

A scenic view of a lake with a sailboat in the foreground and a cliffside with buildings in the background. The sailboat has a blue and white sail with the word 'dmus' on it. The cliffside is covered in green trees and has several buildings visible. The water is calm and reflects the sky.

# **Lewis and Clark Resort**

## **Prospectus for Commercial Lodging Services**

### **Yankton County, South Dakota**

**Lewis and Clark Recreation Area**  
**South Dakota Department of Game, Fish and Parks**  
**Division of Parks and Recreation**

**LEWIS AND CLARK RESORT**  
Located at Lewis and Clark Recreation Area  
**Prospectus for Commercial Lodging Services**

**South Dakota Division of Parks and Recreation**

**Date Issued:** November 2, 2018  
**Offer Must be Received By:** 3:00 P.M. Central Daylight Time on  
November 30, 2018

**Address Proposals to:**

Katie Ceroll, Director  
South Dakota Department of Game, Fish and Parks  
Division of Parks and Recreation  
523 East Capitol  
Pierre, SD 57501

LEWIS AND CLARK RESORT  
Located at Lewis and Clark Recreation Area  
Prospectus for Commercial Lodging Services

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# SECTION I

## BUSINESS OPPORTUNITY

### FOR COMMERCIAL LODGING SERVICES AT LEWIS AND CLARK RECREATION AREA

South Dakota Division of Parks and Recreation

## SUMMARY OF BUSINESS OPPORTUNITY

The purpose of this Summary is to provide a synopsis of the key elements of the Lewis and Clark Resort Draft Concession Agreement which is attached to this Prospectus. In the event of any inconsistency between the terms of the Draft Concession Agreement and this Summary, the Draft Concession Agreement prevails.

### NATURE OF BUSINESS AND SERVICES PROVIDED

The Business Opportunity section of this Prospectus describes the commercial visitor services and essential improvements required within the Draft Concessions Agreement. The following visitor services will be required:

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#### Minimum Required Services for the Concession

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1. Lodging service to include the following:
  - a. 14 three bedroom housekeeping cabins
  - b. 3 two bedroom housekeeping cabins
  - c. 24 motel type housekeeping units
  - d. 1 group lodge
2. Coin operated guest laundry
3. Swimming pool
4. 2 picnic shelters
5. Playground
6. Park entrance license sales

### PROPOSED MINIMUM FEE AMOUNTS

#### Franchise Fee:

- Five percent (5%) of all Gross Receipts

#### Promotion Fee

- Three percent (3%) of all Gross Receipts

#### Repair and Maintenance Reserve

- Two percent (2%) of all Gross Receipts

### TERM OF DRAFT CONTRACT

10 years

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## INTRODUCTION

The South Dakota Department of Game, Fish and Parks ("the State") seeks proposals for Resort concession operations at Lewis and Clark Recreation Area ("the Park"). This Prospectus describes in general terms the existing businesses operations and the future business opportunities for the facilities and services required by the State. Offerors are responsible for reviewing all sections of this Prospectus and, specifically, the terms and conditions of the attached Draft Concession Agreement, including its exhibits, to determine the full scope of a future concessionaire's responsibilities under the Draft Concession Agreement. The State is conducting this solicitation under the authority of ARSD 41:13 - Park Concession Leases. In the event of any inconsistency between the terms of this Prospectus and Draft Concession Agreement, the Draft Concession Agreement will prevail.

The term "concessionaire" as used in this Prospectus refers to the entity that will be the concessionaire under the Draft Concession Agreement. The term "existing concessionaire" refers to Dakota Hospitality Management, Inc., DBA Lewis and Clark Resort, the concessionaire under the existing contract ("Existing Lease").

The mission of the Department of Game, Fish and Parks is to perpetuate, conserve, manage, protect, and enhance South Dakota's wildlife resources, parks, and outdoor recreational opportunities for the use, benefit, and enjoyment of the people of this state and its visitors, and to give the highest priority to the welfare of this state's wildlife and parks, and their environment, in planning and decisions. The Department has the following divisions:

- **Division of Wildlife** manages South Dakota's wildlife and fisheries resources and their associated habitats for their sustained and equitable use, and for the benefit, welfare and enjoyment of the citizens of this state and its visitors.
- **Division of Parks and Recreation** provides diverse outdoor recreational opportunities, acting as a catalyst for a growing tourism economy and preserving the resources with which it is entrusted. This division seeks to accomplish this through efficient, responsive and environmentally sensitive management, and constructive communication with those whom it serves.

The South Dakota State Park system includes 13 state parks, 42 recreation areas, 5 nature areas, 1 historic prairie, 70 lakeside use areas, and 10 marina/resorts. In addition, the Division of Parks and Recreation manages the 114-mile Mickelson Trail, South Dakota's Snowmobile Trail Program, 220 public water access areas and maintains 291 boat ramps with a total of 389 launching lanes.

Additional information on the South Dakota Department of Game, Fish and Parks can be found at <http://www.sdqfp.info>.

## LOCAL MARKET AREA

The Local market area for the Lewis and Clark Resort is a combination of a multi-state regional market, statewide market, and the local market consisting of the city of Yankton and Yankton County. Lewis and Clark Recreation Area is a popular destination for residents of Sioux Falls and surrounding communities as well as residents from neighboring states Iowa and Nebraska. It is anticipated that each segment will play a significant role in the overall business plan for this concession opportunity.

Lewis and Clark Resort is located 5 miles west of Yankton along the north shore of Lake Lewis and Clark adjacent to Gavins Point Dam.

Historically, annual water elevations on the lake have remained consistent as Lake Lewis and Clark is considered a “flow through” reservoir mainly to generate power. Flood storage is not a major operating factor. Although lake levels remain constant annually, slight daily fluctuations are experienced at times.

## PARK OVERVIEW

Lewis and Clark Recreation Area is a 1,045-acre park with over five miles of shoreline located on the northern shore of Lewis and Clark Lake in southeast South Dakota. It is one of the region’s largest and most popular campgrounds. The Lake area attracts over 2 million visitors each year to its shores for endless camping, boating, sailing, fishing, swimming, hiking and hunting opportunities.

**Lewis and Clark Recreation Area** consists of the following State-owned facilities:

- 409 paved, electric campsites
- 18 camping cabins
- 4 large group camping areas
- 2 full hook-up volunteer campsites
- Welcome Center
- 18-hole disc golf course
- 12 modern bathrooms with hot showers
- 4 multi-lane boat ramps with docks
- 8 picnic shelters
- 2 swimming beaches
- 4 boater beaches
- 28-target NFAA (National Field Archery Association) certified archery range w/shooting platform
- 6.1 mile paved bicycle/jogging trail
- Soccer field
- 1.2 mile nature trail
- 4.1 mile multi-use trail for equestrian riders, mountain bikers, hikers
- 8 gravel, electric equestrian campsites and corrals
- 2 RV dump stations that include water for flushing and drinking
- 6 playgrounds
- Fish cleaning station
- Half-court basketball court
- Accessible fishing dock
- Amphitheater for weekend programming activities
- Firewood for sale at the park (no out-of-state firewood allowed)
- WiFi
- 45-space catamaran beach storage and launch area
- 2 sand volleyball courts
- 3 horseshoe pits

Winter Activities:

- ice fishing
- snowmobiling
- cross country skiing
- sledding
- snowshoeing
- bird watching

Additional nearby State-Owned Recreation Areas:

**Pierson Ranch Recreation Area – 59-acre park located 1 mile east of Lewis & Clark Resort**

- 67 electric campsites
- 2 camping cabins
- RV dump station that includes water for flushing and drinking
- 3 modern bathrooms with hot showers
- 4 picnic shelters (1 with kitchenette)
- Paved bicycle/jogging trail which connects to Lewis and Clark Recreation Area trail
- Basketball/tennis court
- Softball and soccer fields
- 9-hole disc golf course
- Amphitheater for weekend programming activities
- 4 playgrounds
- Sand volleyball court
- Horseshoe pit

**Chief White Crane Recreation Area – 195-acre park located 4 miles east & south of Lewis & Clark Resort**

- 144 paved, electric campsites
- 2 tent campsites
- 10 camping cabins
- 4 modern bathrooms with hot showers
- Half-court basketball court
- Amphitheater for weekend programming activities
- 4 playgrounds
- Picnic shelter
- RV dump station that includes water for flushing and drinking
- Sand volleyball court
- Horseshoe pits
- 1.1 mile crushed limestone bicycle/jogging trail

Distance to area attractions:

- Gavins Point National Fish Hatchery & Aquarium – 1.75 miles
- Gavins Point Dam – 3 miles
- Corps of Discovery Welcome Center – 9 miles
- Yankton Chan Gurney Airport – 9 miles
- Sioux City, Iowa – 65 miles
- Sioux Falls, South Dakota – 80 miles
- Omaha, Nebraska – 170 miles
- Minneapolis, Minnesota – 330 miles

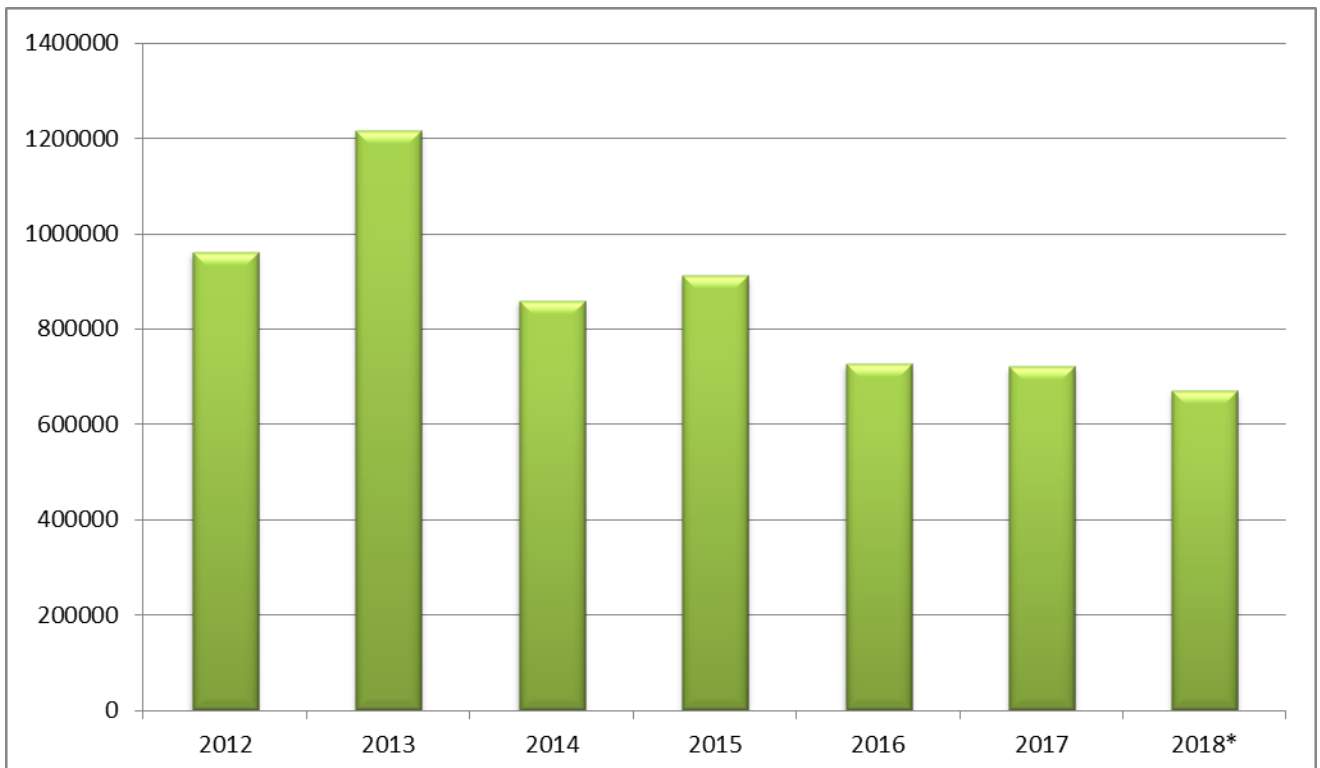
## VISITATION

**Exhibit 1** illustrates total annual visitation at Lewis and Clark Recreation Area from 2001 – 2017. Although the graph suggests a drop in annual visitation in 2007, this is attributable to the modification of counting methods which were implemented in that year. Lewis and Clark Recreation Area is the 2<sup>nd</sup> busiest State Park area in South Dakota. Almost 1,000,000 people on average visit Lewis and Clark RA parks, boat ramps, campgrounds, Resort and Marina every year.

