

Testimony
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Concession Contract Issues for Outfitters, Guides and Smaller Concessions
Subcommittee on National Parks, Recreation, and Public Lands
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Mr. Chairman and members of the Committee, thank you for giving me the opportunity to testify on the National Park Service's (NPS) contracts and authorizations issued to outfitters and guides and small concessioners in National Parks. America Outdoors Association represents the interests of more than 1,200 outfitters, guides and outdoor recreation service providers who are members of our association and our affiliate state organizations. Our members and affiliate members provide recreation services to more than two million Americans each year. Most of our members providing services to the public in National Parks operate under Category III and Category II contracts, so I will address the issues arising with those authorizations.

Mr. Chairman, please accept my sincere appreciation on behalf of outfitters and guides for your concern about the future of outfitted services in National Parks. I also want to express my respect and gratitude to the men and women of the NPS who diligently strive to enrich the lives of visitors by providing the public with access to the wonders, history and recreational opportunities available in National Park units.

Today, if we polled our member companies operating in National Parks, many would say their relationship with the NPS is good, although there are always some frustrations. Even before the 1998 Concessions Management Improvement Act became law, the NPS and the concessioners providing outfitting and guiding services to the public had achieved a high level of success. The services provided were generally excellent. Outfitters and many of the rangers were the quintessential experts in resource protection and interpretation. Our concern now is that storm clouds are gathering over this success and it will take more Congressional oversight to clear the skies. The NPS veterans who understand outfitting and guiding activities at the field level are retiring and it seems that few managers in concessions have experience with outfitting and outdoor recreation activities. Many new hires in concessions are business school graduates, reflecting a hiring policy which has its merits, but their familiarity with traditional outfitting and guiding is often limited. The NPS has increased its reliance on corporate consultants with little knowledge of outdoor recreation to advise the agency on risk management and other contract provisions. The net result is that some of what is now coming out of the Park Service simply doesn't work for outfitters and guides and other smaller concessioners.

The NPS's Commercial Services program is specifically authorized in federal legislation. That is a good thing, but it also leads to bureaucracy, reporting and unrealistic expectations that sometimes leave concessioners wondering whether they are in the business to serve agency processes and employees or Park visitors. As new contracts are issued, these concessioners are being squeezed by higher franchise fees and the added contract expenses levied by higher liability insurance requirements, maintenance requirements and other contract provisions. Even in this weak economy, it appears that the NPS sometimes seems to think there is no limit to the costs a concessioner or its customers can absorb. If current trends continue, many of these services and the quality of those services will be put at risk.

Overview of Challenges Facing Outfitters and Small Concessioners

I will provide specific examples of how this squeeze is playing out in current and pending contract solicitations and suggest some strategies to help the Service make needed adjustments.

- **Increased regulatory burdens and prospectus requirements impose substantial burdens on, and threaten the very viability of, smaller concessioners.**

Section 403 in Title IV of the National Parks Omnibus Management Act of 1998 provides that the award of concessions contracts “shall include simplified procedures for small, individually-owned, concessions contracts.” These simplified procedures are required for Category II and Category III contracts. This is not policy; it is a provision of the law. Despite this statutory requirement, the contracts issued today with their addendums are, in some cases, 15 pages longer than they were 10 years ago and are 54 pages in length for a small concession that grosses less than \$150,000 per year. Furthermore, the contract requirements, in some cases, are not realistic, as Mr. Mills will explain. The NPS’s failure to comply with section 403 threatens the very viability of some of these smaller operations with elevated contract costs and other requirements.

- **NPS insurance and risk management requirements also threaten the availability and affordability of outfitter and small concessioner services.**

The NPS’s imposition of ever higher insurance coverage minimums poses significant concerns for outfitters and guides and other smaller concessioners and the public that enjoy their services. A study by James Lynch, Casualty Actuary LLC, predicts the higher limits will ultimately eliminate smaller concessioners and “restrict the public’s ability to enjoy the spectacular open spaces and unique recreational opportunities that are the hallmark of the national parks.”

