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Decision

Matter of: National Park Service—Special Park Use Fees

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DIGEST

The National Park Service (NPS) may set special park use fees based on market value when it is acting under business-type conditions, but it may not double charge for costs by setting a two-part fee in which one part is based on market value and the other based on costs. Both the Independent Offices Appropriations Act (IOAA) of 1952, codified at 31 U.S.C. § 9701, and section 3a of title 16 of the United States Code authorize NPS to charge a user fee. When providing commercial goods, services, or resources, NPS may charge a fee based on market value under the IOAA and, under section 3a, calculate its actual costs, deduct that amount from the fee collected, and credit that amount to the current NPS appropriation. Any fees collected in excess of costs must be deposited into the miscellaneous receipts of the Treasury. Alternatively, NPS may choose to set special park use fees to recover only its actual costs and retain those under section 3a.

DECISION

In February 2006, GAO reported that National Park Service (NPS) park units were not consistently implementing NPS special use permit guidance for fee-setting and cost-recovery.¹ In the course of this work, we raised concerns about the underlying legal authority for NPS fee-setting guidance. We were concerned that park units, following NPS guidance, might charge fees higher than authorized. This decision addresses whether NPS has authority to charge fees for special park uses that may

¹ GAO, *National Park Service: Opportunities Exist to Clarify and Strengthen Special Uses Permit Guidance on Setting Grazing Fees and Cost-Recovery*, GAO-06-355R (Washington, D.C.: Feb. 9, 2006), at 3. See also GAO, *Livestock Grazing: Federal Expenditures and Receipts Vary, Depending on the Agency and the Purpose of the Fee Charged*, GAO-05-869 (Washington, D.C.: Sept. 30, 2005).

exceed agency costs for managing or supporting such uses.² We conclude that NPS may base fees on market value, but may not charge a two-part fee based on both costs and market value. Current NPS guidance improperly permits park units to combine actual costs incurred by NPS and market value in setting the user fee.

BACKGROUND

NPS provides user fee guidance to park units in three key documents: first, NPS's *Management Policies 2001*, which provides agencywide guidance on a variety of topics, including special park uses and fees;³ second, *Director's Order #53: Special Park Uses*, which clarifies and supplements *Management Policies 2001* by setting forth policies and procedures for administering special park uses on lands;⁴ and

² Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal.htm. In this instance, we received the views of the Office of the Solicitor, Department of the Interior, in March 2006. Letter from Arthur E. Gary and Barry N. Roth, Office of the Solicitor, U.S. Department of the Interior, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO (Mar. 7, 2006) (Solicitor's Letter). The Solicitor provides legal support for NPS.

³ At the time of our February 2006 report, NPS was operating under *Management Policies 2001*. On August 31, 2006, NPS issued a new edition, *Management Policies 2006*, www.nps.gov/policy/MP2006.pdf (last visited July 11, 2007). With regard to fees for special use permits, there are no material differences between the 2001 and 2006 edition. *Management Policies 2001* defines "special park use" as—

"a short-term activity that takes place in a park area, and that: [p]rovides a benefit to an individual, group, or organization rather than the public at large; [r]equires written authorization and some degree of management control from the Service in order to protect park resources and the public interest; is not prohibited by law or regulation; [i]s not initiated, sponsored, or conducted by the Service; and [i]s not managed under a concession contract, a recreation activity for which the NPS charges a fee, or a lease"

Management Policies 2001, NPS D 1416 (Dec. 2000), at § 8.6.1 (internal citations omitted), available at www.nps.gov/refdesk/mp (last visited July 9, 2007).

