



United States Department of the Interior

NATIONAL PARK SERVICE
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IN REPLY REFER TO:

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Memorandum

To: Regional Directors

From: Chief Financial Officer

Subject: Guidance on National Park Service Leasing to another Federal Agency

This memo discusses leasing between the National Park Service (NPS) and another federal agency, and clarifies NPS leasing procedures contained in Director's Order #38: Real Property Leasing, and Reference Manual # 38.

Purpose

This memo:

- Identifies the laws, regulations and policies that regulate leases and agreements with other Federal agencies;
- Clarifies what authorities are available to NPS for leasing NPS owned or administered facilities to other Federal agencies;
- Explains what tools and agreements NPS may use in order to lease NPS owned or administered real property to another Federal agency;
- Discusses similarities and differences between a NPS/Federal lease and a NPS/private lease.

Background

Pursuant to Section 1 of the Reorganization Plan No. 18 of 1950 (40 U.S.C. § 301), the General Services Administration (GSA) holds general leasing authority for government agencies. Generally, absent specific statutory authority, an express delegation of authority from GSA, or falling within the regulatory exception (discussed below), a federal agency may not enter into any lease on its or the government's behalf. The NPS may use any of the following statutory authorities: (1) its own authority under 54 U.S.C. Section 102101, et. seq., recodified from Section 802 of the National Parks Omnibus Management Act of 1998 (the 1998 Act), as implemented under 36 C.F.R. Part 18 (herein an NPS Lease), and (2) Service First, Public Law 113-76, Sec. 430.

Under an NPS Lease, the NPS may lease NPS owned or administered buildings and associated property to any person or governmental entity in certain circumstances. In Reference Manual

#38 (RM-38), the NPS indicates that a governmental entity refers to (1) all levels of government, i.e., federal, state, and local, and (2) federally recognized Indian tribes. The primary advantage to using an NPS Lease is that the rental proceeds remain with the National Park Service rather than going to Treasury. The NPS is required to receive at least fair market value rent under a NPS Lease.

Historically, some parks issued Special Use Permits ("SUPs", 36 C.F.R. § 1.6, Director's Order 53, and Reference Manual 53) to authorize a federal agency's long-term use of park facilities, but SUPs are not the best legal mechanism. As a general matter, short term or long term occupancy of an NPS structure should be authorized under a lease. SUPs should only be used for short-term activities that take place in a park.

Applicable Law, Regulation, Policy, and Guidance

- A. NPS Leasing Authority** [NPS as Landlord/Lessor only]. 54 U.S.C. Section 102101, et. seq., as implemented by 36 C.F.R Part 18, expressly authorizes NPS to lease park area buildings and associated property (under a number of conditions) for activities that are consistent with the purposes of the park area and compatible with NPS programs. Policy and sample lease forms are contained in Director's Order #38: Real Property Leasing, and Reference Manual# 38. Some additional specific guidance on leasing may be found in the Commercial Services Program's Policy Library on Sharepoint and on the NPS policy page under Commercial Services.
- B. National Historic Preservation Act.** The National Historic Preservation Act (Pub. L. 89-665; 54 U.S.C. § 306121, as implemented by 36 C.F.R. Part 18), provides each federal agency, after consultation with the Council on Historic Preservation, the authority to lease historic property owned by the agency to any person or organization if the agency head determines that the lease will adequately ensure the preservation of the historic property.
- C. Federal Agency GSA Requirements.** 40 U.S.C. §585 authorizes GSA to enter into leases for a Federal agency in a building (or improvement) that is in existence or being erected by the lessor for the accommodation of the Federal agency for terms up to 20 years. Unless a Federal agency has a specific regulatory delegation of authority to acquire leased space, it must use GSA to lease real property. However, 41 C.F.R Section 102 -72.30 (the "Can't Beat GSA Leasing" program) allows Federal agencies to lease up to 19,999 rentable square feet of general purpose space for terms of up to 20 years and below prospectus level requirements, regardless of geographic location , without using GSA. This delegation includes some conditions Federal agencies must meet when conducting the procurement themselves, such as training in lease contracting and reporting data to GSA.
- D. Service First.** The "Service First" authority. codified at 43 U.S.C. § 1703, provides agencies within DOI and the USDA with the authority to develop programs to conduct projects, planning, permitting, leasing, contracting, and other agency activities, either

jointly or on behalf of one another. These activities include, but are not limited to, land management planning, all aspects of land management, public affairs, workforce and organizational support. In support of these activities, the agencies may share resources, including equipment and facilities. This authority also permits the Secretaries to make reciprocal delegations of their respective authorities, duties, and responsibilities in support of the "Service First" initiative agency-wide to promote customer service and efficiency.

E. The Department of the Interior, Office of Financial Management, Inter-Intra Agency Agreement Handbook (September 21, 2015). This handbook provides guidance on determining the appropriate legal instrument for executing external (Inter) and internal (Intra) Agency Agreements (IAA).

F. 36 C.F.R. Part 18. This regulation implements that statutory authorities provided by 54 U.S.C. Section 102101, et. seq. and 54 U.S.C. § 306121. Among other provisions, these regulations outline what determinations must be made prior to leasing a property, provide how the Service will solicit and review proposals. outlines what general and specific provisions must be in a lease and limits the term of a lease to 60 (sixty) years.

G. Additional NPS policies. Additional NPS policies related to the leasing of NPS Properties can be found in NPS Management Policies 2006, Director's Order #38, and Reference Manual #38.

