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DECISION



J. Heintz
THE COMPTROLLER GENERAL 664
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-148736

DATE: July 25, 1978

MATTER OF: National Park Service Concession Contract -
Encumbrance of Possessory Interest

DIGEST: Department of the Interior may revise National Park Service (NPS) standard concession contract language to allow new park concessioners to encumber the possessory interest in the concession operation in order to provide collateral for loan used to purchase the concession operation. This practice is authorized by 16 U. S. C. § 20e (1976) and would not be contrary to 16 U. S. C. § 3 (1976), which provides for encumbrance of concessioner's assets to finance expansion of existing facilities. Congress made it clear in enacting 16 U. S. C. § 20e that possessory interest sanctioned by that section could be encumbered for any purpose.

The Acting Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, asks whether we agree with the Department that a proposed revision to section 13 of the National Park Service's (NPS) standard concession contract is legally permissible. The purpose of the proposed revision is to allow concessioners, particularly small business concerns, to encumber their possessory interests in concession assets in order to borrow money to purchase existing National Park Service concession operations.

The current section 13 of the standard NPS contract states in part that:

"No mortgage shall be executed, and no bonds, shares of stock, or other evidence of interest in, or indebtedness upon the assets of the Concessioner, in the area, shall be issued, except for the purposes of installing, enlarging, or improving plant and equipment, and extending facilities for accommodation of the public in the area, and then only upon approval of the Secretary. In the event of default on such a mortgage or such other indebtedness or of

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other assignment, transfer or encumbrance, the creditor or any assignee thereof, shall succeed to the possessory interest of the Concessioner in concessioner's improvements, but shall not thereby acquire operating rights or privileges. (Section 13). "

Section 3 of title 16, United States Code (1976) authorizes the Secretary of the Interior to "grant privileges, leases, and permits for the use of land [parklands] for the accommodation of visitors in the various parks, monuments, or other reservations" under his jurisdiction. This section includes the following proviso:

"[T]he Secretary may in his discretion, authorize such grantees [concessioners] * * * to execute mortgages and issue bonds, shares of stock, and other evidences of interest in or indebtedness upon their rights, properties, and franchises, for the purposes of installing, enlarging, or improving plant and equipment and extending facilities for the accommodation of the public within such national parks and monuments. "

This language allows the encumbrance of a concessioner's assets with the Secretary's approval, for the purposes of installing, enlarging, or improving plant and equipment and of extending facilities for serving the public within the National Park system. However, the Department has found a further need to provide a new concessioner with a means to encumber the "possessory interest" in the concession he seeks to purchase in order to provide the collateral needed for loans to finance the purchase of an existing concession operation.

16 U. S. C. § 20e (1976) states in part:

"A concessioner who has heretofore acquired or constructed or who hereafter acquires or constructs, pursuant to a contract and with the approval of the Secretary, any structure, fixture, or improvement upon land owned by the United States within an area administered by the National Park Service shall have a possessory interest therein, which shall consist of all incidents of ownership except legal title, and except as hereinafter provided, which title shall be vested in the United States. * * * The said possessory interest may be assigned, transferred, encumbered, or relinquished." (Emphasis added.)

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NPS has proposed the following revision of that part of section 13 of the contract quoted above:

"No mortgage shall be executed, and no bonds, shares of stock, or other evidence of interest in, or indebtedness upon, the assets of the concessioner, including this contract, in the area, shall be issued, except for the purposes of installing, enlarging or improving, plant, equipment and facilities, provided that, possessory interests, or evidences of interests therein, in addition, may be encumbered for the purposes of purchasing existing concession plant, equipment and facilities. In the event of default on such a mortgage, encumbrance, or such other indebtedness, or of other assignment, transfer, or encumbrance, the creditor or any assignee thereof, shall succeed to the interest of the Concessioner in such assets including possessory interests, but shall not thereby acquire operating rights or privileges which shall be subject to the disposition of the Secretary."

In his letter, the Acting Assistant Secretary explains the reasons for this amendment:

"The practical problem is that frequently existing concession operations are sold to new operators where no new improvements are involved but either the existing concessioner, or lenders to the new concessioner, wish to create an encumbrance in the assets of the concession, including possessory interest, for the purpose of securing loans used to purchase the operation or to guarantee payment of the purchase price. In other words, in order to secure the capital raised to purchase a concession operation, the new concessioner usually desires to encumber the possessory interests purchased, even though no new improvements are to be constructed. Over a period of years, the National Park Service has approved numerous such transactions as part of its administration of concession contracts. However, the current standard language of National Park Service concession contracts, as quoted above, is ambiguous as to whether encumbrances of possessory interests for such purposes are permissible.

"The National Park Service, therefore, is desirous of amending this provision, because, unless encumbrances can be created in the circumstances of purchase of concession operations described above, it becomes difficult, if not impossible, for small businesses to raise the capital needed to purchase an existing concession operation. Limiting encumbrances to the purposes of constructing new improvements has the anomalous result of encouraging only large businesses to purchase concessions, businesses which can raise the purchase price from general assets without the necessity of security interests."

The question is whether the proposed language would be contrary to the Secretary's authority to enter into contracts under 16 U.S.C. § 3 *supra*, because the proviso to that section appears to authorize encumbrances only for expansion of concession facilities and because it does not expressly authorize encumbrance of possessory interests. We believe this language would be within the Secretary's statutory authority covering concession contracts.

In 1965, Congress passed the "Concessions Policy Act," 16 U.S.C. §§ 20-20g (1976), for the purpose of establishing concession policies in the areas administered by the NPS. After reciting the Secretary's existing authority under 16 U.S.C. § 3, the Senate Report on the bill which was the derivative source of the 1965 Act goes on to state:

"The Government now depends heavily, and must continue to depend heavily, on private entrepreneurs to provide visitors to the national park system with necessary facilities and services. Because this is so, the provisions of law just recited [16 U.S.C. § 3] need to be supplemented by a clear statement in statutory form of the authority of the Secretary of the Interior to deal with various matters in the field of concession policy such as those mentioned above." S. Rep. No. 765, 89th Cong., 1st Sess. 2 (1965).

The Report further states that:

"While legal title to the improvement will continue to be in the United States, the bill specifically recognizes that the possessory interest may be assigned, transferred, and encumbered by the concessioner." *Id.* at 3.

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As the Department points out, one reason for the statutory recognition of possessory interests was to help concessioners obtain financing for construction of new concession facilities by pledging the possessory interest as collateral. The language of 16 U.S.C. § 20e clearly allows pledges of possessory interests without limitation as to purpose. Moreover, a pledge for the purpose of enabling a potential concessioner to raise capital to finance the purchase of a concession seems consistent with the purposes of the 1965 Act. The Senate Report indicates that one intention was to make loans based on pledges of possessory interest more accessible "to concessioners and would-be concessioners." S. Rep. No. 765, supra, 2, emphasis added.

We agree with the Department of the Interior that "the proposed amendment to section 13 is legally acceptable, as the encumbrance of possessory interests is authorized by 16 U.S.C. § 20e without limitation * * *." 16 U.S.C. § 3 does not, in our view, preclude the encumbrance of possessory interests as authorized by 16 U.S.C. § 20e. A contract which would allow a concessioner to encumber its "possessory interest" for the purposes of acquiring existing concession facilities would conform to the policy of the 1965 Act. We have no objection to the language proposed by the Department for this purpose.

Deputy


Comptroller General
of the United States