⁴ A few of the types of special park uses contemplated under *Director's Order #53* are agricultural or livestock uses; special events such as regattas, pageants, or large group camps; and filming and photography activities. *Director's Order #53*, §§ 11–14 (Apr. 4, 2000), available at www.nps.gov/policy/DOrders/DOrder53.html (last visited July 9, 2007).

third, *Reference Manual 53: Special Park Uses*, which provides detailed guidance for carrying out the agency's special park use program.⁵

Management Policies 2001 envisions a two-part fee: a cost recovery and a use charge. *Management Policies 2001*, § 8.6.1.2. It requires that “[a]ll costs incurred by the Service in writing the permit, monitoring, providing protection services, restoring park areas, or otherwise supporting a special park use will be reimbursed by the permittee. When appropriate, the Service will also include a fair charge for the use of the land or facility.”⁶ *Id.* *Director's Order #53* implements this two-part fee by specifying that charges should reflect the “fair market value” for the requested use, noting that the fair market value of a special park use “is the value of the lands or facilities used, plus NPS costs incurred in managing or supporting the use.” *Director's Order #53*, § 3.6. It further addresses the separate disposition of the two parts of the fee by noting that “NPS will retain funds recovered for the cost of managing a special park use” while “[c]harges arising from the use of NPS lands and facilities must be deposited in the U.S. Treasury, unless otherwise specifically authorized by law.” *Id.* *Reference Manual 53* provides detailed guidance for calculating the two parts of the fee in separate sections addressing recoverable costs and land or facility use fees. *Reference Manual 53* at C10-3 to C10-6.

NPS guidance cites two statutory authorities under which it charges special park use fees. *Id.* at C10-1. NPS is authorized by 16 U.S.C. § 3a to recover, and credit to current appropriations, costs of providing necessary services associated with special use permits. In addition, the Independent Offices Appropriations Act of 1952 (IOAA), codified at 31 U.S.C. § 9701, authorizes federal agencies to prescribe regulations establishing a user fee for a service or thing of value provided to a person by the agency. Unless a statute provides otherwise, agencies must deposit user fees charged under IOAA into the general fund of the Treasury as miscellaneous receipts. 31 U.S.C. § 3302(b); *see, e.g.*, 49 Comp. Gen. 17 (1969).

Reference Manual 53 cites 16 U.S.C. § 3a as authority for the recovery and retention of costs, and 31 U.S.C. § 9701 as authority for the imposition of additional charges for the value of the land or facilities used, or the services provided. *Reference Manual 53* at C10-1. It also discusses the separate disposition of the amounts recovered under each authority, noting that funds recovered for costs may be retained while those collected for land or facility use must be deposited as miscellaneous receipts. *Id.* at C10-7 to C10-8.

⁵ *Reference Manual 53: Special Park Uses*, RM-53 (Apr. 2000), available at www.nps.gov/refdesk/DOrders (last visited July 9, 2007). The Office of the Solicitor has informed us that our understanding of NPS guidance in this area is “essentially correct.” Solicitor’s Letter at 2.

⁶ *See also Management Policies 2006*, § 8.6.1.2 (“When appropriate, the Service will also collect a fee for the use of the land or facility based on a market evaluation.”).

DISCUSSION

NPS guidance for imposition of special park use fees presents the following issue: whether IOAA authorizes NPS to charge fees set at market value for special park uses, and if so whether this may be done in addition to NPS's section 3a authority to recover agency costs for managing or supporting such uses.

Section 3a, by its own terms, does not permit NPS to recover amounts exceeding its costs. It provides, "Notwithstanding any other provision of law, the National Park Service may . . . *recover all costs* of providing necessary services associated with special use permits, such reimbursements to be credited to the appropriation current at that time." 16 U.S.C. § 3a (emphasis added). This authorizes NPS to recover and credit to its appropriations a fee equal to its total costs. There is nothing in the language of the statute that authorizes NPS to charge a fee exceeding its costs.

