renewal. Thus, all concessioners, including concessioners with a preference right, must continue to provide satisfactory services.

Further, because concessioners must earn the preference by providing quality services, the preferential right of renewal in and of itself creates an incentive to provide high quality services. Only concessioners with satisfactory records are given the opportunity to match the terms and conditions of the best competing proposal.

Without this preference, concessioners are faced with uncertainty as to whether they will be awarded the contract the next term and, therefore, tend to forgo investing in costly improvements that could improve visitor experience for fear of losing the contract the next term and, in turn, losing their investment. Without some assurance of continuity, the incentive to maximize services beyond what is required by the contract is seriously threatened and visitor services and facilities will progressively erode. Thus, the question should be what incentive is there for companies *without* a preferential right to provide the highest quality possible in visitor services?

When a concessioner does a great job, it enhances its profits, which in turn enhances the park's revenues through increased franchise fees. Increased park revenues enhance the park's ultimate goal of maximizing visitors' experience and enjoyment. Creating a stable and predictable business environment as well as clear guidelines for operating our business, will enable us to do our jobs well and ultimately enhance visitors' enjoyment of the park.

Question 3. Would a standard format for proposals, with limits on the number of pages, number of illustrations or a standardized format for financial reporting, result in a more equitable bidding process? What suggestions do you have for making the bidding or proposal process more equitable between large and small concessions?

Answer. I am not sure if standardization is as important as are clarity, consistency, objectivity and transparency in the entire bidding process. Rather than developing a standardized prospectus for all parks, I believe that, in some cases, tailoring the prospectus to the specific site may be in the best interest of the park, the concessioner and the public.

As I stated in my written testimony, the guidelines and criteria used in the bidding process have been a constantly changing target. The reasons for these changes are difficult to discern and often appear to be the result of personal or political agendas. As we are discovering from past competitions, the NPS does not have a quantifiable evaluation process. It is very subjective and often shaped to support a desired outcome. We have seen this most recently in the Jamaica Bay competition and the final decision of the GAO. If a quality incumbent loses because of an overly subjective evaluation process and for no other reason, it is ultimately the public's loss.

Proper oversight, well-structured contracts, and clearly stated expectations from both the NPS and the concessioner are the best tools for ensuring quality services. Unless there are clear guidelines, the responsibility for deficient visitor services must be shared with the local park staff, who have oversight authority over all concessions contracts. In many instances, small operators have been operating on one year extensions for decades, with no annual evaluations and no ongoing, interactive support from their local park officials. We cannot read the minds of NPS officials. If the NPS and the concessioners are truly equal partners in providing quality visitor services, then they must communicate effectively and both act to address problems before they get out of hand. The overly complicated and costly bidding process mandated by the law is not the answer to improving services where they have fallen below acceptable standards.

In addition to changing guidelines, small concessioners are placed at a competitive disadvantage due to the cost associated with responding to a prospectus. In many instances, small concessioners are discouraged from bidding when competing with large corporations. There are several examples of factors that contribute to excessive costs to small concessioners.

For example, concessioners earning at least $1 million are required to submit audited prospective financial statements by an independent accounting firm. The cost to obtain an independent audit has increased significantly over the years and is prohibitive for small concessioners. This additional cost must be passed on to the visitor by increased rates. Accordingly, I believe that the threshold for the audit requirement should be increased from $1 million to $4 million and should also be indexed to an annual consumer price index (CPI).

Another example of overly burdensome costs is the requirement for a formal environmental plan. In fact, preparing a formal environmental plan often requires hiring a professional to write the plan, another cost which can be prohibitive to a small concessioner. Moreover, no matter what the format of the prospectus, it is hard for small concessioners to compete with large companies with dedicated proposal writers, marketing departments, and environmental staff. Accordingly, I would strongly recommend greater oversight on the role of support contractors in developing criteria, particularly in the environmental area. The standards of expectation of environmental management, in particular, should be subjected to peer review and objective discussion and compared to standards adopted by most other federal agencies.

In addition to having more money to pay dedicated proposal writers, marketing departments and environmental staff, large concessioners also have more money to offer the NIPS in franchise fees. The present bidding process encourages franchise fee bidding and should be eliminated because it serves no public interest. The only result is the placing of small concessioners at the mercy of wealthy corporations or conglomerates, some of whom are willing to purchase a small concessioner even if they know it will lose money in the short term. The franchise fee should be set by the park prior to issuing the prospectus so that the concessioner can prepare its budget and proposal based on a set fee.