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**Exhibit 1 Annual Park Visitation**

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*\*2018 through October*

*Source: State of South Dakota*

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## EXISTING CONCESSION OPERATION

The exhibit below provides a summary of facilities and services currently offered within the Resort lease area.

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### Exhibit 2 Facility and Services Summary

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|               |   |
|---------------|---|
| <b>Resort</b> | <ul style="list-style-type: none"> <li>14 – 3 bedroom cabins</li> <li>3 – 2 bedroom cabins</li> <li>24 – motel rental units (contained within 3 separate buildings)</li> <li>1 – group lodge</li> <li>2 – picnic shelters</li> <li>Swimming pool</li> <li>Playground</li> <li>Office/manager’s residence building</li> <li>Guest coin operated laundry service</li> </ul> |
|---------------|---|

*Source: State of South Dakota*

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## RESORT LEASE AREA AND FACILITIES

Below is an aerial photo of the Lewis and Clark Resort facilities. Building identification is provided below.



- C – rental cabin
- GL – Group Lodge
- M – Motel unit
- O – Office/manager residence
- PS – Picnic shelter

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**Exhibit 3 Lewis and Clark Resort Cabins**

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**Exhibit 4 Lewis and Clark Resort Motel Units**

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**Exhibit 5 Lewis and Clark Resort Group Lodge**

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## HISTORICAL CONTRACT REVENUES

**Exhibit 6 Historical Lease Revenue 2008 - 2017**

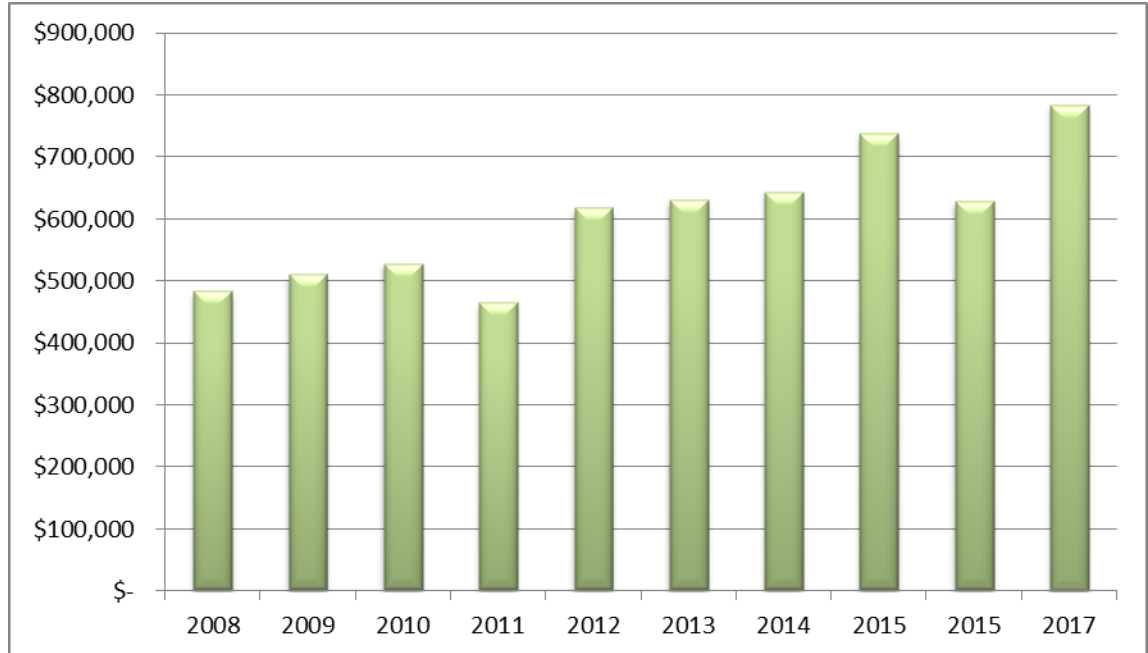


Exhibit 6 displays historical revenue for the last 10 years of operation. The Group Lodge began operation in 2012.

## FUTURE OPERATIONS

The exhibit below provides a summary of facilities and services that are required under the Draft Concession Agreement.

**Exhibit 7 Future Operations**

### Minimum Required Accommodations, Facilities and Services

1. Lodging service to include the following:
  - a. 14 three bedroom housekeeping cabins
  - b. 3 two bedroom housekeeping cabins
  - c. 24 motel type housekeeping units
  - d. 1 group lodge
2. Coin operated guest laundry
3. Swimming pool
4. 2 picnic shelters
5. Playground

6. Park entrance license sales

**Additional Authorized Services:**

1. Resort store including curios, souvenirs and accessories
2. Meeting room service
3. Bike rentals

## SUMMARY OF REQUIRED INVESTMENT

The required investment of the next concessionaire is in accordance with the terms of the Purchase Agreement provided in Section 4 of this prospectus. The sale price was established by the existing Concessionaire in accordance with the 1990 version of Administrative Rule 41:13 to which the current Concession Agreement is subject. The lease offered will be subject to the 2005 version of ARSD 41:13 according to which the valuation process of the concessionaire facilities upon transfer to a successor shall be based on an independent appraisal of Concessionaire Facilities. This is a competitive process and the terms of the sale will be the same for all interested parties. This investment includes the purchase of real property and personal property.

The purchase price for this opportunity is set at \$3,550,000.00 for Concessionaire Facilities and personal property which is further detailed in the Purchase Agreement provided in Section 4 of the Prospectus

## REPAIR AND MAINTENANCE RESERVE

The State believes that all facilities should be preserved and maintained by the concessionaire at a high level on an ongoing basis throughout the term of the concession agreement.

This reserve will be generated from all Resort sales and will provide an annual budget to be utilized towards concessionaire facilities as defined in the Draft Agreement. This is an expenditure requirement of the concessionaire to provide for ongoing and annual repairs on an as needed basis. These funds are not allowed to be used towards new development, every day cleaning, routine maintenance or annual inspections. Rather, it is intended to provide repairs and improvements to existing facilities which maintain their integrity and preserve the investments while serving the public in an attractive setting.

The Draft Agreement stipulates an annual plan to be submitted by the concessionaire for approval by the Department. Ideally, the concessionaire and Park Manager will cooperatively identify and prioritize needed repairs on an ongoing basis and develop this plan annually.

The State proposes the following Repair and Maintenance Reserve minimums:

- Two percent (2%) of all gross receipts

## PROMOTION FEE

South Dakota codified law 41-17-22.1, requires concession agreements within Lewis and Clark Recreation Area to include a Promotion Fee of up to 3%. This required fee is assessed on all concession sales within Lewis and Clark Recreation Area. The Promotion Fee is established at 3% in the Draft Concession Agreement. In accordance with the statute, the revenue collected from the promotion fee is used by the Department to promote the facilities, attractions and activities of Lewis and Clark Recreation Area which includes the concession operations. The fee may be added to the price of goods sold.

An annual cooperative promotion plan is developed between the Park, the Resort, and Lewis and Clark Marina. The goal of this process is to develop a mutually agreeable plan which best promotes all services offered at Lewis and Clark Recreation Area using the most effective and economic methods based on annual fund contributions.

## PERSONAL PROPERTY RESERVE

The State is interested in ensuring that the personal property related to visitor services (e.g. furniture, appliances, linens, etc.) is maintained in good quality over the course of the term. The state would like to see a commitment to reinvestment in the personal property as needed over the course of the ten year term. This is not a contractual requirement. However, the State is interested in a commitment to this issue.

## SITE VISIT

A site visit can be arranged for intended bidders which will include a Park overview, on-site tour and inspection of resort facilities and property. Please contact the Division of Parks and Recreation for scheduling a site visit.

Concession and Lease Manager  
South Dakota Department of Game, Fish and Parks  
Division of Parks and Recreation  
523 E Capitol Avenue  
Joe Foss Building  
Pierre, SD 57501  
(605) 773-3391

## EFFECTIVE DATE AND TERM OF NEW AGREEMENT

The effective date of the concession agreement is estimated to be January 1, 2019. The effective date of the contract is subject to change prior to contract award if determined necessary by the State.

The agreement is offered for a term of ten years for meeting the minimum terms proposed in this prospectus. Any proposed additional investments and modifications to the lease term are subject to Department review and approval. If approved, additional investments will be included as a requirement in the final concession agreement.

## **SECTION II**

### **PROPOSAL PACKAGE INSTRUCTIONS**

Proposal to Provide Commercial Lodging Services  
At Lewis and Clark Recreation Area

South Dakota Division of Parks and Recreation

## PROPOSAL INSTRUCTIONS

### 1) Submission of Proposal

- a) Proposals must be received by the due date and time shown on the front page of this Prospectus.
- b) All proposals must be addressed to Katie Ceroll, Director, Division of Parks and Recreation, 523 E Capital Avenue, Joe Foss Building, Pierre, SD 57501. Any information received in the proposals will be confidential and will not be released by the Division unless requested by the bidder to do so. Unsuccessful proposals or proposals received after the deadline will be returned to the bidder. Late proposals will be returned unopened.
- c) A draft concession agreement has been included in this Prospectus and sets forth the minimum terms and conditions under which the concession operation is to be conducted. Items included in the applicant's offer, if accepted as part of the proposal, will be incorporated into the final version of the lease agreement.
- d) Two copies and an original, plus required electronic forms, must be submitted and signed by the authorized person in the organization.

### 2) Questions

- a) If you do not understand something in the Prospectus, you must submit your questions in writing to the following person no later than November 23, 2018

Concessions Manager  
South Dakota Department of Game, Fish and Parks  
Division of Parks and Recreation  
523 E Capital Avenue  
Joe Foss Building  
Pierre, SD 57501

- b) The Division will respond to questions in writing, and will provide the questions and responses to all potential Offerors who have requested a Prospectus. Questions submitted after this date may not be answered.

### 3) Forms in Which Proposal Must be Submitted

- a) Offerors must follow the format provided in the Proposal Package, including in its entirety without alteration the "Offeror's Transmittal Letter," in competing for the concession opportunity. Failure to submit the Offeror's Transmittal Letter without alteration (except for filling in the indicated blanks) will make your proposal non-responsive.
- b) Please number each page and section in your completed proposal. Add information to your proposal only to the extent that it is necessary and relevant to respond to the factor. Each page should have a heading identifying the selection factor and subfactor to which the information contained on the page responds. Stay within the organizational framework in the Proposal Package. However, in assessing an offeror's response to a given selection factor, the Division may consider relevant information contained elsewhere in the proposal.

### 4) Evaluation of Offers

- a) All proposals received by the deadline will be evaluated by the Division of Parks and Recreation.
- b) The Division of Parks and Recreation reserves the right to reject or disregard any proposals submitted or to make counter proposals which it may consider reasonable or desirable, and it

reserves the right to negotiate with the bidder making the proposal deemed best to achieve the most desirable Agreement.

- c) The bidder, by submission of this proposal, agrees that if selected by the Department, to complete the negotiation and execution of an agreement by January 1, 2019.