The Office of the Solicitor has asserted that NPS's authority to impose additional fees above and beyond the costs authorized in 16 U.S.C. § 3a is provided by IOAA, commonly referred to as the "User Charge" statute.⁷ The Solicitor's Office argues that interpreting these two statutes *in pari materia* would permit imposition of a fee equaling costs (under section 3a) plus an additional fee equal to the value of the facility, land, or service provided (a market value calculation under IOAA).⁸

Market value fees under IOAA

Before addressing the propriety of the two-part fee envisioned by the Solicitor's Office and NPS guidance, we will consider whether IOAA permits NPS to charge a fee based on the market value of the facility, land, or service provided.

IOAA establishes a government policy that "each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible." 31 U.S.C. § 9701(a). IOAA authorizes heads of agencies to prescribe regulations establishing charges for a service or thing of value provided by an agency, and requires that fees be "fair" and based on four factors: "(A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." 31 U.S.C. § 9701(b). Judicial interpretation to date has applied IOAA to the government's exercise of its regulatory functions, and in that context courts have narrowed the application of these factors so that fees charged under IOAA are "limited to the cost to the agency

⁷ The Solicitor's Office states, "The NPS is entitled to utilize both 16 U.S.C. § 3a and the IOAA in determining and charging fees for special use permits." Solicitor's Letter at 2.

⁸ Statutes *in pari materia* are those "on the same subject; relating to the same matter." *Black's Law Dictionary* 807 (8th ed. 2004).

of a specific benefit rendered to a particular entity.” *Florida Power & Light Co. v. United States*, 846 F.2d 765, 767 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989).

This understanding of IOAA is based on federal case law from the mid-1970s, beginning with two Supreme Court decisions issued on the same day in 1974. In *National Cable Television Ass’n (NCTA) v. United States*, 415 U.S. 336 (1974), the Supreme Court considered fees set under IOAA by the Federal Communications Commission (FCC) for regulation of community antenna television (CATV) systems. FCC had calculated fees based on FCC’s total costs of regulating the CATV industry. *NCTA*, 415 U.S. at 340. The Court rejected this methodology and drew a clear distinction between permissible fees assessed for benefits received by a specific recipient and impermissible fees (or taxes) for benefits inuring to the public as a whole. *Id.* at 341–43. The Court rejected recourse to the “public policy or interest served” and “other relevant facts” factors of IOAA because, the Court said, these factors “*if read literally*, [carry] an agency far from its customary orbit and [put] it in search of revenue in the manner of an Appropriations Committee of the House.” *Id.* (emphasis in original). Because FCC had levied charges to recoup its total costs of regulating the CATV industry rather than fees based on the “value to the recipient” of FCC services, the Court viewed the charges as taxes. *Id.* at 343–44.

In a companion case to *NCTA* issued the same day, the Supreme Court considered yearly assessments set under IOAA by the Federal Power Commission (FPC) to recoup a portion of its costs of regulating gas and power utilities. *Federal Power Commission v. New England Power*, 415 U.S. 345, 346–47 (1974). FPC charged these fees even to utilities that had had no proceedings before FPC during a particular year. *Id.* at 351. The Court rejected this scheme. The Court agreed with the Office of Management and Budget’s interpretation of IOAA as permitting charges only when there is an “identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit” and that “no charge should be made . . . ‘when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public.’” *Id.* at 349–51, *quoting* OMB Budget Cir. No. A-25 (Sept. 23, 1959).

In a follow-up to *NCTA*, the D.C. Circuit Court of Appeals addressed a revised annual fee scheme established by FCC under IOAA. *National Cable Television Ass’n v. FCC*, 554 F.2d 1094 (D.C. Cir. 1976). FCC, once again, set fees based on the total costs to FCC of regulating the industry, although the agency now sought to recover only certain aspects of those costs. *Id.* at 1098. Finding that FCC had not been sufficiently explicit in detailing the specific expenses which made up the cost basis for its individual fees, the court rejected the new FCC effort. *Id.* at 1104–05.