Reasons to Lease to Federal Agencies

A number of DO1 and federal policies encourage federal agencies to find space within other federal sites. For example, the Office of Management and Budget's "Freeze the Footprint" initiative directs agencies to work collaboratively and consider co-location with other agencies as a way to reduce rental of space outside of the Federal Government. In addition, 41 C.F.R. § 102-83.95 states that "prior to purchasing, constructing, or leasing new space, Federal agencies must.. ." seek space in historic properties already under agency control. These properties may lie within National Park Service sites. There may be other reasons why this type of arrangement is in the best interest of both agencies, due to shared mission, resources, or services to visitors.

Selecting the Appropriate Authority and Using an Interagency Agreement

Land management agencies (including NPS when acting as a lessee) should cite Service First as the authority allowing the agency to enter into the IAA. Any other agency will most likely have to go through GSA to accomplish the lease, unless specific delegation from GSA is available and obtained, or unless the lessee agency has its own specific leasing authority. When GSA is involved, NPS would execute an agreement with GSA, and GSA would execute an occupancy agreement with the leasing agency.

Leasing transactions between NPS (as the lessor) and another federal agency (as the lessee) should, whenever feasible, be executed as an IAA as opposed to using the Lease Templates found in Reference Manual #38 for drafting the actual lease. However, the IAA should attach an operational document that uses language from the NPS leasing template as part of the

Agreement. The IAA should cite the NPS Leasing Authority (54 U.S.C. § 102102) as the NPS authority to enter into the lease.

Since there are multiple authorities that are available to the NPS and other federal agencies and each particular situation will differ from park to park, if a park is considering entering into a lease with another federal entity, it should contact Regional or WASO level leasing staff to determine the best way to achieve the desired outcome.

Specific Details Regarding Lease Provisions and Arrangements

- A. **Non-Competitive Leasing.** 36 CFR Part 18 permits non-competitive leasing of federal facilities to a unit of government or a nonprofit entity if the lessee "will contribute to the purposes and programs of the park area. Therefore, the Administrative Record must include a determination that the contribution requirement has been satisfied. If so, there is no requirement to compete these leases.
- B. **Term of the Lease.** 36 CFR Part 18 limits the term of NPS leases for buildings and improvements to 60 years. There are no term limits to IAAs, however they must follow federal appropriation laws in regard to funding arrangements and must include language requiring regular review of the agreement to determine the appropriateness of modification, extension or termination. GSA leases may be for a term of no longer than 20 years, and if the lease authority is delegated by GSA, usually a 20-year term or less is required. Therefore, unless the other agency is citing an authority outside a GSA delegation, or the agency has specific statutory authority to enter into a longer-term lease (e.g. 54 USC § 102102 for the NPS as referenced above) the term of the lease must be 20 years or less.
- C. **Fair Market Value Rent.** NPS's Leasing Authority requires NPS to receive at least fair market value rent, as determined by an approved appraisal. Other authorities may allow occupancy on a cost-recovery basis only.
- D. **Multi-year Holding of Lease Proceeds.** Rent received for a lease of NPS property can be used by the park over multiple funding years (54 USC §102102(e)(2)), as long as the rent is used for the purposes cited in NPS's Leasing Regulations found at 36 C.F.R. Part 18.
- E. **Insurance Requirements.** Since all Federal agencies are self-insured, NPS will not require the other Federal agency to carry liability, property, or other insurance as a condition of the lease. However, the lease may recite that the lessee is covered by the Federal Tort Claims Act (28 U.S.C. §2671, et seq.) and as such is determined to be self-insured.
- F. **Building Improvements.** Needed building improvements can be completed by either NPS or the lessee agency (subject to the limitations of 36 C.F.R. §18.1 2(i)). Just as in an NPS lease with a private entity if the restoration, rehabilitation, or other improvements are required under the lease to be completed by the lessee, those improvements must be taken into account when determining fair market value rent.

G. **Building Operations and Maintenance.** NPS leasing regulations require the lessee to maintain the property throughout the lease term. When federal entities enter into a lease through GSA, those leases are typically "full service" leases, where building operations and maintenance services are provided by the lessor. However, based on the circumstances in each individual situation, either approach is appropriate, as long as the appraisal of fair market value rent to be charged takes into consideration the requirements of both the lessor and the lessee.

H. **Review and Approval of Leases between the NPS and another Federal Agency.** Review, approval, and signature of NPS/federal agency leases must follow the same review and approval process as leases between NPS and private entities, including review by the DOI Office of the Solicitor. A warranted Contracting Officer (CO) is always required to approve IAAs where NPS is transferring funding to another agency. If an IAA involves a federal lease and no funding is being transferred to another agency from NPS, in accordance with Director 's Order #38, the Deciding Official should execute the IAA and CO approval is not needed. However, in accordance with Director's Order #38 the Director must approve 1) Proposed leases with terms of more than ten (10) years; 2) Proposed leases or lease amendments that provide for a leasehold mortgage interest or similar encumbrance; and 3) Proposed amendments of existing leases that required Director's approval prior to execution.

Conclusion

NPS leases to other Federal agencies can be a beneficial way to accomplish important goals for an underutilized asset and provide for an income stream to be used by the park. For the other agency, the lease may help it accomplish its mission and goals, as well as provide operational space within existing federally owned structures. Once both entities understand the special nuances that apply to a federal to federal lease, the arrangement can be positive for all involved.

Further Information

For questions on this guidance, please contact William "Gordy" Kito, NPS Leasing Program Manager, at (202) 354-2096.

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