The liability insurance limits of \$5,000,000 established for float trips, horseback riding and similar activities in one Park, for example, will not be sustainable when a harder insurance market inevitably returns. If this limit is applied to other activities in other Parks, smaller concessioners will be unable to obtain coverage at an affordable price. America Outdoors Association has provided NPS Commercial Services staff with documentation that confirms this conclusion. The response to our input, which was solicited by Commercial Services, was that these outfitted activities might be eliminated if they were not insurable at the levels recommended by the NPS consultant. These insurance requirements are taking the form of higher liability insurance limits and additional, sometimes quixotic coverages, which add unnecessary and inappropriate expense to the concessioner’s operation.

- **Some concessioners are being squeezed by higher fees and the transfer of the costs for facilities rehabilitation to the concessioner’s customers.**

The NPS is requiring concessioners with Category II contracts to make capital improvements under the maintenance provisions of their contracts, which is a change in policy made in the Washington office without notice, and is an unexpected, unforeseen obligation for contracts already in effect. At the same time some of these operators are finding the NPS cutting or curtailing the concessioner’s operations, such as suspending or eliminating its use of trails, which diminishes its revenues and its ability to absorb these added maintenance expenses. One Category II concessioner saw its fees triple and its maintenance fee more than double. This concessioner projected negative income for the first five years of a 10-year contract. Meanwhile, the Park is trying to diminish its use of trails. Even Bowles Simpson

recommended higher fees to support NPS operations. We think this may be a recipe for disaster for smaller concessioners since fees were raised significantly during a more robust economy.

Outfitting and guiding in National Parks offers the public incomparable experiences that cannot be duplicated. From climbing Grand Teton, to rafting the Colorado River through the Grand Canyon or canoeing the Buffalo River in Arkansas, the NPS is blessed with a cadre of dedicated professionals to take the public into places in the backcountry that they would never be able to visit without the assistance of an outfitter. The majority of these operations are fairly small. Of the 575 concessions contracts, 75 percent gross less than \$500,000. Many of these operators receive less personal income, health insurance and retirements benefits from their operations in the National Park than the agency personnel who oversee them. The NPS must take a different approach and different attitude toward these concessions if it expects them to continue to be able to deliver quality service to the public.

Discussion of Issues and Recommendations

1) Increased regulatory burdens and prospectus requirements.

As noted earlier, Section 403 in Title IV of the National Parks Omnibus Management Act of 1998 states that the award of concessions contracts “shall include simplified procedures for small, individually-owned concessions contracts.” As you will hear today, those procedures are anything but simplified. These processes are becoming overwrought and far too complex with requirements that cannot reasonably be fulfilled. If the NPS continues on its current course, its policies, fees and contract requirements coupled with a sometimes indifferent attitude toward concessioners will ultimately jeopardize the services and opportunities available to the public in the backcountry of National Parks. At a time when Park visitation is lagging below population growth and the public is spending less on travel, the NPS should be more realistic in its fees and regulation and, as we have asked, eliminate duplication, restructure staffing, and streamline reporting requirements and overhead costs.

Congress has an important role to play in oversight. Without the direct involvement of the members of this Committee and your colleagues in Congress, many opportunities will be lost because these experiences delivered by small concessioners will become too expensive due to fee increases, duplicative regulation and restrictions on concessioner activities. With deficit and debt reduction taking center stage among Congressional priorities, it is incumbent upon federal agencies to improve their operating efficiencies and develop strategies to encourage participation in Park activities. Simply passing on the costs for inefficient processes and high construction overhead is not the answer.

We realize this statement may not be viewed positively by agency policymakers. Indeed, we are eager to be partners with the NPS in delivering high quality services to the public. At this point, however, unless there are changes in attitude and management, with less reliance on unknowledgeable consultants, we fear for the future of many recreation opportunities delivered by outfitters and small concessioners.

Recommendation: Ask the NPS Concessions Management Advisory Board

- a) To Submit a Plan to Streamline Concession Contract Proposals for Smaller Concessions, and
- b) Eliminate Duplication and Unnecessary Reporting Requirements for Smaller Concessioners.

We respectfully suggest that the Committee ask the Concessions Management Advisory Board to provide the Committee with a report on how NPS may reduce some of the prospectus and subsequent

contract reporting requirements for smaller concessioners in keeping with the intent of the 1998 Act. The authority for the Concessions Management Advisory Board calls for it to advise NPS on “[w]ays to make National Park Service concessions programs and procedures more cost effective, more process efficient, less burdensome, and timelier” and to submit an annual report to the House Committee on Natural Resources on its activities.