In doing so, the D.C. Circuit held that FCC was “required to show the particular costs which they are assessing against the recipients so as to assure them that they are paying only for the specific expenses which are incurred in connection with the service of granting them their operating authority.” *Id.* The court interpreted *NCTA* and *FPC* to mandate that an agency “look *not* at the value which the regulated party may immediately or eventually *derive* from the regulatory scheme, but at the value of

the direct and indirect services which the agency *confers*.” *Id.* at 1107 (emphasis in original). Thus, IOAA “must be interpreted to limit the [FCC] to assessing fees at a rate which reasonably reflects the cost of services performed or the expense of other value transferred to the payor.” *Id.* In a footnote in a companion decision issued the same day, the court explained its rationale: “When the cost of the benefit conferred is exceeded by any material amount, one immediately gets into the taxing area, and the result is revenue and not a fee.” *National Ass’n of Broadcasters v. FCC*, 554 F.2d 1118, 1129 n. 28 (D.C. Cir. 1976). It is at that point, the court said, that charges “cease being fees and become taxes levied, not by Congress, but by an agency.” *Id.*

In that case, Judge Tamm included a concurring opinion arguing against what he viewed as the D.C. Circuit’s undue narrowing of agency discretion by defining “value to the recipient” as including only “costs and not also the value of the benefits bestowed on a regulatee.” *Id.* at 1134 (Tamm, J., concurring). Judge Tamm asserted that *NCTA* “does not dictate that the proportion-of-cost basis is the only acceptable method of determining a proper fee.” *Id.* In response, the majority opinion noted that fees based on value created or derived by recipients were clearly prohibited, but that “[a]s to whether it is possible under *NCTA* to promulgate ‘value to the recipient’ fee schedules *not initially related to costs*, we express no opinion.” *Id.* at 1129, n. 28 (emphasis added).

The D.C. Circuit, in another decision issued the same day, summarized the requirements of the cost-based standard:

“First, the [FCC] must *justify* the assessment of a fee by a clear statement of the particular service or benefit which it is expected to reimburse. Second, it must calculate the *cost basis* for each fee assessed. This involves (a) an allocation of the specific direct and indirect expenses which form the cost basis for the fee to the smallest practical unit; (b) exclusion of any expenses incurred to serve an independent public interest; and (c) a public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular terms. Finally, the [FCC] must set a fee calculated to return this cost basis at a *rate* which reasonably reflects the cost of the services performed and value conferred upon the payor.”

Electronic Industries Ass’n v. FCC, 554 F.2d 1109, 1117 (D.C. Cir. 1976) (emphasis in original).

The D.C. Circuit has since applied the cost-based standard in reviewing fees assessed by the Interstate Commerce Commission in regulating motor carriers,⁹ the Nuclear

⁹ *Central & Southern Motor Freight Tariff Ass’n v. Interstate Commerce Commission*, 777 F.2d 722 (D.C. Cir. 1985). The court found in this instance that

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Regulatory Commission (NRC) in regulating nuclear power licensees,¹⁰ and the Environmental Protection Agency in regulating engine manufacturers under the Clean Air Act.¹¹ The Fifth Circuit Court of Appeals followed suit in a case considering NRC licensing fees.¹²

These court cases involved agencies exercising their regulatory functions. No court has directly addressed the question facing us here; that is, may an agency, when acting not in a regulatory context but in a commercial or proprietary context, set fees based on market value rather than recovery of agency costs? Or should we read federal case law to require that even in a commercial or proprietary context, fees may only reflect the costs incurred by the agency in providing a service or thing of value to a recipient?

Special park uses, in many ways, are factually distinct from the regulatory activities contemplated to date in federal case law. Generally, there is a voluntary element present when a rancher, for example, approaches NPS to use park land for grazing that is not present when a television broadcast company approaches FCC for a license to use the public airwaves. If the rancher does not want to pay what NPS will charge, the rancher can decide whether to seek grazing rights elsewhere. The television broadcast company, however, cannot walk away from its transaction (unless, of course, it decides to walk away, also, from its broadcast business); the federal government is the only source for a broadcast license. Unlike grazing rights, a license to broadcast is not a commodity traded in an open market. The license has a very real economic value nonetheless—indeed, it could amount to the value of the

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some of the ICC's cost based calculations were not adequately precise, or adequately explained. *Id.* at 737–39.