#### **5) Cautions to Offerors about Submission and Evaluation of Proposals**

- a) Offerors must follow the format provided in the Proposal Package, including in its entirety without alteration the "Offeror's Transmittal Letter," in competing for the concession opportunity. Failure to submit the Offeror's Transmittal Letter without alteration (except for filling in the indicated blanks) and a completed copy of the Proposal Package will make your proposal non-responsive.
- b) All information regarding this Prospectus will be issued in writing. No Department or other State of South Dakota official is authorized to make substantive oral representations relating to this matter, and no Offeror should rely on any oral representations made by government officials with respect to this transaction.
- c) The proposal includes the selection factors to be used by the Department to evaluate proposals. Under each factor, the Department identifies subfactors to ensure that all elements of the factor are considered. You, the Offeror, should ensure that you fully address all of the selection factors and related subfactors.
- d) The information provided in this Prospectus, including the Appendices, is provided to allow Offerors to understand the operations and terms of the new concession agreement. Offerors are encouraged to thoroughly review all information and required submittal documents before beginning to prepare a proposal.
- e) The Purchase Agreement contained in Section 4 of this prospectus has been provided by the current Concessionaire to which all Offerors must agree. The Offeror is responsible for fully understanding the terms of sale contained in the Purchase Agreement.
- f) If you propose to make any financial commitments and considerations in response to any selection factor, your proposal will be closely reviewed and analyzed against your financial statements and supporting documents with appropriate review of feasibility. Such documents reviewed and analyzed will include but not be limited to the Business Organization and Credit Information, financial statements and balance sheets required in the proposal.
- g) The proposal and related materials submitted should reflect the entire proposal you are making. The Department will consider your written submission as your full and final proposal in response to the Prospectus, and will make its selection based on the written information you have submitted and other appropriate information. Do not assume that the Department knows anything about you or your proposal. Do not assume that any information about you or your proposal, previous correspondence or previous submissions are in the possession of or will be considered by the Department. This is true even if you are the current concessionaire or have operated another concession within the State of South Dakota.
- h) The draft concession agreement and its exhibits, which set forth the terms and conditions under which the concession operation is to be conducted, are attached. The Director may amend this Prospectus and/or draft concession agreement including extending date prior to the proposal due date. The Director may also cancel a solicitation at any time before the award of the concession agreement if the Director determines in its discretion that this action is appropriate in the public interest. No Offeror or other person will obtain compensable or other legal rights as a result of an amended, extended, canceled or reissued solicitation for this concession agreement.
- i) Document delivery services, including overnight delivery, to some areas may not provide true overnight delivery. Offerors are encouraged to insure the timely submittal of proposals by contacting the delivery service of their choice regarding delivery availability for the specific location specified on the front page of this Prospectus.

- j) Offerors are responsible for undertaking appropriate due diligence with respect to this business opportunity.
- k) The Department makes no representations as to the validity of the value of the required investment or the profitability or financial feasibility of the Lewis and Clark Resort business opportunity.
- l) The Offeror assumes all financial risks and liabilities associated with the sale transaction, investment and operation of Lewis and Clark Resort and further releases, indemnifies and holds harmless the Department from any responsibility for any such risk or liability.
- m) Offeror understands that, if selected, it is required to purchase existing concessionaire facilities as well as concessionaire's personal property in accordance with ARSD 41:13 (1990 Version). Offeror further understands that the advertised lease will be subject to ARSD 41:13 (2005 Version) which provides that upon future sale, the required purchase will be limited to only concessionaire facilities. Personal property purchased by the selected concessionaire pursuant to this prospectus may be sold in the future upon sale to a successor on negotiated terms but the future successor will not be required to purchase said personal property as part of a future prospectus.

## SECTION III

### PROPOSAL PACKAGE

PROPOSAL TO PROVIDE COMMERCIAL LODGING SERVICES  
AT LEWIS AND CLARK RECREATION AREA

South Dakota Division of Parks and Recreation

# EXHIBIT 1: THE OFFER

Katie Ceroll, Director  
South Dakota Division of Parks and Recreation  
523 East Capitol Avenue  
Pierre, SD 57501-3185

Dear Mrs. Ceroll:

I hereby agree to provide all visitor services, facilities, and improvements at Lewis and Clark Resort in accordance with the terms and conditions specified in the prospectus, draft concession or lease agreement provided in the Prospectus; and to execute the draft concession agreement. I have attached, to support my offer, those items as described in Exhibit 2 (Certificate of Corporate Proponent) and 3 (Proposal) of the Prospectus

By submitting this Proposal I hereby agree, if selected for award of the next concession lease:

1. To commence operations under the next concession lease on the effective date of the lease
2. To the terms, conditions, and values included in the Settlement Agreement
3. To resolve any disputes that may occur in accordance with the Administrative Rules of South Dakota
4. (Include only if the Offeror is not to be the Concessionaire under the draft concession agreement)  
To provide the entity that is to be the Concessionaire under the draft concession agreement with the funding, management, and other resources described in the proposal.

If selected by the Game, Fish and Parks Commission, I agree, within 30 days of notification and acceptance of my offer, to enter into negotiations with the South Dakota Department of Game, Fish and Parks for a concession agreement to furnish the accommodations and services as described in the prospectus.

Sincerely,

Signature

\_\_\_\_\_  
Witness

(Seal)

\_\_\_\_\_  
Company of Corporation

Address \_\_\_\_\_  
\_\_\_\_\_

Phone Number \_\_\_\_\_

## EXHIBIT 2: CERTIFICATE OF CORPORATE PROPONENT

I \_\_\_\_\_ certify that I am the \_\_\_\_\_ of the corporation named as proponent herein; that \_\_\_\_\_, who signed this proposal on behalf of the offer; was then \_\_\_\_\_ of said corporation; that said proposal was duly signed in behalf of the corporation by authority of its governing body and within the scope of its corporate powers.

\_\_\_\_\_

Title

## EXHIBIT 3: PROPOSAL

### PART 1: MANAGERIAL EXPERIENCE

#### STATE'S OBJECTIVES

The State is interested in appointing a concessionaire who has the relevant management and operational experience to manage the lodging concession operation at Lewis and Clark Recreation Area. The State wishes to understand the background of the Offeror in providing the same or similar types of services as those to be provided under the Concession Agreement.

#### QUESTIONS

##### **Question 1.1 Resume and experience of key executive personnel**

Demonstrate that you or your organization's key executive personnel have the experience and skills to effectively carry out the responsibilities of the Draft Concession Agreement.

- a. Describe the qualifications of the Offeror with responsibility for directly supervising this concession agreement. Include relevant experience, minimum qualifications, certifications (if applicable), and education in a consistent format.

##### **Question 1.2 Prior experience**

The State believes that past experience is an indication of future performance. Please provide example(s) of your experience in the operation and management of lodging facilities. The State will evaluate, among other factors, the length of experience, and the size and scope of the operation. Please provide the following information:

- a. Provide the name and location of operation
- b. Identify the owner or operator that you managed the project for including contact information (phone and email)
- c. Describe the nature and tenure of the Offeror's involvement
- d. Present information on the size of the operation: for example number and type of rental units and total annual nights rented
- e. Describe the amenities and services offered
- f. Gross revenues for the most recent three years of operation in which the Offeror was involved with the business
- g. Indicate the current status of the business (e.g., owned and operated by Offeror, sold, open but no longer operated by Offeror, closed, etc.)

##### **Question 1.3 Outline staffing levels for Lewis and Clark Resort services**

Demonstrate that your operation can effectively carry out the responsibilities of the Draft Concession Agreement by providing your plan for staffing in both full and part time equivalents in the following operational areas:

- a. Management and front desk staff
- b. Housekeeping staff

- c. Maintenance staff

**Question 1.4 Prior experience with external stakeholders**

- a) The Park has spent considerable time and effort to develop and foster good working relationships with the surrounding community: i.e., Chambers, tourism organizations, CVB and other associations interested in the well being of the Park. Please describe your experience with relationships with similar organizations and communities in and around locations where you currently have business operations.

## PART 2: FINANCIAL CAPABILITIES

### STATE'S OBJECTIVES

The State wishes to ensure that the future Concessionaire is financially able to meet the requirements of the Concession Agreement, and has a financial history that demonstrates the ability of the Offeror to operate the concession profitability and effectively.

### QUESTIONS

#### Question 2.1 Financial statements

Demonstrate that you are financially sound and have a history of meeting your financial obligations by providing financial statements for the two most recent fiscal years, with all notes to the financial statements. Personal financial statements must be provided for any owners of a sole proprietorship or general partners within a partnership.

#### Question 2.2 Credit report

Provide a current credit report (within the last three months) from a major credit reporting company such as Equifax, Experian or Dunn & Bradstreet.

#### Question 2.3 Initial Investment Schedule

Demonstrate your understanding of the financial obligations of the draft Concession Agreement by providing your estimates of the acquisition and start-up costs of this business using the Acquisition and Startup Cost form included at the end of this section and on the excel spreadsheet provided in the appendix. Explain fully the methodology and the assumptions used to develop the estimate. The information provided should be of sufficient detail to allow a reviewer to fully understand how the estimates were determined.

#### Question 2.4 Sources of capital

Demonstrate your ability to obtain the required investment funds detailed above. Identify the source(s) of the funds and provide compelling documentation of your ability to obtain the funds from these sources. Explain fully the financial arrangements you propose, using the following guidelines:

- a. Document each source and availability of all funds with your current financial statements, financing agreements, letters of commitment, or similar supporting documents.
- b. If funds are to be obtained from lending institutions (banks, savings and loans, etc.), include a letter (addressed to the lender and containing all appropriate bank contact information) permitting the lender to release any information to the State concerning the financing arrangements of this opportunity. Include the contact name on the letter.
- c. If funds are to be obtained from an individual, or a corporation whose primary fund source is an individual, provide the following as appropriate:
  - Current personal financial statement for the primary source of funds.
  - Documentation of any assets to be sold.

## PART 3: FRANCHISE FEES AND OTHER BENEFITS

### STATE'S OBJECTIVES

The State seeks to balance visitor services and resource protection with financial returns which are reinvested back into the facilities at Lewis and Clark Recreation Area; and concessionaire re-investment.

### QUESTIONS

#### Question 3.1 Franchise Fee

1. The minimum franchise fee structure acceptable to the State for this lease operation is:
  - Five percent (5%) of Gross Receipts

The offer of a higher franchise fee than this minimum is generally beneficial to the State and accordingly will generally be more favorably evaluated. However the State will balance consideration of revenue with its objectives of protecting, conserving, and preserving resources of the park area and of providing visitor services to the public at reasonable rates.

State the franchise fee that you propose. Such fee must at least equal the minimum franchise fee set forth above. Express this fee as a percentage of annual gross receipts.

\_\_\_\_\_percent of Gross Receipts

**Question 3.2 Promotion Fee**

The Draft Concession Agreement requires a Promotion Fee of 3% of all Gross Receipts. This fund is required by state law 41-17-22.1 and is generated from all concession based sales within Lewis and Clark Recreation Area. A cooperative promotion plan is developed between the Park, the Resort and the Marina annually based on actual fund balances. The goal of this plan is to promote all services offered at Lewis and Clark Recreation Area using the most effective and economic methods based on annual fund contributions.

The state realizes the prominent role that outdoor recreation plays in our economy, and the value of attracting additional tourism activity to the area. Additionally, the state believes that Lewis and Clark Recreation Area with its abundance of natural beauty and recreational opportunity, has established itself as a major recreational destination in the state. Promotion is just one part of the successful marketing efforts that a concessionaire will need to undertake in order to maximize the public perception and awareness of this resource.

Please provide a sample marketing plan for Lewis and Clark Resort that will provide for the maximum public use, business growth, and fulfillment of the obligations outlined in the draft concession agreement. This plan should include at a minimum the following items

- a. Background and overview
- b. Identification and segmentation of target market segments
- c. Strategy for marketing to each segment, including trends associated with each segment, an estimation of resources to be allocated to each segment, and comparable mix of business to other similar business operations
- d. Your philosophy on customer service, meeting visitor expectations, and expanding the customer base.

**Question 3.3 Repair and Maintenance Reserve**

As outlined in the Business Opportunity section, the State believes that well maintained facilities at Lewis and Clark Recreation Area are an integral part of the visitor experience. The Draft Agreement includes a minimum Repair and Maintenance Reserve for Concessionaire Facilities as follows:

- 2% of Gross Receipts.

This monetary obligation is in addition to routine or preventative maintenance necessary for continued use and appearance. It is intended to be put towards renovations, or repairs which help preserve the integrity of the facilities or towards replacements of major components once they have reached the end of their useful life.

The Draft Agreement stipulates an annual plan to be submitted for approval by the Department. Ideally, the concessionaire and Park Manager will cooperatively identify and prioritize needed repairs on an ongoing basis and develop this plan annually.