Another problem incurred by small concessioners is unanticipated costs. We are incurring costs that were not predicted when we signed contracts under the law that protected our preferential right to renewal. For example, if I am not planning to put my business on the open market, there is no need to spend tens of thousands of dollars to have an appraisal done. An appraisal is only necessary if I am placed in the position of having to negotiate my leasehold surrender interest with another party. However, under the current NPS policy, I must pay for an appraisal even though there is no need for one. These unanticipated and unnecessary costs and complications discriminate against incumbent small concessioners because they were not known at the time we signed our contracts and make it nearly impossible to plan and effectively operate our businesses.

The lack of clarity, predictability and objectivity in the current prospectus process is costly to both potential bidders and the NPS. To fully appreciate the scale of this problem, I think it would be very instructive to quantify the amount of money and staff time that small concessioners have had to spend preparing for this process. I would also strongly recommend an accounting of the immense resources that the NPS has spent on this process. For example, I have heard that the NPS recently spent $300,000 developing one prospectus for one operation that grosses under $3 million annually. Wouldn't it have been more cost effective to just renegotiate a well structured contract for higher franchise fees, increased capital outlays and better environmental standards, if that was the desired outcome?

Question 4. Do you feel that you have been well represented by the Concessions Management Advisory Board? What suggestions would you make for improving the Board?

Answer. Because the industry representatives on the board are from large corporations, they have very different experiences and concerns than the small concessioners. There are some issues in which small and large concessioners have a common interest and others in which our perspectives and concerns are very different. For example, the board has focused a great deal of attention on the issue of cross-collateralization. For those of us having small, single site operations cross-collateralization is not a particularly significant issue. In fact, because it is a potential benefit that we are not able to take advantage of, it could be seen as discriminatory. Having large concessioners in key positions allows them the opportunity to shape outcomes for their strategic purposes.

That being said, I have appreciated the openness of the meetings and the tone which has been set by the chairman. Because it is prohibitive for small companies without huge travel budgets to attend meetings at great distances, it has been helpful to have the meetings coincide with the NPHA meetings. However, 1 believe that greater efforts could be made to get input from small concessioners when specific issues are to be discussed and decided upon.

Additionally, the minutes of the board meetings have not been made available until months after the meeting, and they have been somewhat difficult to obtain. This is unfortunate because they often explain developments that are critical to preparing for the competitive bidding process.

To help elevate small concessioners' representation by the Board, I suggest that small concession representatives be added to the working groups, where much of the creative problem solving and decision making are taking place. I also suggest that a working group be established to look into inconsistencies and discrepancies in how the bidding process has been implemented in different localities.

APPENDIX II

Additional Material Submitted for the Record

RESPONSE OF JOHN TURNEY, CAVERN SUPPLIES, TO TESTIMONY OF A. DURAND JONES, DEPUTY DIRECTOR, NATIONAL PARK SERVICE

In response to comments made by Mr. A Durand Jones, Deputy Director, National Park Service to the Senate Subcommittee on National Parks of the Committee on Energy and National Resources on April 8, 2004 regarding the status of the National Park Service Concessions Management Program that were misleading, I feel that it is important for the members of this Committee to understand the truth.

Mr. Jones stated that "[o]f the 52 operations currently grossing over $3 million in revenues, five are operating under newly awarded contracts, 17 have not yet reached their original expiration date, and 30 are currently operating under contractual or regulatory extensions (that is, their original operating date has passed). To date, we have awarded five of these contracts, at Greater Lake, Glen Canyon, Denali, Glacier Bay, and Yellowstone. We have released prospectuses for two others—Mount Rushmore and Carlsbad."* He failed to mention that Carlsbad Caverns Concession Contract is less than $3 million and with the statement he made above indicates that Carlsbad is in the over $5 million group of 52 operations. He also failed to mention that the prospectus issued was called back within about a month because it contained points that were not legal and were contrary to the law. He also failed to mention that the second prospectus was issued and there were no bidders because of the requirements that were placed on the concessionaire. He failed to mention that a third prospectus for the Caverns has not been issued as yet, therefore his statement concerning releasing a viable prospectus and misleading the committee into believing that Carlsbad has a workable prospectus is not true. Mr. Jones' statement makes it sound like a contract will be issued soon, and that is not true, at least until the new third prospectus is issued that is acceptable to the bidding concerns.

It appears that the passage of P.L. 105-391, the National Park Service has taken the stand that the concessionaires can fund many of the projects that they can not or are not willing to fund themselves. In our situation at the Caverns, the Park Superintendent could not control her staff during their breaks, so her solution to the problem was to issue a memo stating that no Park Service employee is allow to go to the concession restaurant for their breaks. As a further control measure, in the remodeling of the Visitor Center, she has taken all of the storage space and some space used for merchandising and restaurant seating to be converted into a break room for the Park Service. This will keep the employees out of the public eyes and will have a very bad negative effect on the areas of the concessionaire. No storage, no access to the Gift Shop except through the kitchen and seating area of the restaurant. Asking the concessionaire to invest $3.28 million in remodeling the building that will not be a workable building makes little to no sense at all. As long as the concessionaire owned the building, Park Service could not do what they wanted, so they bought out the possessory interest in the building so they could do what they wanted to do. Destroy the usefulness of the building because they could not control their employee and they needed additional space on the visitor center side and could not work it into what space they had felt. With them putting their break room in the concessions building, it is easier to use the franchise money that the park has kept to on such things as air condition and heating, which they plan us use in the entire visitor center complex.

The Park Services lack of knowledge of the business world is shown in their proposing the increase of the franchise fee increases in the first contract prospectus, from 6.5% to 15% to 25% as your gross sales go up does not indicate a under-

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*This quote is taken from Mr. Jones' written statement to the subcommittee.

standing on how to operate a successful business, especially with a 15 year contract. When the second prospectus was issued the term of the contract was 10 years with the franchise fee from 10% to 15% to 25% as your gross sales go up, also does not indicate business knowledge, only greed on the part of the Park Service.

There are also some three-quarters of a million dollars of hidden cost in the prospectus that are not included in the $3.28 million, plus the purchase of the possessory interest of the current concessionaire. Total figure will be $4.3 million at least, but nothing is said that a large part of that investment will not qualify for Leasehold surrender interest.

Mr. Jones' comment concerning the Advisory Boards meetings being held where the smaller concessionaires can attend is stretching the truth somewhat. On at least 2, possibly 3 different times the Advisory Board scheduled a meeting the following week after the National Park Hospitality Association Meeting. This was very convenient and plans were make to attend their meetings, only to have their meeting canceled at the last moment and rescheduled at a later date. Travel funds are not as readily available to the small Concessioner as they are to the Park Service.

As the new law became more and more entrenched, it was evident that the Park Service had to do something to make the pill not so bitter. They began to mislead the concessionaire as to what would be expected. We were told early on that the contract would be a status-quo contract. When the planning was completed and the money spent on preparing for the "Status-quo" contract, were we ever surprised when almost $4 million had to be spent to keep the facility. I cannot help but wonder what it would cost if it were not a "Status-quo" contract?

Because of the Park Services desire to implement the new law and take away our preference in renewal, even though we have it in writing from the Regional Director, we have been under extensions now for 13-14 years. We have not been able to retain our key employee because of the uncertainty of year to year extensions. We have not been able to invest in the business like we would like because again of the uncertainty of the contract.

The new law and the way Park Service has interpreted it has just about ruined our future and has limited our ability to provide the visitor services that were contracted to do. Because of their greed and unwillingness to serve the visitors, two of our contractual rights were taken away without even a good reason being given. One day we were told that we would no longer provide those services. No amendment, no reduction in franchise fee, no nothing, just you will not offer those services again. Now they are trying to remove the Underground lunchroom from the Caverns by circumventing the law and reduce the activity so much that sales will be reduced by 80% or so and it will not be profitable to operate the facility, a facility that the public wants and has expressed their wishes more than once,but those wished have fallen on deaf ears.

PREPARED STATEMENT OF THE SMALL CONCESSIONS COALITION

RESTORING THE RIGHT OF PREFERENCE TO SMALL CONCESSIONERS

INTRODUCTION

For over 50 years, performing concessioners could earn a preferential right to renew their concessions contracts[1] by providing quality services to National Park visitors. In 1998, Congress limited this right to "small" concessioners (grossing less than $500,000 annually) or those providing guide and outfitting services (regardless of income). It was thought that limiting the preference right would spur competition leading to better visitor services. But from an on-the-ground perspective that has not been the case. Instead, the threat of takeovers and the burden of a paperwork-laden prospectus process are creating instability and apprehension diminishing the quality of visitor services provided by many smaller concessioners. Accordingly, the concerned concessioners recommend that Congress change the threshold to restore the earned preference to "small businesses" as defined by the Small Business Act, 15 U.S.C. §§ 631-657, Pub.L. 85-536 (i.e., $6 million).

BACKGROUND

Approximately 600 concessioners hold an estimated 640 contracts to provide services in the National Park System. These concessioners fall into three categories.

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[1] Concessions contracts are issued by the National Park Service ("Park Service") and authorize concessioners to provide accommodations, facilities, and services to visitors to the National Park System.

One group consists of large operators, some of which are subsidiaries of national corporations. Of these large concessioners, there are approximately 17 companies that hold 28 concessions contracts exceeding $6 million in annual revenue. Four of these companies also hold another 23 contracts of lesser value. These large concessioners, who pay approximately 90 percent of the fees generated by the program, would remain ineligible for the preference if the threshold were increased to $6 million. This group of large concessioners is collectively referred to as the "big 50."

A second group consists of the smallest businesses. This group constitutes the majority of concessioners that gross less than $500,000 annually and have retained the preference.

The final group consists of approximately 60 concessioners that fall into the "in-between" category: not part of the big 50, but have revenues greater than $500,000. These are the concessioners defined as "small businesses" by the Small Business Administration ("SBA") and that would have their preferential right of renewal restored if the threshold is changed to reflect SBA standards. This group of concessioners is collectively referred to as the "Small Concessioners."

Historically, the Park Service granted performing concessioners a preferential right to renew their concessions permits. *See* National Park Service Concessions Policy Act of 1965, 16 U.S.C. § 20 ("1965 Act"), Pub. L. 89-249. This so-called "preferential right of renewal" or "preference" granted incumbent concessioners with satisfactory past performance the opportunity to match the terms and conditions of the best competing proposal. Accordingly, the preference provided a critical incentive for concessioners to provide quality visitor services. Additionally, the preference offered stability and continuity to performing concessioners and facilitated long-term planning and investment, which improved the quality of visitor services. Absent the preference, incumbent concessioners, even those providing quality services, faced extreme uncertainty as to whether they would hold the contract the next contract term.

Leading up to 1998, there had been some noteworthy cases involving big 50 contracts where poor services were provided and the financial return to the Park Service was minimal (e.g., approximately one percent return on a $50 million contract). Furthermore, prospective new concessioners were reluctant to incur the costs associated with submitting a competing bid proposal for these very large contracts knowing that the existing concessioners would likely retain the contract by matching the terms of a proposal.

In 1998, Congress reacted by amending the Concessions Act to improve visitor services and increase the financial return on concessions. *See* National Park Service Concessions Management Improvement Act of 1998 ("1998 Act"), 16 U.S.C. §§ 5951-5963, and Title IV of the National Parks Omnibus Management Act of 1998, Pub. L. 105-391. Congress eliminated the preferential right of renewal for many concessioners and implemented a revamped competitive selection system that included a franchise fee bidding component.

The selection process begins with the Park Service issuing a prospectus inviting proposals for the contract. 36 C.F.R. § 51.4. The Director then identifies a "best" proposal based on specified criteria. Each criterion is scored and the proposal with the highest cumulative point score is designated as the "best." Secondary selection factors also may be considered which include protection, conservation and preservation of park resources and minority employment.

All concessioners must submit bids under this system; however, the 1998 Act allows performing concessioners providing outfitter and guide services and those with annual gross revenues of less than $500,000 to match the best competing proposal. By restricting the preference, Congress sought to encourage possible new concessioners to bid on existing contracts, which (in theory) would increase competition and improve the quality of services. While Congress recognized the need to provide some degree of continuity to small businesses, the $500,000 threshold took the earned preference from many small concessioners that also need the assurance of reasonable continuity.

PREFERENTIAL RIGHT SHOULD BE RESTORED TO CONCESSIONERS WITH ANNUAL GROSS RECEIPTS OF $6 MILLION OR LESS

Increasing the threshold is consistent with the goals of the 1998 Act. Congress's explanation for limiting the preference is found in each committee report from both the House and Senate:

> The Committee considers it appropriate to extend a statutory preference in renewal to these two categories of concessioners. With respect to outfitter and guide concessioners, it is important to encourage the continuity of concessioner operations because of the need to encourage the retention of the highly skilled

> guides needed to provide a safe and enjoyable experience to back-country visitors in need of expert assistance. With respect to concessioners where the concessioner contract is expected to gross less than $500,000, the committee considers that encouragement of operations of concessioners with this modest level of revenue is appropriate and that, in light of the small investment generally necessary to make a proposal for such a business, there will be an adequate level of competition for such a concession contract even under the preference of renewal. Senate Report 105-202 (June 5, 1998); House Report 105-767 (October 2, 1998).

This rationale should extend to "small" concessioners as defined by the SBA. For instance, competition will likely continue for contracts valued between $500,000 and $6 million. There are major differences in costs associated with bid preparation and buyout of leasehold surrender interests on big 50 contracts compared to the others. The lower costs related to contracts under $6 million will assure a level of competition consistent with Congressional intent. Additionally, the need for continuity of concessioner operations is fully applicable to most small business concessioners.

Increasing the threshold to $6 million is also consistent with the Department Pot Commerce, U.S. Small Business Administration classification for small businesses in the service industry and many of the justifications for assisting small businesses apply here. See 36 C.F.R. § 121.201. The Small Business Act states:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation. 15 U.S.C. § 631.

The Small Business Act further sets forth Congress's small business economic policy as follows:

> For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, to implement and coordinate all Federal department, agency, and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses. 15 U.S.C. § 631a.

As further explained below, concessioners classified as small businesses under the SBA should receive similar support from the government in order to compete effectively. Moreover, restoring the preferential right to performing Small Concessioners will improve the quality of visitor services in the parks.

INCREASING THE THRESHOLD TO $6 MILLION WOULD IMPROVE COMPETITION

Congress's decision to eliminate the preferential right of renewal for SBA-defined Small Concessioners places these small enterprises at a substantial competitive disadvantage inconsistent with Congressional policy to increase competition. By only protecting the very smallest operations, Small Concessioners (usually family and local enterprises) are left to compete with large, sophisticated national corporations. Thus, rather than increase the pool of qualified concessioners, the 1998 system reduces the supply of concessioners to only the very smallest and very largest operators. Failure to restore the preference to the 60 Small Concessioners assures that the 17 companies currently holding the big 50 contracts will soon hold 110 contracts.

Such concentration of the largest contracts does not enhance competition, but creates the opposite result.

One competitive advantage larger concessioners have over Small Concessioners is their ability to acquire contracts held by incumbent concessioners based on revenue generated from their multiple operations. Small Concessioners often are dependent on the tourism market from year to year and do not typically possess other holdings that spread their risks. In contrast, large concessioners are not as financially dependent on the revenues generated by an individual concessions opportunity. A loss in one concessions operation does not have as significant an impact on larger operations concessioners with multiple and diversified operations. Thus, large concessions operators may take on a contract, even if it will incur a loss initially, because the company's other operations carry it through losing years. Small Concessioners do not have this luxury and cannot operate at a loss or break-even point just to acquire the contract.

Further, because the cost to prepare a proposal is fixed despite the disparity of revenue generated among concessioners, the proposal cost represents a larger proportionate share of costs to Small Concessioners as compared to the large national entities. Requiring Small Concessioners to spend a disproportionate share of their resources to compete with the larger concessioners places Small Concessioners at a substantial competitive disadvantage. Consequently, the "cost to compete" is driving up Small Concessioners' costs and driving down their revenues at a more significant rate than the larger concessioners.

Additionally, the franchise fee factor places Small Concessioners at a competitive disadvantage. In the 1998 Act, Congress reacted to a few high profile cases where very large concessioners were paying absolutely minimal fees. Congress sought to increase the government's return by allowing a measure of fee bidding, especially for the big contracts that generate the majority of revenue to the government.

Initially, the franchise fee factor was intended to serve as a tie-breaker when opposing bids were otherwise evenly scored. Based on concerns that the tie-breaking concept might lead to franchise fee bidding, the Park Service removed the tie-breaking concept from the final rule, but retained the franchise fee consideration as one of the scored criteria. *See* 65 Fed. Reg. 20641 (April 17, 2000). Congress also added language to clarify that the primary purpose of the 1998 Act is to improve visitor services and park resources, not solely to generate more revenue to the government.[2]

Despite Congress's attempt to prevent fee bidding, fee bidding has occurred. While the larger concessioners can afford to pay higher franchise fees to the government in order to secure their bids, Small Concessioners simply do not have the resources to successfully compete in fee bidding and, therefore, are at a competitive disadvantage. Squeezing smaller qualified concessioners out of the market for the sake of increasing government's revenues is inconsistent with the 1998 Act's purposes. It tilts the scales to national corporations able to be the highest bidders. Restoring the preference to SBA-defined small businesses will help level the playing field in this area.

Moreover, restoring the preference to Small Concessioners will have a minimal impact on revenue collection. Based on Park Service financial reports, in 2003 all concessioners paid approximately $25.1 million in fees. The Park Service estimates that the big 50 group was responsible for approximately 90 percent of those fees. Further, that amount does not include the $25-$30 million in special accounts (facility construction, etc., in lieu of fees) the government receives primarily from the big 50. Thus, restoring the preference to Small Concessioners would not adversely impact Congress's fee collection goal.

INCREASING THE THRESHOLD WOULD IMPROVE THE QUALITY OF VISITOR SERVICES

In the 1998 Act, Congress identifies competition as a means of improving visitor services. Restoring the right of preference to Small Concessioners would advance this quality of services goal.

First, most Small Concessioners have a vested interest in the well-being of the parks in which they operate and, therefore, are more likely to provide quality services. Small Concessioners are typically local family-owned businesses that have provided quality services to visitors of our nation's parks for many years. In some cases, the operation pre-dated the park's establishment and, consequently, constitutes a significant historical aspect of the park. Additionally, in marked contrast

[2] Consideration of revenue to the United States in this determination and in scoring proposals under principal selection factor five will be subordinate to the objectives of protecting, conserving, and preserving the resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates. 36 C.F.R. § 51.16.

to the big 50, most Small Concessioners consist of only one local business. These family enterprises contribute substantially to their local communities and are frequently a vital part of rural economies. Small Concessioners also recognize that they must operate in an environmentally sound fashion to make the parks a pleasant place to visit.

Second, restoring the preference to Small Concessioners would improve visitor services because only concessioners that have performed satisfactorily under their previous contract earn the preference. *See* 16 U.S.C. § 5952; Pub. L. 105-391 § 403; 36 C.F.R. § 51.42. If concessioners do not perform and provide quality services, they do not earn the chance to match the best competing offer. The preferential right of renewal offers a substantial "carrot" to Small Concessioners to provide quality services so that they may earn the preference the next contract term. On the other hand, a system without this preference offers no incentive to provide quality services, especially when concessioners know it confers no benefits at the time of renewal. The current system encourages small concessioners to obtain a contract, make money and get out. The lack of the earned preference is a particular disincentive near the end of a contract. Small concessioners are unable to make capital investments in facilities and maintenance since they may not be able to recover those costs. The presence of the renewal right provides the incentive and assures continuing investment in quality visitor facilities.

Third, restoring the preference to Small Concessioners would allow more continuity, which experience demonstrates leads to better services. Restoring the preference would extend a measure of security to Small Concessioners allowing them to engage in long-term business planning and providing an incentive to make visitor beneficial investments throughout their contract terms—investments they are unlikely to make, especially in the final years of their contracts. Additionally, restoring the preference would help Small Concessioners retain qualified employees because of the assurances that their positions will continue.

Lack of continuity, on the other hand, is inefficient and adversely affects visitor services. Whether turnovers in concessions contracts has increased significantly since 1998 has yet to be determined; however, what is known is that when a turnover occurs, the contract award is either contested in a lawsuit or subjected to Congressional review. Visitor services are impaired by the uncertainty created as to which concessioner will be providing services the next term.

SUMMARY

Restoring the preference to Small Concessioners is consistent with the goals Congress articulated in the 1998 Act. Restoring the preference would provide performing Small Concessioners an opportunity to compete in the selection process on a level playing field, which would promote competition at all levels, not just among the smallest and largest operators. Restoring the preference would also provide the assurance of continuity Small Concessioners need in order to operate effectively, which in turn, will lead to improved visitor services. Accordingly, Congress should increase the threshold for the preference right consistent with the SBA standard for small businesses.

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