¹⁰ *Florida Power & Light Co. v. United States*, 846 F.2d 765, 767 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989). The issue in this case was the application of a fee statute other than IOAA, but the court, in *dicta*, did reinforce its prevailing interpretation of IOAA. *Id.* at 767, 774.

¹¹ *Engine Manufacturers Ass'n v. Environmental Protection Agency*, 20 F.3d 1177 (D.C. Cir. 1994). In this case, the court stated a slightly broader proposition that “[a]n agency may not charge more than the reasonable cost it incurs to provide a service, or the value of the service to the recipient, *whichever is less.*” *Id.* at 1180 (emphasis added), *citing National Cable Television Ass'n*, 554 F.2d at 1104–07.

¹² *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Commission*, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). The Fifth Circuit cited D.C. Circuit precedent for the proposition that “the fee assessed cannot exceed the cost to the agency of rendering the service.” *Id.* at 230, *citing Electronic Industries Ass'n*, 554 F.2d at 1114.

company's broadcast business. This could obviously be quite high, and using it as the limit for user charges would give agencies extraordinarily broad authority. It is in this sense that we understand the D.C. Circuit's holding that basing a fee for a license on value derived would be in the nature of a tax. A fee based on the cost to the government of providing this economic value to the licensee reflects a balance between the IOAA policy that federal activities be self-sustaining to the extent possible and the Supreme Court's admonition that Congress, in IOAA, did not delegate taxing authority to agencies.

Grazing rights, on the other hand, do have a value that can be determined by the open market. In such a commercial transaction, as in the regulatory context, it is possible that the government may incur very little cost, and the economic value of the government's action may exceed the government's costs.¹³ In that case, a fee that is designed merely to recover the government's costs could very well interfere, however inadvertently, with a competitive marketplace by having the government "selling" below the market rate. A fee based on the market price of the transaction would reflect a balance between the IOAA "self-sustaining" policy and a healthy respect for the marketplace.¹⁴

We see nothing in IOAA to prohibit an agency from setting a fee in a commercial or proprietary transaction that reflects the market price. In IOAA, Congress directed agencies to base fees on four factors, including "the value of the service . . . to the recipient" and "public policy or interest served." 31 U.S.C. § 9701(b)(2)(B), (C). While, as the Supreme Court explained, this does not permit an agency to tax, we believe that at least in a commercial transaction, an agency may fairly decide that it should set its fees in reference to prices that arise out of competition in open markets.¹⁵ Therefore, we believe that IOAA permits agencies to appropriately weigh the statutory factors in accordance with executive branch policies, and with respect to commercial transactions, to set fees based on market price.

This distinction was broached by the Court of Claims while referring to IOAA in *Yosemite Park & Curry Co. v. United States*, 686 F.2d 925, 932--34 (Ct. Cl. 1982). *Yosemite* involved a contract dispute between NPS and a concessioner in Yosemite National Park, the Yosemite Park and Curry Company. As part of the concession,

¹³ One commentator referred to the economic value in circumstances such as this as the "benefits of exclusive use." Clayton P. Gillette and Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L.Rev. 795, 862-63 (1987).

¹⁴ See generally B-124195, Apr. 15, 1973 (the Alaska Railroad, owned and operated at that time by the federal government, should ascertain the fair market value of the property it leased to private concerns and establish a rental rate in accordance with sound business management principles and comparable commercial practices).