Here are some examples of issues that should be considered:

- **Is a 10-year pro forma projection of revenues from a weather-dependent, seasonal business renting canoes and kayaks realistic?** One could understand some financial projection requirement for larger concessions with fixed capacity, but when the Park Service prohibits a horseback riding concessioner from accessing the trail system for several weeks because an official in the Park decided it was too wet to use the trails, financial projections are irrelevant. Some outfitters have reasonably reliable seasons, while others are totally dependent upon the benevolence of weather and water conditions that vary dramatically from one year to the next. Projecting 10 years of revenue in these situations is superfluous and expensive for a small concessions contract. These projections may be appropriate for concessioners who are expected to maintain facilities, but there is no way a concessioner can meet the expectations of those financial projections when the Park is curtailing its operations for sometimes specious reasons.
- **The NPS’s archaic policy of approving concessioners’ prices based on “comparability studies” should be eliminated.** Even though the 1998 Act provides the authority for “comparable” prices in Section 406 (Title IV, National Park Omnibus Management Act of 1998), and the Service interprets this as a requirement, oftentimes there are no comparable services in the area and certainly not under conditions comparable to those that the NPS demands. Furthermore, the 1998 Act gives the Director flexibility in setting prices. The Concessions Management Advisory Board should recommend an alternative to comparability studies, especially when concessioners are subjected to unanticipated costs or interruptions in their business.
- **The Advisory Board should review reporting requirements for Category II and Category III contracts and recommend elimination of unnecessary and duplicative reports.** A concessioner operating under a Category II contract will submit between 72 and 100 reports annually to the NPS about various aspects of its operation (See Exhibit 1 in the Addendum). Additional reports, audits and returns are required to be submitted to multiple state and federal agencies as well as to the NPS. One Category II concessioner estimates his staff spends two weeks out of a four-month season submitting reports to NPS. We respectfully suggest that the Advisory Board include in its report to the Committee ways to cut down on this reporting, which will leave more time for the concessioner to provide services to its customers.

2) Unsustainable and inappropriate insurance requirements.

One of the most disturbing trends as the new cycle of contracts emerges is the increased insurance requirements. These changes come in two forms:

- Higher liability insurance coverage limits, which are as high as \$5 million for float trips, horseback riding and other activities in one Park; and
- Broader coverage requirements that are inappropriate and in some cases frivolous.

High limits simply will not be affordable for some higher adventure activities, as you will hear today. While the limits established for each contract are based on a consultant’s analysis, the ultimate responsibility in setting them lies with NPS. Ultimately, it is the visitor who pays the price.

In "Pushing the Limits: An Examination of Liability Insurance Limits for National Park Service Concessioners," liability insurance expert James Lynch concluded:

"Insurance prices are currently at a low point. When they rise, they will rise sharply, probably 50% or more, perhaps to the point where – if these limits are adopted throughout the park system - concessioners will be forced out of business.

- *At the same time that insurers raise prices, they will restrict the availability of coverage. Some concessioners will be unable to obtain coverage at any price, as insurers pull back from the perceived higher risks of outdoor recreation business.*
- *The affordability and availability problems will affect both large corporate concessioners and smaller, family-run ones. However, the smaller firms will face a greater challenge to survive, as they lack the financial resources to weather the five to 10 years that can pass before an insurance crisis is resolved.*

The net result appears to have the potential to severely restrict the public's ability to enjoy the spectacular open spaces and unique recreational opportunities that are the hallmark of the national parks."

I have worked in the outfitting and outdoor recreation industry since 1980 and since 1982 as an industry trade association executive. On two occasions, in 1988 and again after the September 11, 2001 terrorist attacks, contraction in the insurance markets resulted in elimination of liability insurance coverage for many adventure recreation services. Certainly, limits of \$5 million would not have been available during these periods for many adventure activities, and premiums remained elevated for a period after September 11. So, aside from greatly increasing the costs, the threat that the higher liability insurance limits we see in some Parks will eliminate these recreation experiences and services is real and inevitable.