Given the State's objectives and the requirements discussed in the Business Opportunity section and clarified in Section 15 of the Draft Agreement, please elaborate on your plan for facility repair and maintenance. Your plan should include the following:

1. Preliminary observations of items to be renovated, your expected schedule, and prioritization plan
2. Brief description of the plan, including any strategy to make immediate improvements in the first year of operation
3. Estimated costs (if available)

Although a minimum reserve is established in the Draft Agreement, offering a reserve higher than the proposed minimum will be more favorably evaluated.

State the repair and maintenance reserve that you propose. Such fee must at least equal the minimum set forth above. Express this reserve as a percentage of annual gross receipts.

\_\_\_\_\_percent of Gross Receipts

### **Question 3.4 Personal Property Reserve**

The State is interested in ensuring that the personal property related to visitor services (i.e. furniture, linens, etc.) is maintained in good quality over the course of the term. The state would like to see a commitment to reinvestment in the personal property as needed over the course of the ten year term. This is not a contractual requirement. However, the State is interested in your commitment to this issue.

1. Identify how you will be responsive to this issue (e.g. commitment to a personal property reserve and/or a replacement schedule by usage or years in service.)

## PART 4: OTHER CRITERIA

### QUESTIONS

#### **Question 4.1 Other Facilities and Services Offered**

In addition to the Minimum Required Services, the Draft Concession Agreement also provides for additional authorized services. These are intended to allow flexibility in additional services offered. Please indicate if you intend to provide any of these services and describe any additional facilities and services beyond those authorized that you propose which will expand, enhance and improve the visitor experience at Lewis and Clark Resort.

## ACQUISITION AND STARTUP COSTS FORM

|   |          |          |
|---|----------|----------|
| <b>Acquisition Cost</b> <sup>(1)</sup>            |          | \$ _____ |
| Possessory Interest                               | \$ _____ |          |
| Other Incumbent Concessionaire Property           |          |          |
| Personal Property                                 | \$ _____ |          |
| Inventory   | \$ _____ |          |
|   |          | \$ _____ |
| <b>Immediate Purchase of New Items</b>            |          |          |
| Personal Property (Year One and Two total)        | \$ _____ |          |
| Merchandise and Supplies                          | \$ _____ |          |
|   |          | \$ _____ |
| <b>Initial Improvements</b>                       |          |          |
| Initial Improvements in facilities <sup>(2)</sup> | \$ _____ |          |
| Deferred maintenance <sup>(2)</sup>               | \$ _____ |          |
|   |          |          |
| <b>Other Soft Costs</b> <sup>(2)</sup>            |          | \$ _____ |
| <b>Initial Working Capital</b> <sup>(2)</sup>     |          | \$ _____ |
| <b>Total Acquisition Cost</b>                     |          | \$ _____ |

(1) All Offerors must include their estimate of the value of all property intended, whether planned for acquisition or currently owned, for use in the new Agreement

(2) Provide detail

## ASSET PURCHASE AGREEMENT

**THIS ASSET PURCHASE AGREEMENT**, herein this “**Agreement**”, made as of \_\_\_\_\_, 2018, between **Dakota Hospitality Management, Inc.**, a South Dakota Corporation currently having its principal offices at P.O. Box 754, Yankton, South Dakota 57078, herein “**Seller**”, and \_\_\_\_\_, herein collectively “**Buyers**”,

### WITNESSETH:

**WHEREAS**, Seller is the owner of the Lewis and Clark Resort, herein the “**Business**”, located upon the Premises, as defined below; and

**WHEREAS**, Seller is the tenant under a certain Lease with South Dakota Game Fish and Park Department, herein “**Landlord**”, having a commencement date of December 31, 2022, herein the “**Lease**”, pertaining to a certain real property including all improvements located thereon commonly known as 43496 Shore Drive, Yankton, South Dakota, herein the “**Premises**”, (a copy of the Lease is attached hereto as Exhibit “A” and by reference made a part hereof); and

**WHEREAS**, Seller desires to sell to Buyers, and Buyers desire to purchase from Seller, certain assets of Seller relating to the Business, upon the terms and conditions hereinafter set forth.

**NOW, THEREFORE**, in consideration of the covenants and conditions contained herein, it is agreed as follows:

1. Assets to be Sold and Purchased: Subject to the terms and conditions of this Agreement, Seller agrees to sell, assign, and deliver to Buyers, and Buyers agree to purchase and accept from Seller, the following assets:

- A. The tangible personal property set forth in Exhibit “B” attached hereto and by reference made a part hereof (which is understood by Buyers to be exclusive of the Excluded Assets set forth in Paragraph 8), herein the “**Equipment**”;
- B. The intangible personal property, set forth in Exhibit “C”, attached hereto and by reference made a part hereof, herein the “**Intangibles**”;
- C. All of Seller’s right, title and interest, if any in and to the “**Concessionaire Facilities**” as defined in the Lease and other improvements at or about the Premises;

C. All inventory of food, beverages, paper and cleaning and maintenance supplies, herein collectively the “**Inventory**”, located at the Business on the Closing Date; and

D. The goodwill of the Business.

2. Closing Date: The purchase and sale provided for herein shall be closed on or before December 20, 2018, herein sometimes the “Closing Date”, at \_\_\_\_\_, or such other place as may be mutually agreed upon. All normal items of proration, such as utilities, taxes, and the like will be computed as of the Closing Date. All prorations shall be re-calculated and adjusted by the parties hereto, based upon the actual bills within ten (10) days of when all the actual bills are received relating to the period of time prior to the Closing Date.

3. Seller’s Conditions Precedent: The obligation of Seller to close the transaction contemplated hereby is, at Seller’s option, subject to the following conditions precedent:

A. Seller obtaining the release of Seller and/or of the personal guarantees of Seller’s principals under the Lease; and

B. Seller successfully and without cost terminating those contracts identified on Exhibit “D”, attached hereto and by reference made a part hereof, or, at the option of Seller, assignment thereof to and assumption thereof by Buyers with release of Seller and its principals.

In the event the conditions precedent set forth above have not been satisfied on or before Closing, Seller shall have the option to terminate this Agreement, and the parties hereto shall be relieved of any other or further liability or obligation of any nature whatsoever to the other.

4. Buyers’ Conditions Precedent: The obligation of Buyers to close the transaction contemplated hereby is, at Buyers’ option, subject to the following conditions precedent:

A. Buyers’ obtaining financing; and

B. Buyers entering into a lease agreement with the South Dakota Department of Game Fish and Park.

5. Purchase Price:

A. The purchase price to be paid by Buyers to Seller shall be Three Million Five Hundred Fifty Thousand Dollars and No Cents

(\$3,550,000.00) (plus or minus prorations) for the properties set forth in Paragraph 1. above, allocated as follows:

|  |                    |
|--|--------------------|
| The Equipment, Intangibles & Inventory | (\$ 25,000.00);    |
| Concessionaire Facilities              | (\$ 3,375,000.00); |
| Goodwill                               | (\$ 150,000.00).   |

and payable as follows:

B. One Thousand Dollars (\$1,000.00) earnest money deposit, payable upon the execution of this Agreement by cash or check, which deposit shall be held by Seller's attorney, herein "**Escrowee**", and deposited in Escrowee's non-interest-bearing Trust Account. Upon Closing of the sale, the earnest money deposit shall be paid to Seller and shall be applied as a credit against the Purchase Price. In the event this transaction does not close for any reason, except for the default of Buyers, this earnest money deposit shall immediately be returned to Buyers upon notice to Escrowee from Buyers that this Agreement has been terminated. If Buyers defaults, Seller shall, as its sole remedy at law or in equity, be entitled to such earnest money deposit as liquidated damages, the parties agreeing that actual damages would be difficult to ascertain, that they have made a reasonable endeavor to fix such damages, that the earnest money deposit bears reasonable relation to probably damages and is not disproportionate to any damages reasonably to be anticipated and that the earnest money deposit does not constitute a penalty;

C. Three Million Five Hundred Forty-Nine Thousand Dollars (\$3,549,000.0) at Closing.

6. Transfer of Assets: The Equipment, the Intangibles and the Inventory shall be transferred at the price and terms set forth herein, and conveyed by a Bill of Sale and/or Assignment, without warranty of quality, fitness, merchantability, or otherwise, except as is set forth herein, but with full warranty of title as regards all of the Equipment except such as may be considered fixtures to the real estate and with respect to which the interests of Landlord shall not be warranted against.

7. Conduct of the Business by Seller: Seller will operate the Business in the usual and ordinary course until the Closing, including the sale of the Inventory and the purchase of new inventory to maintain the Inventory at a level comparable to that which exists at the execution of this Agreement.

8. Excluded Assets: Seller is selling and transferring only those assets heretofore identified, and Seller shall retain all right, title, and interest in and to all other assets, including but not necessarily limited to the following:

- A. All proceeds and monies to be received by Seller under this Agreement, and all other rights of Seller hereunder;
- B. All cash on hand or in banks;
- C. All accounts receivable;
- D. All cash equivalents, notes, securities, and evidences of indebtedness;
- E. All claims of Seller for refund (including interest thereon) of any and all taxes, assessments, and similar levies of every kind and character;
- F. Any non-assignable local and state licenses; and
- G. All assets of Seller having to do with operations unrelated to the Business.

9. Representations and Warranties of Seller: Seller represents and warrants to and agrees with Buyers as follows, which representations, warranties, and agreements shall continue in full force and effect each and every day to and including the Closing, and thereafter as provided in Paragraph 9. hereof:

- A. Seller is a corporation duly organized, validly existing, and in good standing under the laws of the State of South Dakota, and Seller is or will, at Closing, be entitled to own or lease its property and conduct the Business and has the necessary power and authority to enter into this Agreement and to consummate the transactions contemplated hereby;
- B. The Board of Directors of Seller have taken all action required by law, the Articles of Incorporation, its Bylaws, or otherwise to authorize the execution and deliver of this Agreement and the consummation of the transactions contemplated hereby and this Agreement has been duly executed and delivered by Seller and constitutes the valid, legally binding obligation of Seller in accordance with its terms;
- C. The execution and delivery of this Agreement and the consummation of the transactions contemplated by this Agreement

will not conflict with, or result in breach of, or constitute a default under, any partnership agreement, any articles of incorporation, or bylaws, contract, instrument, or obligation to which Seller is a party or is bound, or to which the assets being sold hereunder are subject, or result in the creation of any lien or encumbrance upon the assets being sold hereunder, nor will this Agreement violate any existing statute, order, writ, injunction, or decree of any court, administrative agency, or governmental body;

- D. Seller owns good, indefeasible, and marketable title in and to its respective assets being sold hereunder which at Closing will be free and clear of any mortgage, pledge, lien, judgment, claim, security interest, charge, option, or encumbrance of any nature whatsoever, and has taken all steps necessary or otherwise required to perfect and protect its rights in and to the respective assets being sold hereunder, and has the full right and power to sell, transfer, and assign the respective assets being sold hereunder without restriction;
- E. Seller is not a party to nor the subject of any pending suit, action, or legal, administrative, arbitration, or other proceeding or governmental investigations affecting the Business or the assets being sold hereunder, and to the best of Seller's knowledge, no such suit, action, proceeding, or investigation is threatened. There is no outstanding order, writ, injunction, or decree of any court, governmental agency, or arbitration tribunal against or affecting the Business or the assets of Seller being sold hereunder;
- F. No contract, relating to the Business and the assets being sold herein, has been made which is not cancelable within thirty (30) days, other than which are listed on Exhibit "D" attached hereto;
- G. There are no judgments, liens, actions, or proceedings pending against Seller;
- H. Payment has been made in full, or arrangements will be made for the payment in full at the Closing, of all withholding, social security, unemployment insurance, and sales taxes;
- I. Seller is not a party to any written or oral (a) contract for the employment of any individual employees; (b) continuing contract for the future purchase of materials, supplies, or equipment not cancelable upon a maximum of thirty (30) days' notice, except as agreed to herein; or (c) supply contract not made in the ordinary course of business;