¹⁵ We recognize that this is an inexact science and at times there may be no comparable private sector supplier.

the concessioner purchased electricity from NPS. NPS is authorized by 16 U.S.C. § 1b(4) to provide electricity to concessioners on a reimbursable basis. The concessioner asserted that NPS was overcharging for the electricity it supplied because NPS charged rates based on local utility rates, which could exceed NPS costs. The Court of Claims referred to a variety of authorities, including IOAA, in concluding that the NPS rate-setting methodology was “reasonable” within the meaning of the contract, although it, in fact, might result in NPS charging a rate in excess of cost. *Id.* at 930.

In referring to IOAA, the Court of Claims acknowledged the line of federal cases interpreting IOAA to “mandate a cost based fee schedule” and establish that “cost must be the ultimate basis of fees,” but found that those cases were “not apposite” to NPS’s authority under 16 U.S.C. § 1b(4). *Id.* at 930–32. Instead, the court relied on the fact that the government was not acting, in that instance, as a sovereign: “In the present case . . . the Government has not created the need for electricity, nor is the service provided a regulatory one.” *Id.* at 932. In selling electricity to the concessioner, the government was entering into a voluntary contract for the sale of electricity to a willing partner. *Id.* at 934. This is fundamentally different from the circumstances in *NCTA*, for instance, where “the Government’s power to allocate the airwaves and to issue licenses came not from its ownership of the airwaves but from its sovereign power to regulate certain activities. . . .” *Id.* Thus, the Court of Claims found the comparative-rate system methodology used by NPS to set rates for electricity acceptable, despite the fact that those rates could exceed NPS costs.¹⁶

We conclude that in a commercial transaction, an agency may set its fees under IOAA based on market price. However, consistent with IOAA, we recommend that NPS establish its special park use fee structure through the rulemaking process and in accordance with executive policy as reflected in OMB Circular A-25.

Two-part fee

NPS guidance, as described above, contemplates a two-part fee, including both a market value charge and a cost-based charge. As explained below, we find that even under business-type conditions, the NPS two-part fee for special park uses is inconsistent with OMB Circular A-25. In addition, we do not think that the two applicable statutes may reasonably be read as authorizing the two-part fee, which double counts costs.

First, OMB Circular A-25 does not support charging a two-part fee as delineated in the NPS guidance. Rather, it sets out alternative methodologies for calculating the

¹⁶ The Office of Management and Budget (OMB) adopted the court’s distinction between the government acting as a sovereign and the government acting commercially in a 1993 revision to its Circular A-25. OMB Cir. No. A-25, *User Charges*, 58 Fed. Reg. 38142 (July 15, 1993). Circular A-25 has set out executive policy for establishing user charges under IOAA.

appropriate user fee: (1) “full cost” recovery, which should be used when the government is acting in its capacity as sovereign, and (2) “market price,” which should be used under business-type conditions, such as when leasing or selling goods or resources. OMB Cir. No. A-25, § 6.a.2. The Circular defines market price as “the price for a good, resource, or service that is based on competition in open markets, and creates neither a shortage nor a surplus of the good, resource, or service” and provides that “when substantial competitive demand exists for a good, resource, or service, its market price will be determined using commercial practices, for example . . . by reference to prevailing prices in competitive markets”¹⁷ OMB Cir. No. A-25, § 6.d.2.

The Circular states that under these conditions, user charges “need not be limited to the recovery of full cost and may yield net revenues.” OMB Cir. No. A-25, § 6.a.2(b). Thus, under the Circular, where use of a market price is appropriate, costs are treated as an inherent component of that price and are not to be separately added to the market price in setting the user fee. Market price is used as an alternative methodology to the full cost methodology, not in addition to it. We conclude that the use of both the full cost and the market price methodologies to set a two-part fee, as provided for in the NPS guidance, is contrary to the Circular. We recognize that section 3a gives the NPS specific authority to retain its costs associated with special park use permits. Hence, we are not concluding that NPS cannot charge market price and also calculate its costs for purposes of knowing how much money it can credit to its appropriation under section 3a.

