



# United States Department of the Interior

## NATIONAL PARK SERVICE

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Washington, D.C. 20240

IN REPLY REFER TO:

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### Memorandum

To: Regional Directors

From: Director 

Subject: Interim Guidelines for Commercial Use Authorizations

This memorandum provides interim guidelines under which Regional Directors may authorize superintendents to issue commercial use authorizations in accordance with Section 418 of Public Law 105-391 (Section 418). Commercial use authorizations (CUAs), for the most part, are a new means to authorize the provision of services to park area visitors that previously have been authorized under the Incidental Business Permit (IBP) program.

Section 418, which became law in 1998, permits the National Park Service (NPS) to authorize private individuals and entities to provide commercial services to park area visitors under CUAs instead of under concession contracts in two limited circumstances.

The first – “**in-park services**” -- is where the commercial services originate and are provided solely within the boundaries of a park area and do not have annual gross receipts of more than \$25,000. An example would be campground firewood sales.

The second—“**out-of-park services**” -- is where the commercial services originate and terminate outside of park area boundaries, regardless of annual gross receipts, and the use of park area resources is incidental to the services. An example would be a horseback trail ride that originates outside of park boundaries, crosses into the park area, and terminates outside the boundaries.

In either circumstance, a CUA may not permit the construction of structures, fixtures or improvements on park area lands.

On November 27, 2002, the NPS issued a proposed rulemaking to implement Section 418. A number of comments on the proposed rule were received (mostly concerned with the statutory requirements of Section 418 itself rather than the administrative requirements of the regulation). However, as a result, we have reviewed the proposed regulation and consider that there may be a

need to publish a revised proposed regulation for public comment. We are in the process of drafting a revised CUA regulation.

In the interim, to provide the field with the flexibility provided by CUAs, we are providing the attached interim CUA guidelines for your immediate implementation. They replace existing IBP guidelines including Special Directive 95-10 (except that the fee requirements of Special Directive 95-10 shall remain in effect and are applicable to CUAs pending further notice). Renewal of current CUAs/IBPs will be accomplished under the attached guidelines as CUAs.

Regional Directors may delegate, in writing to park area superintendents authority to issue all CUAs. However, the Regional Director must approve in advance in writing the issuance of any proposed CUA with estimated annual gross receipts of more than \$100,000, determining whether a CUA is the appropriate instrument to authorize the services. Regional Directors must notify Jo Pendry, Concession Program Manager, in writing of any proposed CUAs with estimated gross receipts in excess of \$1 million.

If you have any questions regarding these guidelines and the implementation of them, please contact Jo Pendry, Program Manager or Kathy Fleming, IBP/CUA Program Coordinator, in the WASO Concession Program Offices.

#### Attachments

cc: Regional Concession Chiefs

## COMMERCIAL USE AUTHORIZATIONS: INTERIM GUIDELINES

### Background

Section 418 of the National Parks Omnibus Management Act of 1998, Public Law 105–391 (Section 418), authorizes (but does not require) NPS, upon request, to issue commercial use authorizations (CUAs) to persons (referring to individuals, corporations and other entities) to provide commercial services to park area visitors in limited circumstances. CUAs, although used to authorize commercial services to park area visitors, are not concession contracts. They are intended to provide a simple means to authorize suitable commercial services to visitors in park areas in the limited circumstances described below. There is overlap between CUAs and concession contracts. A concession contract instead of a CUA may be awarded (under 36 CFR Part 51) if it is determined that the proposed services are necessary and appropriate for public use and enjoyment of the park area and that the more extensive requirements of a concession contract are necessary in light of the scope and nature of the services to be provided.

### Types of CUAs

There are two general types of commercial services that may be authorized by a CUA:

- (1) **In-park services.** “In-park services” refers to an operation with annual gross receipts of not more than \$25,000 from commercial services originating and provided solely within a park area. An example of an in-park service is firewood sales to visitors in a park area campground.
- (2) **Out-of-park services.** “Out-of-park “services” refers to the incidental use of park area resources by operations that provide commercial services originating and terminating outside of the park area (or within an inholding). An example of an out-of-park service is a horseback trail ride operation that is based outside of the park area but takes visitors on rides into and out of the

park area. A CUA of this type may not authorize solicitation of customers, sales, or payment for commercial services to take place within the park area; all of these activities must occur outside of the park area (or within an inholding).

Unlike a CUA for in-park services, there is no cap on the annual gross receipts that may be generated by the authorized services under an out-of-park CUA.

### **Issuance of Commercial Use Authorizations**

CUAs may be issued in the following conditions:

- (1) The authorization is issued to a qualified person to permit the provision of suitable commercial services to park area visitors. (A qualified person is a person that the superintendent determines has the ability to satisfactorily carry out the terms of the commercial use authorization);
- (2) The superintendent determines that the commercial services: (a) will have minimal impact on the park area's resources and values; (b) are consistent with the purposes for which the park area was established; and, (c) are consistent with all applicable park area management plans, policies and regulations;
- (3) For in-park services, the annual gross receipts are estimated to be less than \$25,000; and The superintendent determines that the terms and conditions of the authorization require the commercial services and related activities to be undertaken in a manner that is consistent to the highest practicable degree with the preservation and conservation of the resources and values of the park area. The authorization may include, when appropriate, terms and conditions designating use of a limited portion of a park area and/or visitor use limitations (entrance, user days, or similar use allowances).

### **Limiting the Number of Commercial Use Authorizations in a Park Area**

The superintendent is not to issue more CUAs than are consistent with the preservation and proper management of park resources and values. In considering whether to limit the number of CUAs to be issued for a particular type of commercial services, consideration should be given to the broader context in which CUA limits will be applied, including possible limits on private individuals, institutional use and commercial use. One tool is to limit the number of commercial operators. Other tools may include limiting use of all types by time period, area, number of trips, user days, party size or other parameters.