Some of the problem with higher liability insurance requirements appears to be the misconception by NPS regarding the proper purpose of insurance. Insurance is not designed to be a form of compensation for injured parties regardless of negligence. In 2011, at least 18 people, mostly hikers and none of them on outfitted trips, died in Yosemite National Park alone. It is illogical and unreasonable to maintain that the customers of concessioners should be compensated for their injuries regardless of negligence while the vast majority of visitors to National Parks who do not use the services of concessioners would not be eligible for similar compensation. The double standard should be abundantly clear. As Director Jarvis noted in Director's Order #50C, "The National Park Service's mission is to conserve park natural and cultural resources and processes unimpaired and provide opportunities for the public to enjoy them. In doing so, the NPS must strive to prevent visitor injuries and fatalities within the limits of available resources. Within this context, visitor risk management does not mean eliminating all dangers, nor can the NPS guarantee visitor safety or be responsible for acts and decisions made by visitors that may result in their injury or illness."

Ironically, NPS requires canoe liveries to assume responsibility for self-inflicted injuries by requiring \$5,000 in no-fault medical payment insurance to their customers who rent equipment and then set about on their own trips beyond the supervision of the concessioner. If one of these visitors cuts himself with a knife while in an NPS campground during the canoe trip, this coverage requirement would apply. This coverage is not standard as Commercial Services and the NPS consultants maintain. No-fault medical coverage may be included in liability policies when a person is under the care and supervision of an outfitter, but even \$5,000 is higher than normally found in the outfitting industry. If

this coverage is standard, then, by the same token, NPS should provide similar coverage to compensate campers at NPS-run campgrounds and other visitors paying fees for services delivered by NPS for a fee.

Some activities include inherent risks that can be managed but not totally eliminated, and under no circumstance can visitors to National Parks be assured that their visits will be “safe,” which is an unachievable absolute. NPS outfitter concessioners strive to manage and reduce their risks, but cannot be expected to achieve absolute safety in their operations without eliminating the adventure that makes the experience authentic and incomparable.

NPS Commercial Services appears to be bound to accept the recommendations of its consultants who appear to know little about outdoor recreation services. Higher limits are not necessary to protect the National Park Service, which is generally afforded protection under the Federal Tort Claims Act.

Some examples of the impacts of the higher insurance requirements include the following:

- In Grand Teton National Park, one guest ranch located outside the Park that provides a relatively small number of visitors with recreation services in the Park saw its premiums jump from \$19,000 in 2009 to \$44,500 in 2010—a \$25,000 increase in one year—due to the increased liability insurance requirements in its contract. This same ranch even asked NPS if it could temporarily suspend its contract while it considers whether to continue to provide the services authorized if the premium increase was too much of a financial hardship.
- Another guest ranch, which is on Park property, is required to carry \$11 million in liability insurance, which is far in excess of its liability exposure. While the ranch has carried this amount of insurance in the past because it had, heretofore, been inexpensive, the contract requirement eliminates the concessioner’s flexibility if the premiums skyrocket. Perhaps the most unreasonable requirement is for earthquake coverage, since the ranch rests in a fault zone. Earthquake coverage will likely cost the ranch \$8,000 to \$10,000 in additional premiums to rebuild NPS-owned property in the event of a catastrophe. The NPS also added a requirement for flood insurance even though the ranch is not eligible to participate in the National Flood Insurance Program because it is not in a flood zone.
- As previously mentioned, canoe liveries on the Buffalo River are required to carry \$5,000 no-fault medical payment coverage for injuries sustained on self-guided canoe trips even when those injuries are self-inflicted or due to the negligence of the injured party. NPS claims it reduced the franchise fee to reflect this requirement; however, the policy of requiring no fault medical coverage for self-guided trips is inappropriate even if the fees are lowered.
- In 2006, one of NPS’s consultants decided that whitewater rafting outfitters had to have maritime insurance, which would have eliminated many if not most of these experiences in National Parks. Fortunately, NPS Commercial Services rejected that proposal. But this is another example of the kinds of inappropriate recommendations that continue to emerge through reliance on these consultants who do not seem to appreciate that these adventures are part of what makes our National Parks unique.

Recommendation:

The Federal Lands Recreation Enhancement Act (FLREA) authorized the National Park Service and other federal land managing agencies to provide services directly to the public, to rent equipment and facilities for a fee. For example, at Buffalo National River, the National Park Service operates campgrounds and collects fees from campers. No concessioner is involved in the campground operation. Visitors to NPS campgrounds are not afforded the insurance coverage that canoe livery operators are required to provide under their contract, and the agency enjoys protection from lawsuits

under the Federal Tort Claims Act provided it does not violate its regulations or the laws in providing those services.

If Congress authorizes federal agencies to provide recreation services, facilities and equipment for a fee when FLREA is reauthorized, those agencies and authorized concessioners should be subject to the same liability requirements. Otherwise, unfair competition could emerge as outfitter operations struggle under higher liability insurance requirements while government provided services and the services offered by Park affiliated organizations are offered without the added costs to the consumer of high insurance premiums.

We also question whether NPS should routinely require concessioners to insure agency property for catastrophic events such as floods and earthquakes. Many National Parks are in areas that by their nature are geologically unstable or prone to natural disasters. The flood in Yosemite Valley wiped out 500 to 600 overnight units, many of which will not be rebuilt due to successful legal challenges. How many similar insured properties would actually be restored after a catastrophic event? NPS should reconsider a requirement for earthquake coverage at the very least.

3) Inappropriate use of maintenance clauses in contracts for capital improvements.

There is no question that NPS is looking to recover from concessioners some of the diminished construction appropriations for rehabilitation of neglected Park facilities and to restore reduced appropriated funding for its operations through franchise fee increases. As reported in the Billings Gazette on May 30, 2012, an NPS spokesperson at Yellowstone National Park stated that the concessions contract was the most viable source of funding to make major improvements in facilities in Yellowstone. While this strategy may be appropriate in some instances, NPS cannot rationally expect small concessioners and their customers to restore facilities and historic structures after decades of neglect in ten-year contracts while at the same time increasing insurance costs, franchise fees and other financial burdens. If NPS wants to require such investments, it should consider adjusting the franchise fee or extending the term of the contract in order to ensure a reasonable opportunity for these concessioners to make a profit under their contracts.

Here are some examples:

- NPS hired Price Waterhouse Coopers to inspect all NPS facilities in several western parks to specifically identify shortcomings in facilities with the goal of assigning more tasks to concessioners to bring facilities up to code and appropriate operating condition. In some cases, over 300 individual items were identified for disposition. Performance of all items would, in the short term of a contract, allow NPS to recover from decades of neglect and restore these facilities to near new condition. The impact on concessioners is a material increase in expenses associated with repairs and maintenance that is outside the parameters of the “reasonable and ordinary” maintenance requirement in the contract. In one case of a small concessioner in a western park, repair and maintenance costs increased by 350 percent due to the exploitation of the maintenance clause in the contract for projects that were not revealed or anticipated when the proposal was submitted. Back-loading Category II contracts for capital improvements is inappropriate.
- There appears to be a trend to break down capital improvement projects in segments that are deemed to be repairs and maintenance and therefore required to be completed during an existing contract term by concessioners even when capital improvements, as noted earlier, are not appropriate policy for Category II contracts. In the case of one concessioner in a western park, 28 such projects were identified and assigned to the concessioner. The concessioner was forced to hire

an attorney at considerable expense to file a protest of the decision and was able to remove 26 of the 28 projects requested.

- A retiring concession maintenance coordinator for that same park told the concessioner that he was instructed at an annual NPS meeting held in Denver in early 2010 that all park personnel should look for ways to push more capital improvement costs to concessioners, and discussed “creative” ways to do so. Unilaterally changing the requirements of an existing NPS contract is not a fair and honorable way to do business.

At some point, the quality of visitor services available to the public will suffer if concessioners are put in the position of having to operate marginally profitable businesses. Concessioners must maintain profitability to invest in new equipment and have sufficient cash on hand to fund their promotions and staffing during the off-season. Some concessioners have already seen dramatic fee increases in previous contract solicitations, which were issued in a more robust economic environment. They cannot absorb or pass on more costs during a weak economy.

Under any circumstances, NPS should not foist capital improvements onto concessioners where these requirements were not disclosed and anticipated when the concessioner submitted its proposal. This is simply an unfair and inappropriate business practice that would not be tolerated by NPS if a concessioner attempted to misinterpret its authority in the contract.

Certainly, NPS may want to encourage concessioners to make investments in Park facilities where appropriate, but in doing so, the Service must be up front about those requirements and provide adequate terms, appropriate fees and allow a reasonable return on the investment.

Recommendation:

The 1998 Concessions Management Improvement Act requires NPS to allow a reasonable opportunity for a profit. When some of these contract requirements are developed or audits are conducted, it appears that this critically important provision of the 1998 Act is being overlooked. What constitutes a reasonable opportunity to make a profit is not well defined and therefore subject to interpretation. Nonetheless, NPS should not require capital investments from contracts that were not intended for that purpose, such as Category II contracts, unless it changes its official policy. The agency should use appropriate funds to restore these facilities and not rely on revenues generated by the concessioners’ customers since many of these structures are truly historic and very old. We just do not think the customers and market for recreation activities can bear the costs of the preservation of these facilities. I cannot say that we have the answer to this issue, except that the agency may need to consider some non-traditional, new strategies to achieve the restoration of these facilities.

4) Eliminate duplicative regulatory functions.

This is a management and operations issue which may require reorganization. Some Parks have limited concessions staff while other Parks have duplicative positions. If a concessioner is a day late with one of its numerous reports, it may be charged with a contract violation. But if it needs price or other approvals, often no one is around for days, sometimes weeks, because staff is on leave or assigned to temporary duty elsewhere in the Service. In other Parks, duplicative staffing is an issue. For example, in one western Park, a concession is subject to surprise inspections by a Park Concessions Specialist who audits its compliance with maintenance provisions in its contract, and another inspector who is the Maintenance Specialist who performs a similar inspection. Often, the conclusions and reports from these two inspectors are at odds, even though they both work for the concession services.

Recommendation:

The NPS is blessed with some innovative and remarkable new superintendents and regional directors. We believe many of them understand that in light of current and future budget shortfalls, the NPS will be among the federal agencies forced to operate more efficiently. The costs of years of creeping bureaucratic growth and duplicative functions in overlapping departments cannot simply be passed on to the public without diminishing participation and appreciation for National Parks.

There are cultural issues within NPS that we believe give rise to some of these problems with the private sector — insensitivity to the demands of running a small business when there should be a stronger sense of partnership.

Congress and this Committee certainly have an important role to play in recognizing and appreciating those within the NPS who are not afraid to make improvements to the efficiency of the agency. We hope that adoption of some of the recommendations in this testimony is one small step in that direction.

Thank you for the opportunity to testify on these important issues. Their resolution will determine whether access to high quality outdoor recreation services for the outfitted public will remain a viable option for visitors to National Parks tomorrow and into the future.

Exhibit I
Reporting Requirements Category II Contract

NPS requires extensive reporting regardless of size of a concessionaire. We currently file the following reports. Some of the reports are submitted monthly or every month during the concessioner's operation, so the total number of annual reports exceeds 70 to 100 for a Category II contract, depending on the number of months of operation.

1. Annual Maintenance Plan
2. Annual Safety Plan
3. Annual Employee Manual update
4. Annual Pricing analysis
5. Dates of Operation Request
6. Annual Reviewed Financial Statements (These have to be keypunched into a national database system and reviewed a second time by accountants at concessionaire expense, submittal format is not in compliance with GAAP)
7. Annual Environmental Plan
8. Annual Integrated Pest Management Plan
9. Annual Utility Pass through calculations and request
10. Annual Trail Maintenance Plan
11. Monthly Trail Maintenance Report
12. Monthly Incident Log
13. Monthly Accident Log
14. Monthly Report of Reduced Rates Government Employees
15. Monthly Visitor Use Report
16. End-of-Year (EOY) Maintenance Recap
17. EOY Annual Income Recap
18. EOY Utility Pass through recap
19. EOY Accident/Incident meeting, must bring all our logs for inspection
20. EOY Trail maintenance meeting, must bring all of our logs for inspection
21. EOY Safety meeting, must bring all our internal safety meeting minutes and documents for inspection
22. Subject to two surprise inspections at each facility per season and have as little as 48 hours or at the most two weeks to respond to inspection report findings, including any repair and maintenance issues. Repair and maintenance issues identified by inspector are often inconsistent with agenda as set by the maintenance concession specialist. Therefore, additional repair and maintenance tasks often get added outside the agreed upon tasks in approved and monitored maintenance plan.