Second, NPS asserts authority to charge a two-part fee (market price plus full cost) by citing both IOAA and 16 U.S.C. § 3a. We do not think this is a reasonable reading of these two fee-setting statutes because it fails to read them harmoniously as part of an overall statutory scheme. IOAA is the predominant federal user fee statute, and it is the only governmentwide authority. In 1993, more than 40 years after enactment of IOAA, Congress enacted 16 U.S.C. § 3a, which, as stated, authorizes NPS to recover its costs of providing necessary services associated with special use permits and to credit those costs to its current appropriation. *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, title I, 107 Stat. 1379, 1387 (Nov. 11, 1993). This authority was provided “[n]otwithstanding any other provision of law.” *Id.* While there is little legislative history available to help understand section 3a, it differs from IOAA authority by permitting NPS to credit funds recovered to its current appropriation rather than depositing them into the general fund of the Treasury as miscellaneous receipts.¹⁸ Thus, we read the “notwithstanding any other provision of law” clause contained in section 3a as

¹⁷ The Circular lists “grazing lands in the general vicinity of private ones” as an example. OMB Cir. No. A-25, § 6.d.2(a)(ii).

¹⁸ Under the miscellaneous receipts statute, 31 U.S.C. § 3302(b), agencies must deposit user fees charged under IOAA into the general fund of the Treasury as miscellaneous receipts. *See, e.g.*, 49 Comp. Gen. 17 (1969).

creating an exception to the miscellaneous receipts statute for actual costs associated with special use permits. While section 3a addresses cost recovery, already authorized under IOAA, there is no indication in the statute or the legislative history that it was intended to supersede NPS's general user fee authority under IOAA. Rather, the two laws can be read harmoniously by observing that section 3a modifies the disposition (credit to the agency's appropriation) of certain fees recovered under IOAA (costs of providing necessary services).

While the NPS guidance acknowledges the two statutes, the two-part fee system described in its guidance essentially construes them as allowing for recovery of the same costs under each. Specifically, the guidance defines market value as the value of the land being used as determined by the market price (*Reference Manual 53* at C10-5) *plus* NPS costs incurred.¹⁹ *Director's Order # 53*, § 3.6. Calculating market value in this manner essentially double counts the costs to the government that may be recovered as part of the fee, a result clearly not supported by any reasonable reading of the underlying statutes.²⁰

CONCLUSION

Under IOAA, NPS may charge fees for special park uses based on market value when it is acting under business-type conditions but may not separately charge an additional fee for its costs. Consistent with IOAA, we recommend that NPS establish its fee structure through the rulemaking process and in accordance with executive policy as reflected in OMB Circular A-25.²¹ NPS may charge a fee based on market value under IOAA and, under section 3a, calculate actual costs to the government, deduct that amount from the fee collected, and credit that amount to the current NPS appropriation. NPS should deposit into the miscellaneous receipts of the Treasury any amounts collected that exceed the actual costs to the government. We

¹⁹ Valuing the land by reference to its market price incorporates a cost component into the formula since comparable prices in an open market will presumably be determined, at least in part, based on cost. We note, however, that it is conceivable that market value in some circumstances may have little relation to actual costs or be less than actual costs.

²⁰ It is possible that NPS inartfully drafted its guidance and does not intend to double charge for costs in its two part fee. Nevertheless, this is the effect of separately allowing for the recovery of both market price and actual costs. In establishing a fee structure consistent with this decision and OMB Circular A-25, NPS should ensure that when NPS is leasing or selling goods or resources under business conditions, and the fee charged is based on market value, an additional recovery of costs is not permitted.

²¹ See, e.g., *Grazing Fees on National Forest System Lands in the Eastern States*, 55 Fed. Reg. 2646 (Jan. 26, 1990), *codified at* 36 C.F.R. part 222.

suggest that NPS inform the relevant congressional committees of its actions and keep them informed throughout the rulemaking process.

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel