

Director's Order # 35A: Sale or Lease of Park Services, Resources, or Water in Support of Activities Outside the Boundaries of National Park Areas.

Approved: /s/ Donald W. Murphy (for Director; signed original on file in Office of Policy)
Director

Effective Date: July 8, 2004

Sunset Date: This Order will remain in effect until amended or rescinded by the Director

This Director's Order (DO) renews the previous DO #35A, which sunset on July 7, 2004.

1.0 Background and Purpose

Public Law 91-383 (84 Stat. 827) was enacted in 1970 to improve the administration of the national park system. As amended by Public Law 94-458 in 1976 (90 Stat. 1939), Section 3 of Public Law 91-383¹ provides the following authorization:

Sec. 3. In order to facilitate the administration of the national park system, the Secretary of the Interior is authorized, under such terms and conditions as he may deem advisable, to carry out the following activities:

(e) enter into contracts which provide for the sale or lease to persons, States, or their political subdivisions, of services, resources, or water available within an area of the national park system, as long as such activity does not jeopardize or unduly interfere with the primary natural or historic resources of the area involved, if such person, State, or its political subdivision--

(1) provides public accommodations or services within the immediate vicinity of an area of the national park system to persons visiting the area; and

(2) has demonstrated to the Secretary that there are no reasonable alternatives by which to acquire or perform the necessary services, resources, or water.

This authority shares some similarities with the authority contained in section 4 of the Act of August 8, 1953 (16 U.S.C. 1b(4)), which allows the National Park Service (NPS) to furnish, on a reimbursement of appropriations basis, all types of utility services to concessioners, contractors, permittees, or other users of such services, within the national park system. The major distinction between the two authorities is that this authority is generally applicable outside the parks, whereas the 16 U.S.C. 1b(4) authority is applicable exclusively within the parks. The purpose of this Director's Order is to establish operational policies, procedures, and requirements for implementing the 16 U.S.C. 1a-2(e) authority. Implementation of the 16 U.S.C. 1b(4) authority is the subject of Director's Order 35B: Sale of Park Utility Services to Support

¹ Codified at 16 U.S.C. 1a-2(e)

Activities Within the Boundaries of National Park Areas.

2.0 Authority to Issue this Director's Order

The authority to issue this Director's Order is contained in 16 U.S.C. 1 through 4 (the NPS Organic Act), and in Part 245 of the Department of the Interior Manual, which delegates to the NPS Director the Secretary of the Interior's authority to supervise, manage, and operate the national park system.

This order is intended only to improve the internal management of the NPS and it is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its department, agencies, instrumentalities or entities, its officers or employees, or any other person.

3.0 Policies, Procedures, and Requirements

Neither the law nor NPS policy obligates the NPS to sell or lease any services, resources, or water. The decision to sell or lease is within the sole discretion of the Secretary of the Interior (or the Director, as the Secretary's designee). However, some requests for the use of NPS services, resources, or water may lie outside the scope of 16 USC 1a-2(e) and Director's Order #35. In these instances, the NPS will seek guidance from the Office of the Solicitor regarding applicable legal authorities.

With specific regard to water resources, water is considered a vital part of the park environment. While this Director's Order conditionally allows the NPS to authorize the sale or lease of water, the NPS's primary responsibility under the Organic Act is the preservation and protection of park resources—including water resources and the water dependent environment—for the enjoyment of future generations. Meeting this commitment in the future may require NPS use of water presently considered available for sale or lease. Therefore, when a park's future resource protection or visitor needs dictate, the NPS will terminate the sale or lease of park waters.

3.1 Park superintendents may exercise the Director's authority to sell or lease park services, resources, or water, provided that the requirements contained in this Director's Order are met. Superintendents are encouraged to consult with subject matter experts at the Support Office, Regional Office, Washington Office, and the Office of the Solicitor early in the application evaluation process to ensure that all appropriate factors are considered.

3.2 The NPS will consider a request for the use of park services, resources, or water through a Special Use Permit (permit) application and approval process, or through the use of a written agreement, whichever is most appropriate to the situation. In considering applications and granting approvals, the requirements of this Director's Order will apply. If resources or water are to be transported across Federal property, a separate right-of-way permit may be required, in accordance with Director's Order #53: Special Park Uses.