### **Actions to Take if the Number of Commercial Use Authorizations is Limited**

If the superintendent does determine to limit the number of CUAs to be issued for a particular type of commercial service, the issuance of the available authorizations is to be accomplished by the superintendent through a competitive process (unless otherwise provided with respect to Alaska park areas by Section 1307 of the Alaska National Interest Lands Conservation Act). The process is to provide all applicants a fair opportunity to obtain an available authorization. The most qualified applicant(s) (as determined under criteria developed by the superintendent as part of the competitive process) will be selected for issuance of the available CUAs. Superintendents are to consult with the applicable Regional Concession Program Manager to develop procedures and criteria for the competitive selection process.

If the superintendent limits the number of CUAs issued for a park area for a particular type of commercial service, or, if the superintendent establishes visitor use limitations under the authorization, the superintendent must take appropriate measures to ensure that the commercial

services are provided to visitors at reasonable rates and under appropriate operating conditions. The superintendent may include in the applicable CUAs special terms and conditions for this purpose (see attached CUA form). Superintendents are to consult with the Regional Concession Program Manager when considering limiting the number of CUAs to be issued or regarding reasonable rates or operating conditions.

### **Decision Process**

A decision to issue a CUA (or to limit the number of CUAs to be issued) must be made in accordance with park area planning policies and procedures, including appropriate compliance with NEPA and/or Section 106 of the National Historic Preservation Act as applicable.

### **Term of Commercial Use Authorizations**

The term of a CUA may not exceed 2 years and no preferential right of renewal or similar provisions for renewal may be provided.

### **Construction Under CUAs**

A CUA may not authorize construction of structures, fixtures or improvements within in a park area. However, a CUA may provide for the use of existing NPS buildings when necessary to assist in providing the authorized commercial services. If the provider will be responsible for a particular facility or assigned area within which they conduct their services, the authorization should include an assignment of those areas as an attached special provision to the CUA Form, including any associated fee requirements.

## **Commercial Tours**

Commercial tours that meet the requirements of these guidelines will be authorized through CUAs. (A commercial tour consists of one or more persons traveling on an itinerary that has been packaged, priced or sold for leisure/recreational purposes and no other services (except for incidental services such as on-board interpretation and box lunches) are provided.) Fees and related issues regarding commercial tours will be established under separate guidelines. Until new guidance is issued, current policy remains in effect regarding:

1. Use of the established tour fee schedule (see attached Exhibit C);
2. Park areas using the commercial tour fee schedule should not charge an additional administration fee if the park area issues CUAs for commercial tours (see attached Exhibit D);
3. No limitations on the number of commercial tour CUAs are allowed unless limitations are supported by other approved processes and policies; and
4. One-year notification to the tour industry regarding fee changes is required.

## **Non-Profit Organizations**

In accordance with Section 418, a non-profit organization is not required to obtain a CUA to conduct activities in a park area (even if the activities would otherwise be subject to authorization by a CUA) if the nonprofit organization does not derive taxable income from the activities. (A non-profit organization is an organization that has been determined by the Internal Revenue Service to be exempt from Federal income taxation as a nonprofit or not-for-profit organization under the terms of the Internal Revenue Code.) In order to avoid the need to obtain a CUA where it would otherwise be required, a non-profit organization must state in writing to

the superintendent that it will derive no taxable income from its activities in the park area, and, if requested, further substantiate this statement to the satisfaction of the superintendent. (Taxable income means income that is subject to Federal income tax under the terms of the Internal Revenue Code.)

However, a non-profit organization is required to obtain special use permits or other appropriate authorization as may otherwise be required by applicable NPS policies and regulations (and pay to NPS any required fees associated with the authorization) when engaging in activities on park area lands. Note that 36 CFR 5.3, in the absence of special regulations, prohibits engaging in or soliciting any business in park areas except in accordance with a permit, contract, or other written agreement.

## **Fees**

The superintendent is required to charge a reasonable fee for a commercial use authorization, the fees to remain available for expenditure by the superintendent to recover, at a minimum, associated management and administrative costs. Additional guidance on establishment and expenditure of CUA fees is to be issued. In the interim, the fee establishment and expenditure guidelines applicable to IBPs (see the applicable section of Special Directive 95-10 attached hereto as Exhibit A) shall continue to be followed. However, as park area facilities were not assigned under the IBP program, a fee for facilities should be included in any CUA that assigns park area facilities to the holder. See NPS 53 for assistance in determining an appropriate facilities fee.



Park area visitors who are transported into the park area by a holder of a CUA are to pay the same entrance and other fees as paid by other park area visitors unless otherwise stated in the CUA in accordance with applicable NPS policy and regulations.

### **Commercial Use Authorization Form**

Attached as Exhibit B to these guidelines is a CUA form that is to be used for issuance of CUAs.

### **Instructions for Filling out the Form**

1. Fill in information about the holder of the authorization.
2. Enter the areas of the park and facilities (if any) the holder is authorized to use.
3. Enter the beginning date of the authorization.
4. Enter the ending date of the authorization.
5. Enter a description of the commercial services authorized under the authorization.
6. Check the appropriate box on NEPA compliance.
7. Fill in the application fee as appropriate. (See Attachment A)
8. Check “required” with regard to insurance and fill in the minimum coverage amount. If law establishes a statutory minimum for the applicable State, include this as the required coverage. If there is not statutory minimum, include minimum coverage that is customary in the area of the park for similar operations.
9. Enter the Cost Recovery Fee.
10. Insert a facility fee, if any.
11. Enter the names of the signatories and date of execution of the CUA.
12. Include in the addendum any special park area conditions or instructions applicable to the authorization.

Attachments