3.3 When applying for a permit or agreement, the applicant must demonstrate that:

(a) the accommodations or services provided are available to the general public in the immediate vicinity of a park unit; and

(b) the service, resource, or water under consideration is essential to the provision of the accommodations or services described in 3.3(a); and

(c) there is no reasonable alternative to their use of services, resources, or water from within the park by showing that either:

(1) an emergency need exists, due to an unforeseen disruption to an existing source of services, resources, or water, and the use of any other source of the service, resources, or water is not feasible; or

(2) a non-emergency need exists, and no other alternatives to the use of park services, resources, or water are legally, economically, or environmentally viable.

(d) if the request is for the use of water, the water use will not contribute to a future dependency on, or increased demand for, a park's water resources.

3.4 An application may be approved only after the superintendent first determines that:

(a) the NPS concurs with the applicant's assertions under 3.3 (a), (b), (c), and (d); and

(b) the use of park services, resources, or water by the applicant facilitates the administration of the park; and

(c) *if the application is for the use of water*, the use of water will be in accordance with the laws and regulations governing ownership and use of water and water rights; and

(d) the use will not jeopardize or unduly interfere with the visitor experience, or cause unacceptable adverse impacts to the park's cultural or natural resources. This determination can be made only as a conclusion of National Environmental Policy Act environmental impact analysis prepared in accordance with Director's Order #12. Where the available information is not adequate to draw conclusions, the applicant will be required to provide additional information. The documentation will describe impacts inside and outside the park, including the effects of use of the service, resources, or water on the park's environment, administration, management, protection, and visitors; and

(e) the applicant will reimburse the cost to the government of processing the application (for example, the cost of developing and reporting information necessary to make any of the determinations in 3.4 (a) through (d)). Reimbursement of costs may be waived by the NPS if the NPS determines that approval of the application will be commensurately beneficial to the interests of the NPS.

3.5 If an application is approved, the permit or agreement will contain the following, at a minimum:

(a) a charge of fair market value for the use of the services, resources, or water, but not less than the full cost to the government of providing the services, resources, or water (e.g., costs for mitigating or monitoring the effects on the park environment, administration, management, protection, and visitors), in accordance with 31 U.S.C. 9701, OMB Circular A-25, and the procedures established in Reference Manual 35; and

(b) an expiration date commensurate with the immediacy of the applicant's need and the potential for environmental effect. Permits or agreements based on emergency needs will be for a period of 1 year or less. Where it is deemed to be in the best interest of the NPS, other permits may be for time periods longer than 1 year but, under normal situations, not to exceed 5 years. Expired permits or agreements may be renewed only upon re-application of the policies, procedures, and requirements of this Director's Order. Renewal of permits or agreements based on emergency needs will require evidence that the applicant is diligently planning and implementing actions to resolve the emergency; and

(c) a provision for revocation at the discretion of the NPS at any time without compensation; and

(d) a provision that no permanent property rights will be conveyed to the user for any resource or water within an area of the national park system; and

(e) *if the request is for the use of water*, a provision that the NPS will review throughout the permit period all plans by the applicant for water-consuming or water-dependent development to verify that the permitted water use will not contribute to a future dependency on, or increased demand for, a park's water resources.

3.6 The superintendent must maintain an administrative record for each application, documenting the decision steps and implementation activities.

3.7 Prior to final approval of an application requesting services, resources, or water *for non-emergency needs* under section 3.3(c)(2), the superintendent will send through the regional director to the appropriate associate director (e.g., for water, the Associate Director for Natural Resource Stewardship and Science; for services, the Associate Director for Park Planning, Facilities, and Lands) a copy of:

(a) the applicant's request, including all pertinent background information;

(b) documentation required under sections 3.3 through 3.6; and

(c) a draft of the authorizing special use permit or agreement, including all special conditions.

The associate director will provide review comments on the application package for completeness and Service-wide policy consistency.

3.8 An application requesting services, resources, or water *for emergency needs* under section

3.2(c)(1), should be reviewed following the section 3.7 procedures whenever practicable. However, if health or safety is in jeopardy, and time is of the essence, then approval may be granted without prior review. In those cases, the superintendent will notify the regional director and the appropriate associate director (e.g. for water, the Associate Director for Natural Resource Stewardship and Science) as soon as possible, preferably before approval rather than after approval. Although approval may have already been granted, the associate director will still provide review comments on the application package for completeness and Service-wide policy consistency.

3.9 As part of the review process described in sections 3.7 and 3.8 above, the associate director and superintendent may confer with the Office of Legislative and Congressional Affairs on whether to submit information about the proposal to the appropriate congressional committees for review prior to the NPS entering into any legally or morally binding commitments, as recommended in House Report No. 91-1265.

3.10 Regional directors may impose additional review procedures or considerations beyond those required by this Director's Order.

----- *End of Director's Order* -----