- J. No notices of building or zoning ordinance, or health code, or license violations have been received by Seller and no proceedings against, or in connection with, the Premises or the operation of the Business are pending or to the best of the knowledge and belief of Seller, threatened under any such ordinances, codes, or licenses;
- K. Seller shall not enter into any material contracts between the date of this Agreement and the Closing unless Seller obtains prior approval from Buyers;
- L. Notwithstanding anything contained herein to the contrary, Seller covenants, warrants, and agrees that Buyers is purchasing only the aforesaid assets and shall not be liable for any liabilities of Seller whatsoever, except such contracts as are assigned to Buyers and accepted by Buyers in writing;
- M. No representation or warranty by Seller in this Agreement, nor any statement or certificate furnished, or to be furnished to Buyers pursuant thereto, in connection with the transactions contemplated herein, contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary to make the statements contained herein or therein not misleading;
- N. Seller shall indemnify, defend, and hold harmless Buyers, its employees, agents, heirs, and assigns from and against any and all loss, cost, damage, claims, liability, and/or expense including reasonable attorney fees resulting from any misrepresentation, breach of warranty, concealment, or nonfulfillment of any agreement on the part of Seller hereunder, or from any misrepresentation in or omission from any certificate, schedule, or other instrument furnished or to be furnished to Buyers under this Agreement or arising out of or in any way connected by Seller existing as of the date of Closing. Such duty of indemnification shall include, but not be limited to damage, liability, or loss pursuant to all federal, state, and local governmental laws, strict liability, and common law;
- O. No broker has been involved in this transaction and Seller is not a party to or in any way obligated under any contract for the payment of fees and expenses for any broker or finder in connection with this Agreement;
- P. Seller has not caused or allowed the generation, treatment, storage, disposal, or release of hazardous substances at or upon the Premises except in accordance with local, state, and federal

statutes and regulations. Seller has not caused or allowed the release of any hazardous substance or substances onto, at, or near the site and The Property is not, nor has it ever been to Seller's knowledge, subject to the release of any hazardous substance. As used herein, the terms "hazardous substances" and "release" shall have the same definitions as set forth in the "Comprehensive environmental Response, Compensation, and Liability Act" 42 U.S.C. 9601 et seq. and the "Resource Conservation and Recovery Act", 42 U.S.C.6901; and

Q. All parties who have an interest of any kind or nature in the assets being sold hereunder have joined in the execution of this Agreement.

10. Representations and Warranties of Buyers: Buyers represent and warrant to and agree with Seller as follows, which representations and warranties shall continue in full force and effect each and every day to and including the Closing, and, thereafter, as provided in Paragraph 10. hereof;

- A. Buyers are entitled to own or lease their property and conduct their business in the places where such properties are now owned or leased or such businesses are conducted, and has requisite capacity to enter into this Agreement and to consummate the transactions contemplated hereby;
- B. This Agreement and the transactions contemplated hereby will not result in the breach or termination of any provisions of, or constitute a default under, an indenture, agreement, or other instrument to which Buyers are party and by which any of the properties of Buyers may be bound, nor will this Agreement violate any existing statute, order, writ, injunction, or decree of any court, administrative agency, or governmental body;
- C. This Agreement has been duly executed and delivered by Buyers and constitutes the valid, legally binding obligations of Buyers in accordance with its terms;
- D. No representation or warranty by Buyers in this Agreement, nor any statement or certificate furnished, or to be furnished to Seller pursuant thereto, in connection with the transaction contemplated herein, contains or will contain any untrue statement of a material act or omits or will omit to state a material act necessary to make the statements contained herein or therein not misleading;
- E. Buyers shall indemnify Seller and hold Seller harmless from and against any and all loss, cost, damage, and/or expense resulting

from any misrepresentation, breach of warranty, concealment, or nonfulfillment of any agreement on the part of Buyers hereunder, or from any misrepresentation in or omission from any certificate, schedule, or other instrument furnished or to be furnished to Seller under this Agreement;

- F. No broker has been involved in this transaction, and Buyers are not a party to or in any way obligated under any contract for the payment of fees and expenses to any broker or finder in connection with this Agreement;
  - G. Buyers shall indemnify, defend, and hold harmless Seller, its employees, agents, shareholders, officers and directors, and assigns from and against any and all loss, cost, damage, claims, liability, and/or expense including reasonable attorney fees resulting from any misrepresentations, breach of warranty, concealment, or nonfulfillment of any agreement on the part of Buyers hereunder, certificate, schedule, or other instrument furnished or to be furnished to Seller under this Agreement or arising out of or in any way connected to any condition in, on, or of the Premises created by Buyers existing after the date of Closing. Such duty of indemnification shall include, but not be limited to damage, liability, or loss pursuant to all federal, state, and local environmental laws, strict liability, and common law; and
  - H. Buyers acknowledges that Buyers have not relied upon any business representations of Seller regarding purchase of the Business and that, together with Buyers' advisors, Buyers have managed the Business for approximately three (3) years prior to the execution of this Agreement and have familiarity, knowledge and experience sufficient to understand the risks involved in the transaction contemplated hereby. Buyers further acknowledges that Buyers have had an opportunity to ask questions of, and receive answers from, the Seller concerning the transaction contemplated thereby, as well as the Seller's business and financial affairs, which questions were answered to Buyers' complete and total satisfaction and that Buyers have received all the information Buyers consider necessary or appropriate for deciding whether to purchase the Business. These representations and warranties shall survive the Closing.
11. Documents at Closing:
- A. Seller shall deliver or cause to be delivered to Buyers, at the Closing, the following:

- i. Bill of Sale for all the Equipment, the Intangibles and the Inventory to be conveyed hereunder; and
  - ii. Corporate Resolution authorizing the sale herein.
- B. Buyers shall deliver to Seller, at the Closing, the following: Three Million Five Hundred Forty-Nine Thousand Dollars (\$ 3,549,000.00), plus or minus prorations, in cash, certified or cashier's check or wire transfer representing the amount due under Paragraph 5 herein; and
- C. Seller, on request of Buyers, on or after the Closing, shall execute and deliver such other documents as may be reasonably necessary to transfer or further perfect title to the assets being transferred hereunder.

12. Condemnation and Risk of Loss:

- A. In the event that proceedings to condemn the Premises herein described or any material portion thereof which would impair the use of the Premises commence on or before the date herein set for Closing or such adjourned dates as may be mutually agreed upon or to which either party may be entitled, Buyers at any time after commencement of such proceedings, but not later than thirty (30) days after receipt of notification thereof from Seller, may terminate this Agreement and thereupon, Seller shall return or cause the return to Buyers of all money deposited or paid pursuant to this Agreement without penalty including any interest thereon and Buyers and Seller shall be relieved of any other or further liability or obligation of any nature whatsoever to the other. In the event that Buyers do not elect to terminate but agrees to close this transaction subject to such proceedings, Buyers shall be entitled to all awards to which Seller may be entitled for damages of any kind and nature resulting from such proceedings;
- B. The risk of loss or damage to the Premises by fire or otherwise until closing is assumed by Seller. In the event of loss or damage to the Premises, Buyers shall have the option to terminate this Agreement, and if Buyers exercises their option to cancel, Seller shall forthwith return Buyers' deposit and neither party shall have any further rights or responsibilities under this Agreement with respect to the other. If Buyers do not elect to terminate, this Agreement shall remain in full force and effect and Seller shall assign to Buyers, at the Closing, any and all claims under any then existing fire and casualty insurance policies and Buyers shall be entitled to assignment of any such claim or claims and subject to

such damage or destruction, and, in addition, will receive a proration credit upon Closing in the amount of any insurance deductible.

13. Notices: Any notices required hereunder shall be in writing, signed by the party serving the same, and shall be deemed delivered upon hand delivery, on the second business day after deposited in the registered or certified U.S. mail, return receipt requested, postage prepaid, or on the first business day after being sent by overnight courier, fees prepaid, and if intended for Seller shall be addressed:

To Seller: Dakota Hospitality Management, Inc.  
PO Box 754  
Yankton, SD 57078

with a copy to: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

and intended for Buyers shall be addressed to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

or such other address as any party may furnish the others in writing.

14. Survival of Representations: All covenants, representations, and warranties contained herein or made in writing by Seller and Buyers in connection with the transaction contemplated hereby shall be true and correct at the Closing and shall survive the execution and delivery of this Agreement and the Closing of the sale and implementation hereof for a period of one (1) year.

15. Time of the Essence: It is agreed by all parties that time is of the essence in respect to this Agreement and that failure of either Seller or Buyers to adhere to the time schedules as set forth herein shall constitute a default by that party.

16. Construction: The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions. Failure to require strict performance or to exercise any right or remedy contained herein will not preclude any future requirement or the exercise of any such right or remedy. When used herein, the singular shall include the plural and vice versa, where

applicable, and the use of one gender shall include the other genders. Paragraph headings are for convenience only and shall not affect or define any part of the text. No change in this Agreement will be valid unless signed in writing by all parties.

17. Successors and Assigns: This Agreement shall bind and benefit the parties hereto and their respective heirs, legal representatives, successors, and permitted assigns, as the case may be.

18. Counterparts: This Agreement may be executed in counterparts, each of which will be deemed an original, and all of which together will constitute one and the same instrument. Electronic signature pursuant to the Electronic Signature in Global and National Commerce Act (ESIGN Act) shall not be denied legal effect, validity or enforceability solely because it is in electronic form. This Agreement, to the extent signed and delivered by means of a facsimile transmission or as an attachment to an electronic mail message in "pdf" or similar format, will be treated in all manner and respects as an original agreement or instrument, regardless of any variation in pagination or appearance, and will have the same binding legal effect as if it were the original signed version thereof delivered in person.

19. Entire Agreement: This Agreement represents the entire agreement between the parties and shall not be amended, modified, or changed except by written instrument executed by the party against whom such change is binding.

20. Choice of law, Venue and Attorneys Fees: This Agreement shall be governed by the laws of the State of South Dakota. The Court sitting in Yankton County, South Dakota are agreed to be the courts of proper and exclusive subject matter and personal jurisdiction and venue of and for any and all actions and proceedings relating to this Agreement and, in the event of litigation, the prevailing party, as determined by the Court, shall be entitled to recovery of its reasonable attorneys fees and costs from the non-prevailing party.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement as of the day and year first above written.

Buyers:

\_\_\_\_\_

Seller:

Dakota Hospitality Management, Inc.

By

\_\_\_\_\_  
Jeffrey D. Wahl, Its President



**AMENDMENT TO ASSET PURCHASE AGREEMENT**

**THIS AMENDMENT TO ASSET PURCHASE AGREEMENT**, herein this “**Amendment**”, made as of October \_\_, 2018, between **Dakota Hospitality Management, Inc.**, a South Dakota Corporation currently having its principal offices at P.O. Box 754, Yankton, South Dakota 57078, herein “**Seller**”, and \_\_\_\_\_ herein collectively “**Buyers**”,

WITNESSETH:

**WHEREAS**, Seller and Buyers are parties to an Asset Purchase Agreement dated October 29, 2018, herein “**APA**”; and

**WHEREAS**, it had been agreed that Seller would retain all right, title and interest to the Post Office Box 754, Yankton, South Dakota 57078, and such agreement was not included in the APA; and

**NOW, THEREFORE**, in consideration of the covenants and conditions contained herein, it is agreed that paragraph 8 of the APA be and hereby is amended as follows:

8. Excluded Assets: Seller is selling and transferring only those assets heretofore identified, and Seller shall retain all right, title, and interest in and to all other assets, including but not necessarily limited to the following:

- A. All proceeds and monies to be received by Seller under this Agreement, and all other rights of Seller hereunder;
- B. All cash on hand or in banks;
- C. All accounts receivable;
- D. All cash equivalents, notes, securities, and evidences of indebtedness;
- E. All claims of Seller for refund (including interest thereon) of any and all taxes, assessments, and similar levies of every kind and character;
- F. Any non-assignable local and state licenses;
- G. All assets of Seller having to do with operations unrelated to the Business, and
- H. Post Office Box 754, Yankton, South Dakota 57078.

This Amendment may be executed in counterparts, each of which will be deemed an original, and all of which together will constitute one and the same instrument. Electronic signature pursuant to the Electronic Signature in Global and National Commerce Act (ESIGN Act) shall not be denied legal effect, validity or enforceability solely because it is in electronic form. This Amendment, to the extent signed and delivered by means of a facsimile transmission or as an attachment to an electronic mail message in "pdf" or similar format, will be treated in all manner and respects as an original agreement or instrument, regardless of any variation in pagination or appearance, and will have the same binding legal effect as if it were the original signed version thereof delivered in person.

IN WITNESS WHEREOF, the parties hereto have signed this Amendment as of the day and year first above written.

Buyers:

\_\_\_\_\_

\_\_\_\_\_

Seller:

Dakota Hospitality Management, Inc.

By

\_\_\_\_\_  
Jeffrey D. Wahl, Its President



**FIRST AMENDMENT TO RESTATED  
LEWIS AND CLARK RECREATION AREA  
LODGING LEASE AGREEMENT**

This FIRST AMENDMENT TO RESTATED LEWIS AND CLARK RECREATION AREA LODGING LEASE AGREEMENT between the South Dakota Department of Game, Fish and Parks ("Department") 523 East Capitol, Pierre, South Dakota, 57501 and Dakota Hospitality Management, Inc. DBA Lewis and Clark Resort ("Concessionaire") P.O. Box 754, Yankton, South Dakota, 57078.

WHEREAS, the Department and Regency Inns, Inc. entered into a Lodging Lease Agreement on May 10, 1988 and said Lodging Lease was assigned by Regency Inns, Inc. to Dakota Hospitality Management, Inc. on June 7, 2001; and

WHEREAS, The Department and the Concessionaire amended and restated the Lodging Lease on October 18, 2004 to provide for Concessionaire development plans, term of Lease and extension thereof, geographic scope of the Concession boundary, and other matters to accommodate the proposed development; and

WHEREAS, The Concessionaire completed the development plan to the satisfaction of the Department in accordance with the terms and conditions of the October 18, 2004 Amended and Restated Lodging Lease Agreement, which has resulted in a current contract expiration date of December 31, 2017; and

WHEREAS, the Department and the Concessionaire recognize the Concessionaire's desire to construct a Group Lodge to accommodate larger single groups; and

WHEREAS, the Concessionaire desires to construct the Group Lodge in accordance with the plans prepared by Mannes Architects dated June 23, 2011 and construction cost estimates totaling roughly \$450,000.00 provided to the Department by the Concessionaire in exchange for a 5 year extension of the lease term; and

WHEREAS, the Department and Concessionaire desire to set forth the Group Lodge construction and expenditure requirements with which the Concessionaire must be determined to be in compliance with to be eligible for the extension of the lease term.

IT IS THEREFORE AGREED that the Amended and Restated Lewis and Clark Recreation Area Lodging Lease Agreement dated October 18, 2004 between the Department and the Concessionaire is further amended as follows:

1. Concessionaire is required to provide the Group Lodge at the Resort at its expense. Concessionaire's required expenditure for providing the Group Lodge shall be a minimum of \$400,000.00. The construction of the Group Lodge and the minimum amount which is required to be expended by Concessionaire shall be subject to the following terms:
  - a. The Concessionaire and the Department agree to the following:
    - i. Concessionaire shall not proceed with construction of the Group Lodge without first obtaining the prior written approval of the Department, which is contingent on the Department obtaining all environmental and cultural clearances. Project approval shall not be unreasonably withheld by the Department.
    - ii. The floor plan prepared by Mannes Architects dated June 23, 2011 shall be used to determine the dimensions of construction. Any material deviations or modifications to this plan must be submitted to the Department for approval prior to construction.
    - iii. The Group Lodge shall be designed and constructed to meet all requirements of the International Building Code, 2006 Edition. In addition, all federal, state or local building requirements or regulations will be met. Should any discrepancy exist between a requirement imposed by the IBC, 2006 Edition and a requirement imposed by a federal, state or local law or regulation, the more stringent requirement shall prevail. The Concessionaire shall retain a Certified Building Inspector or architect with approval of the Department to verify that the construction meets the criteria outlined in the section. Further, in regards to the construction of the Group Lodge:
      - (a) The quality and durability of all materials used in the construction of the Group Lodge shall meet or exceed that of the materials used in the existing lodging structures at the Resort.
      - (b) The workmanship in the construction of the Group Lodge shall meet or exceed the workmanship in the existing lodging structures in the resort.
      - (c) The exterior finishes, interior finishes, furnishings, fixtures and equipment shall meet or exceed the aesthetics, colors and styles of the existing lodging units at the Resort.

- iv. The construction of the Group Lodge shall be completed in within 24 months of the execution date of this agreement.
  - v. Concessionaire will provide all water, sewer and electrical supply connections for the Group Lodge at its expense.
  - vi. Upon completion of the Group Lodge, Concessionaire shall submit to the Department for approval a detailed report of activities and the costs expended and incurred for the project. All receipts and invoices attributable to the construction of the Group Lodge shall be held by the Concessionaire and submitted to the Department upon request.
  - vii. All facilities provided by Concessionaire pursuant to this Agreement shall be subject to all fees and all terms of the Lodging Lease Agreement as amended.
  - viii. The Group Lodge will be provided by the Concessionaire and designated as a "Concessionaire Facility" upon completion, at which time Exhibit A-2 of the Lodging Lease Agreement will be amended to reflect such designation.
  - ix. The Concession boundary shall be modified to accommodate for the construction and usage of the Group Lodge. Exhibit A-1 of the Lodging Lease shall be modified and hereby replaced with Exhibit A-1 dated July 22, 2011 which is attached hereto and made a part hereof by this reference.
  - x. Upon completion of the Group Lodge, concessionaire shall reshape and reseed all disturbed and bare soil with a department approved seed mixture.
  - xi. The Department agrees to provide all tree removal necessary for construction site clearance and Group Lodge access.
  - xii. The Department shall provide a temporary gravel parking area to accommodate Group Lodge guests. A permanent parking facility will be provided by the Department at such time that funds are available.
2. The Department will grant a 5-year extension of the lease term contingent upon Concessionaire satisfying all construction requirements and deadlines and meeting the minimum expenditure requirement of

\$400,000.00 established in this Agreement. Once the Department and Concessionaire have agreed in writing that Concessionaire has successfully met all construction requirements and deadlines and has met the minimum expenditure requirement established in this Agreement, and the Concessionaire is in full compliance with the terms established in the Concession Agreement, the Concession Agreement shall be further amended as follows:

- a. Section 1, Term of Agreement, shall be deleted in its entirety and replaced by the following:

Section 1. Term of Agreement

- (a) This Agreement shall be for a term of Thirty-five (35) years, commencing on May 10, 1988 and ending on December 31, 2022.

All other terms and conditions of the Restated Lewis and Clark Recreation Area Lodging Lease dated October 18, 2004 continue to remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this First Amendment To Restated Lewis and Clark Recreation Area Lodging Lease on this 10<sup>th</sup> Day of August, 2011

SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS

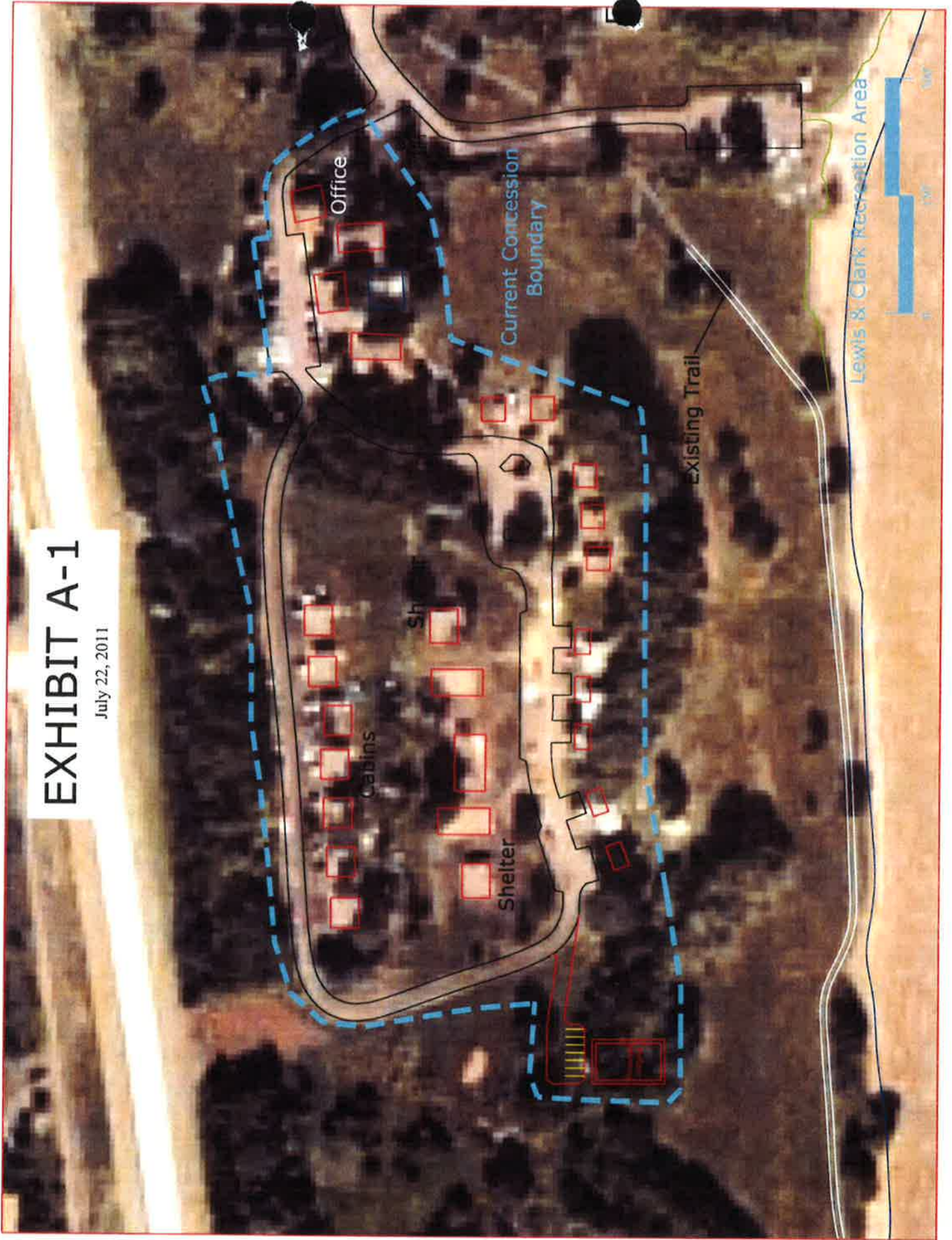
BY: Douglas Hofer DATE: 8-10-11  
Douglas Hofer, Director, Division of Parks and Recreation

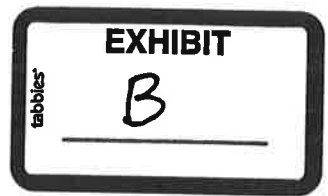
DAKOTA HOSPITALITY MANAGEMENT, INC.  
(CONCESSIONAIRE)

BY: Jeff Wahl, pres. DATE: Aug 4, 2011  
Jeff Wahl  
Dakota Hospitality Management, Inc.

# EXHIBIT A-1

July 22, 2011





Storage Trailer

Flatbed Trailer

Cargo Trailer

Kubota Mower

EZ go Golf Cart

Mr Golf Cart

6 Passenger Cart

2003 Dodge Pickup

1999 Boat

Taxidermy Mounts

# Exhibit C

Intangibles

# Exhibit D

Contracts

**LEWIS AND CLARK RECREATION AREA  
LODGING CONCESSION AGREEMENT**

This Concession Agreement is made and entered into on \_\_\_\_\_, 2018 ("Effective Date") by and between the South Dakota Department of Game, Fish and Parks ("Department") 523 East Capitol, Pierre South Dakota 57501, and \_\_\_\_\_ ("Concessionaire") of \_\_\_\_\_, doing business as Lewis and Clark Resort. This Agreement is subject to and governed by the requirements of ARSD Article 41:13 subtitled Park Concession Leases effective October 17, 2005, (the "Rules") and is subject to all terms and conditions of Lease No. DACW45-1-02-6008 between the Department and the Secretary of the Army copies of both of which have been provided to the Concessionaire.

**WITNESSETH**

**Whereas**, Lewis and Clark Recreation Area is administered by the Department for providing park and related services, tourism, and resource management; and

**Whereas**, the Department desires to have a limited and prescribed portion and area of Lewis and Clark Recreation Area operated by a concessionaire as a lodging resort open to the general public; and

**Whereas**, the Department chooses to commercially operate the area through a private concessionaire to provide services to the general public; and

**Whereas**, the Department has provided grounds and facilities of the area, and desires a private concessionaire to operate the same; and

**Whereas**, the Commission has promulgated the Rules relating to concession leases under which certain powers and authority to enter into concession leases and agreements have been delegated to the Department; and

**Whereas**, Concessionaire desires to enter into a concession agreement with the Department to operate a lodging concession in portions of Lewis and Clark Recreation Area and be a concessionaire, as defined in the Rules.

**Now therefore**, for the purposes of carrying out concession operations in designated portions of the Lewis and Clark Recreation Area pursuant to the terms and conditions of this Agreement, the parties agree as follows:

**Section 1. Term of Agreement**

- (a) This Agreement shall be for a term of ten (10) years, commencing on the effective date, and ending on December 31, 2028.

## Section 2. Definitions

- (a) "Agreement" means this Concession Agreement, and all its amendments, addendums, exhibits, attachments, and all documents executed for the purpose of ensuring Concessionaire's performance of this Concession Agreement.
- (b) "Commission" means the South Dakota Game, Fish and Parks Commission.
- (c) "Concessionaire" means as defined under ARSD 41:13:01.
- (d) "Concessionaire Facilities" means as defined under ARSD 41:13:01.
- (e) "Department" means the South Dakota Department of Game, Fish and Parks.
- (f) "Division" means the Division of Parks and Recreation, a division of the Department of Game, Fish and Parks responsible for the administration of the state park system, including Lewis and Clark Recreation Area.
- (g) "Director" means the Director of the Division of Parks and Recreation, acting on behalf of the Secretary of the Department of Game, Fish and Parks, and his or her duly authorized representatives.
- (h) "Fair Market Value" means as defined under ARSD 41:13:01.
- (i) "Government Facilities" means as defined under ARSD 41:13:01
- (j) "Gross Receipts" means all revenue received, to be received, or realized by Concessionaire from all sales for cash or credit, of services, accommodations, materials and other merchandise made pursuant to the rights granted under this Agreement, Gross Receipts of SubConcessionaires, commissions earned on leases or agreements with other persons or companies operating in the Resort, and revenue earned from sales through electronic media, mail order or otherwise. Concessionaire shall report all of its revenues to the Department without allowances, exclusions or deductions of any kind. For purposes of calculating franchise fees and other fees and reserve amounts identified in this agreement, revenue received from park entrance license sales, and hunting and fishing license sales (excluding agent fees), will be excluded from Gross Receipts.

- (k) "Gross Receipts of SubConcessionaires" means all revenue received, to be received, or realized by SubConcessionaires from all sales for cash or credit, of services, accommodations, materials and other merchandise made as a result of the exercise of the rights conferred by a lease, license or agreement between the Concessionaire and a SubConcessionaire at the Resort, revenues of SubConcessionaires, commissions earned on leases or agreements between SubConcessionaires and other persons or companies operating in the Resort, and revenue earned from sales through electronic media, mail order or otherwise. A SubConcessionaire shall report all of its revenues to the Concessionaire without allowances, exclusions or deductions of any kind or nature.
- (l) "Park" means the property within the boundaries of Lewis and Clark Recreation Area.
- (m) "Personal Property" means as defined in ARSD 41:13:01.
- (n) "Possessory Interest" means as defined in ARSD 41:13:01.
- (o) "Qualified Appraiser" means as defined in ARSD 41:13:01.
- (p) "Resort" means the geographic area as set forth in Exhibit A-1 that includes Government Facilities and Concessionaire Facilities assigned to the Concessionaire as set forth in Exhibit A-2 and A-3, and the operation thereof as permitted under this Agreement.
- (q) "SubConcessionaire" means a third party that, with the approval of the Director, has been granted rights by Concessionaire to operate under a concession lease, license or agreement (or any portion thereof) between Concessionaire and a third party, or between a SubConcessionaire and a third party, whether in consideration of a percentage of revenues or otherwise.
- (r) "Park Supervisor" means the manager of Lewis and Clark Recreation Area or his or her duly authorized representatives.

### **Section 3. Accommodations, Facilities and Services**

- (a) Concessionaire shall provide the following accommodations, facilities, and services within the Resort, subject to the Performance Standards for the Operation and Maintenance of Lewis and Clark Recreation Area Resort attached to the Agreement as Exhibit B.

### Minimum Required Accommodations, Facilities and Services

1. Lodging service to include the following:
  - a) 14 three bedroom housekeeping cabins
  - b) 3 two bedroom housekeeping cabins
  - c) 24 motel type housekeeping units
  - d) 1 group lodge
2. Coin operated guest laundry
3. Swimming pool
4. 2 picnic shelters
5. Playground
6. Volleyball and basketball courts
7. Park entrance license sales

- (b) The Department authorizes the Concessionaire to provide only the following additional accommodations, facilities and services within the Resort. The Department retains the right to approve in writing these or any other additional services contemplated by the Concessionaire prior to the services being offered.

### Additional Authorized Accommodations, Facilities and Services:

1. Resort store including curios, souvenirs and accessories
  2. Meeting room service
  3. Bike rentals
- (c) The Department retains the right to authorize additional accommodations, facilities, services and merchandise within the Resort. The Department shall give the Concessionaire first opportunity to provide such additional accommodations, facilities, services and merchandise. If Concessionaire does not desire to provide such additional accommodations, facilities, services and merchandise, or if the Department and Concessionaire are unable to agree upon the terms under which Concessionaire would provide such additional accommodations, facilities, services and merchandise, the Department shall be entitled to contract with a third party to provide said additional accommodations, facilities, services and merchandise within the Park under terms acceptable to the Department.
- (d) The Department reserves the right to establish reasonable standards as to the nature, type and quality of Concessionaire's services and merchandise. The Department retains the right to disapprove types of services and merchandise that do not meet these standards.

#### **Section 4. Rates and Quality Control**

- (a) All rates, fees and prices charged the public by Concessionaire must be reasonable and comparable to the fees, rates and charges charged for similar accommodations, facilities, services and merchandise in the region or outside the region if similar accommodations, facilities, services and merchandise are not provided in the region. Concessionaire shall clearly post or mark all rates and prices for accommodations, facilities, services and merchandise.
- (b) The Department reserves the right to establish reasonable standards as to the nature, type and quality of the Concessionaire's accommodations, facilities, services and merchandise. All accommodations, facilities, services and merchandise sold are subject to the rules and laws of the State of South Dakota and the United States.

#### **Section 5. Capital Development and Improvements**

- (a) Concessionaire, with prior written approval of the Director, may construct, modify or install at its cost such fixtures, structures, or improvements to Government Facilities or Concessionaire Facilities necessary for the operations required or authorized hereunder, subject to the Possessory Interest (and extent thereof) as authorized by ARSD 41:13. Concessionaire shall acquire no Possessory Interest to any fixtures, structures, and improvements made to Government Facilities or Concessionaire Facilities without the written approval of the Director. Requests shall be made in writing to the Department in sufficient detail to determine the scope, financing and scheduling of the proposed project. Drawings, maps or illustrations shall accompany the written request which accurately describe the location and design of all proposed fixtures, structures and improvements and affected areas. All requests must address the requirements of the Americans with Disabilities Act.
  - i. Unless otherwise agreed upon by the parties in advance, professionally developed design and construction plans for each project contemplated and requested by Concessionaire, prepared by architects, engineers and/or contractors, shall be submitted to the Director for approval. No construction, modification, or installation of fixtures, structures and improvements shall commence without receipt of written approval from the Director. Once approved, Concessionaire shall make no changes or alterations to the construction plans except upon the Director's written approval. Concessionaire agrees that any

review or approval by the Director of Concessionaire's construction plans is solely for the benefit of the Department, and without any representation, warranty or liability whatsoever to Concessionaire or any other person with respect to the adequacy, correctness or sufficiency thereof or any compliance with all local, state and federal laws, regulations and building codes, or otherwise. All designs and construction of the fixtures, structures and improvements shall be in compliance with all local, state and federal laws, regulations and building codes. The Director may require plans to be prepared, approved and signed off by a professional licensed architect and/or engineer for a proposed project.

- ii. Upon completion of approved projects, Exhibit A shall be amended to include the additions and value of Possessory Interest associated with the fixtures, structures and improvements.
- (b) In addition to any rights and remedies afforded to the Department for breach of this Agreement, if Concessionaire Facilities and/or Government Facilities are modified, including the construction of any unauthorized fixtures, structures and or improvements to or of Concessionaire Facilities and/or Government Facilities, and the modifications occur without the Department's written consent, at the discretion of the Department, the Department may:
- (i) Require that the Concessionaire at the Concessionaire's expense, restore the Concessionaire Facilities and/or Government Facilities to their original condition; or
  - (ii) Direct that the modifications becomes Government Facilities and that no Possessory Interest compensation be paid to Concessionaire
- (c) Activities involving any ground disturbance, placement of fill material, prescribed burning of vegetation or tree removal shall require prior written approval from the Department. Any requests for these activities shall be made to the Department in writing in sufficient detail to determine the scope and schedule of the proposed project. Drawings, maps or illustrations accurately describing the location of these activities shall accompany the written request. All activities involving any ground disturbance, placement of fill material, prescribed burning of vegetation or tree removal shall be completed in compliance with all local, state and federal laws and regulations.

- (d) In the event that Concessionaire constructs fixtures, structures or improvements to Concessionaire Facilities or Government Facilities, Concessionaire shall be responsible for securing all necessary licenses and permits required under local, state and federal laws and regulations.
- (e) All construction activities must meet or exceed existing levels of craftsmanship. No Department owned resources or materials from the Park shall be used in any project, except by written consent of the Department.
- (f) Concessionaire shall not cause, permit or suffer any lien or encumbrance to attach to the Resort, the Concessionaire Facilities or Government Facilities, except for capital development improvements to Concessionaire Facilities as outlined in Section 5. If Concessionaire shall cause, permit or suffer a lien or encumbrance to attach, Concessionaire shall cause the same to be cancelled and discharged of record by bond or otherwise as allowed by law at the expense of Concessionaire within thirty (30) days after the filing thereof. Concessionaire shall defend on behalf of the Department, at Concessionaire's sole cost and expense, any action, suit or proceeding which may be brought thereon for the enforcement of such lien or encumbrance. Concessionaire shall pay any damages, including payment of any legal expenses incurred by the Department for doing the same in the event Concessionaire fails to obtain cancellation or discharge of the lien or encumbrance, fails to satisfy and discharge any judgment entered thereon and/or fails to save the Department harmless from any claim or damage resulting therefrom.

**Section 6. Facilities**

- (a) The Department hereby assigns for use by Concessionaire the Resort as identified in Exhibit A-1.
- (b) The Department hereby assigns to Concessionaire the Concessionaire Facilities set forth in Exhibit A-2, the Government Facilities identified in Exhibit A-3 all of which are located within the Resort.
- (c) Concessionaire has inspected the Concessionaire Facilities and Government Facilities identified in Exhibit A-2 and A-3, is thoroughly aware of their condition, and accepts them and other items in an "as is" condition.
- (d) The Department reserves the right to withdraw or expand the land, Government Facilities and/or Concessionaire Facilities located within the Resort during the term of this Agreement for the

purposes of protecting the Park and its visitors, and/or to restrict or provide additional accommodations, facilities, services and/or merchandise. Any material adjustment shall require an appropriate adjustment to the franchise fees, if necessary, and the terms of ARSD 41:13:03:04 (4) shall apply.

- (e) Both parties understand that the State of South Dakota self-insures Government Facilities. Therefore, if a Government Facility is destroyed or damaged to an extent that in the sole discretion of the Department it is impractical to repair or replace, the Department makes no assurance that the Government Facility shall be repaired, improved or replaced.
- (f) If Government Facilities are damaged by the acts, omissions, or conduct of Concessionaire, its agents, employees or customers, which damage in the sole discretion of the Department is practical to repair or replace, it shall be the responsibility of Concessionaire to make the necessary repairs/replacements at its own expense to a condition satisfactory to the Department. If Government Facilities are damaged by the acts, omissions, or conduct of Concessionaire, its agents, employees or customers, which damage in the sole discretion of the Department amounts to a total loss or is impractical to repair or replace, Concessionaire shall compensate Department for the loss.
- (f) The Department shall have the right to enter the Resort, Government Facilities and Concessionaire Facilities for the proper administration of the terms of this Agreement and other purposes the Department deems necessary, including health and safety inspections.
- (g) In the event that a Concessionaire Facility is removed, abandoned, demolished, or substantially destroyed and no other improvement is constructed on the site, Concessionaire shall at its own expense, promptly restore the site to its natural condition to the extent that the Concessionaire Facility had an impact upon the site.

## **Section 7. Operations and Maintenance**

- (a) Concessionaire shall operate the Resort in compliance with the terms and conditions of this Agreement including the performance standards for the Operation and Maintenance of the Resort set forth in Exhibit B. The performance standards are established in order to maintain a high standard of public service, physical appearance, operation, repair and maintenance.

- (b) Concessionaire shall comply with the specific dates and hours of services specified in Section 2 of Exhibit B.
- (c) Concessionaire, at its expense, shall provide all maintenance of Concessionaire Facilities, Government Facilities and Personal Property located within the Resort. The Concessionaire shall perform such work in accordance with the performance standards contained in Exhibit B. Concessionaire shall also be responsible for keeping the Resort free from litter, complying with environmental laws and regulations, complying with safety rules, laws and regulations, and maintaining in good order and in a safe condition the grounds, Government Facilities, Concessionaire Facilities, and Personal Property of and within the Resort and in accordance with the performance standards contained in Exhibit B.
- (d) At the expiration or termination of this Agreement, Concessionaire shall return to the Department the Government Facilities in the same condition or better condition than existed at the initiation of this Agreement, reasonable wear and tear excepted.
- (e) Concessionaire shall not do or permit to be done any act or thing within the Resort and within Concessionaire's operations which shall or might subject the Department to any liability or responsibility or injury to any person or to property by reason of any business or operation being carried on or upon the Resort or by Concessionaire. Concessionaire shall comply with all laws, orders and regulations of federal, state and local authorities, and with any direction of any public officer or officers pursuant to applicable laws which impose any order or duty upon Concessionaire with respect to the Resort, the use or occupation thereof, or with respect to Concessionaire's business and operations.
- (f) Concessionaire shall occupy the Resort as of the Effective Date and thereafter will continuously use the Resort solely for the purpose of providing the accommodations, facilities, services and merchandise identified in Section 3 and other uses incidental thereto. Concessionaire shall not use or knowingly permit any part of the Resort to be used for any unlawful purpose, and shall not conduct or allow to be conducted any activity that shall constitute a nuisance.
- (g) Concessionaire shall not during the term of this Agreement, or during any period of holdover, use, store, generate or treat any Hazardous Materials on or within the Resort, except in accordance with all applicable, federal, state and local laws and regulations. Concessionaire shall not release or allow to be released into the environment any Hazardous Materials. Concessionaire shall indemnify, defend and hold harmless the Department from and

against any loss, cost, damage, liability, or expense, including but not limited to attorneys' fees and disbursements, arising by reason of any clean-up, removal, remediation or detoxification action required under applicable federal, state and local laws and regulations by reason of the Concessionaire's use, generation, storage, treatment or release of Hazardous Materials. The foregoing covenants and indemnity obligation shall survive the expiration or any termination of this Agreement. "Hazardous Materials" shall mean (i) any biologically or chemically active or other toxic or hazardous wastes, pollutants or substances, including, without limitation, asbestos, PCBs, petroleum products and by-products, substances defined or listed as "hazardous substances" or "toxic substances" or similarly identified in or pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., and as hazardous wastes under the Resources Conservation and Recovery Act, 42 U.S.C. § 6010 et seq., (ii) any chemical substance or mixture regulated under the Toxic Substance Control Act of 1976, as amended, 15 U.S.C. § 2601 et seq., (iii) any "toxic pollutant" under the Clean Water Act, 33 U.S.C. § 466 et seq., as amended, (iv) any hazardous air pollutant under the Clean Air Act, 42 U.S.C. § 7401 et seq., 9v) hazardous materials identified in or pursuant to the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 et seq., and (vi) any hazardous or toxic substances or pollutant regulated under any federal, state or local law.

- (h) Any names, logos, trademarks, or copyrights (the "Intellectual Property") developed during or pursuant to this Agreement that in any way associates with, identifies, implicates, or infers an affiliation with the State of South Dakota, the Department, the State Park System, Lewis and Clark Recreation Area, and/or the Resort must receive prior approval from the Commission and belongs to the State of South Dakota upon creation and continues in the State of South Dakota's exclusive ownership upon termination of this Agreement. For all Intellectual Property approved by the Department, Concessionaire shall receive a non-exclusive, non-transferable license to use the Intellectual Property with respect to the accommodations, facilities, services and merchandise offered for sale by Concessionaire. The license shall be limited to the sale of accommodations, facilities, services and merchandise from the Resort only. Concessionaire shall not offer for sale outside of the Resort, including by mail order, other store locations and the Internet, the services and merchandise without the Department's prior written consent. Concessionaire shall not be permitted to sublicense any of the Intellectual Property without the Department's consent. Concessionaire agrees to cooperate in the filing of any affidavits and applications by providing proof of use of the Intellectual Property upon the Department's reasonable request.

Concessionaire acknowledges that the Department has the unrestricted authority to set the standards for the use of the Intellectual Property, as well as the standards, specifications and qualities of the accommodations, facilities, services and merchandise. As such, the Department shall have the right, at all reasonable times, to inspect Concessionaire's business locations, services and merchandise for quality verification purposes. The Department, on behalf of the State of South Dakota, does not make any representation or warranty with respect to the Intellectual Property and the use thereof, and expressly disclaims all representations and warranties including, without limitation, the warranty of non-infringement. Concessionaire agrees to promptly notify the Department of any possible infringement of the Intellectual Property by third parties or, of any claims of infringement against Concessionaire and/or the State of South Dakota made by a third party. The State of South Dakota shall have the sole right to bring any action for infringement and to recover and retain any and all damages.

#### **Section 8. Utilities**

Concessionaire shall pay costs for all utilities in the Resort, including but not limited to water, electricity, garbage disposal, telephone, television and telecommunication and wi-fi service. Maintenance responsibilities of Concessionaire for Department-owned utility systems within the Resort shall be in accordance with the performance standards set forth in Exhibit B.

#### **Section 9. Accounting Records and Other Reports**

- (a) Concessionaire shall prepare and maintain accounting records of the Resort segregated by profit center under generally accepted accounting principles that are customary for lodging businesses. The records shall be made available for inspection by the Department on reasonable notice during normal working hours.
- (b) All capital costs of any fixtures, structures or improvements for which Concessionaire claims a Possessory Interest shall be recorded at actual cost and the depreciation schedule shall be based on generally accepted accounting principles, all of which shall be submitted to the Department at the time such capital assets are entered on Concessionaire's books.
- (c) Concessionaire shall submit to the Department annual accounting records and reports for the operation of the Resort to include Gross Receipts broken down by profit center. These records and reports

along with state tax remittance forms are to be provided to the Department with the corresponding franchise fee payments as provided for in Section 10 as well as promotion fee payments as provided for in Section 11.

- (d) Concessionaire shall within one hundred twenty (120) days of the close of Concessionaire's fiscal year submit to the Department annual audited accounting records and reports for the operation of the Resort to include a consolidated balance sheet and income statement for all operations. Additionally, Concessionaire shall provide a profit and loss statement by profit center and all necessary supporting schedules.
- (e) The Concessionaire shall retain all records and reports required by law and under this Agreement for a period not less than five years following the expiration or termination of this Agreement and its amendments. The Department shall, at any time during the term of the Agreement and until five years after the expiration or termination of this Agreement, have access to and the right to examine any of the pertinent books, records, documents, and papers of Concessionaire related to this Agreement, including state and federal income tax records and returns. If the result of any audit or examination of the Concessionaire's financial records indicates substantial discrepancies from the information that is reported to the Department, the Department reserves the right to bill and the Concessionaire shall pay for the costs of conducting such audit or examination in addition to any other amounts payable to the Department pursuant to this Agreement.
- (f) From time to time, the Department may require Concessionaire to submit other reports and data regarding the Resort, Concessionaire's performance under this Agreement or otherwise, including but not limited to, operational information and capital progress reports.
- (g) Concessionaire agrees to waive any right to confidentiality of all records and reports identified in this section for Commission purposes. This waiver is not intended to apply to third parties or the public at large, except as provided by State law and Subsection (h) below.
- (h) Concessionaire agrees to waive any right to confidentiality of records, reports and information contained therein for the purposes of preparing a prospectus and other documents for leasing the Resort, as necessary for any subsequent concessionaire to operate the Resort, or for other legislative or administrative purposes.

## **Section 10. Franchise Fees**

Concessionaire shall pay to the Department a franchise fee during each year of the Agreement term which shall be a sum of money equal to five percent (5%) of Gross Receipts

Payments shall be made no later than January 30<sup>th</sup>, for the final calendar quarter of the proceeding calendar year; July 30<sup>th</sup>, for the first two quarters of the current year; and October 30<sup>th</sup> for the third calendar quarter of the current year and shall be accompanied by accounting records as described in Section 9(c). Payments to the Department by Concessionaire not received on or before the due date shall be considered to be in arrears and subject to an interest payment equivalent to one and one-half percent (1.5%) per month of the unpaid amount which shall be added to the following month's remittance.

## **Section 11. Promotion Fees**

In accordance with South Dakota Codified Law 41-17-22.1, a three percent (3%) promotion fee shall be assessed on all gross receipts. The fee which may be added to the price of the product or service will be collected at the point of sale by the Concessionaire. The Fee shall be paid by the Concessionaire to the Department on a monthly basis. All promotion fee payments shall be accompanied by accounting records as indicated in Section 9(c).

## **Section 12. Remedies, Termination or Expiration of the Agreement**

- (a) Procedures upon termination or expiration of this Agreement shall be in accordance with ARSD Article 41:13 in effect at the Effective Date of this Agreement or as the same may hereafter be amended during the term of this Agreement.
- (b) Upon termination or expiration of this Agreement for any reason, and, in the event that Concessionaire is not to continue the operations authorized under this Agreement after its expiration, Concessionaire shall comply with all applicable requirements of Exhibit C to this Agreement, "Transition to New Concessionaire." This section and Exhibit C shall survive the expiration of this Agreement.
- (c) The Department may elect any and all remedies available to the Department under applicable law, including but not limited to the termination of this Agreement upon written notice in whole or in part at any time for default, and may terminate this Agreement upon written notice in whole or in part when necessary for the protection of visitors or area resources. Termination for default may be

utilized in circumstances where the Concessionaire has materially breached any requirements of this Agreement, including but not limited to failure to provide obligated fee payments, maintain and operate the minimum required accommodations, facilities, services and merchandise as provided in Section 3 herein, sale of merchandise disapproved for sale, failure to meet the requirements of the operations and maintenance performance standards as set forth in Exhibit B, and has failed to cure the breach as set forth in this Subsection. If Concessionaire materially defaults on any of the terms or conditions of this Agreement, and does not cure or remedy such default within ten (10) days of receipt of written notice from the Department, or Concessionaire is not diligently proceeding to cure such default if the curing of such default cannot be reasonably effected within such ten (10) day period, the Department may terminate this Agreement without further notice. In the event of termination of this Agreement for default, the provisions of this Section apply.

- (i) To avoid interruption of service at the Resort upon expiration or termination of this Agreement, Concessionaire shall, at the option and in the sole discretion of the Department:
  - a. continue to provide visitor services for a reasonable time, as agreed upon in writing by the parties, to enable the Department to select a successor, and to allow the successor to otherwise comply with the terms of this Agreement in the ordinary course of business and endeavor to meet the standards of service and quality that are required by the Department in order to maintain customer service in conjunction with Exhibit B; or
  - b. consent to the assignment of a temporary operator, or operation by the Department, for the operation of the Concessionaire Facilities and Personal Property for a period not to exceed 365 days; provided that the temporary operator or the Department pays Concessionaire a reasonable fee for the use of the Concessionaire Facilities and Personal Property, not to exceed ten percent (10%) annually of the depreciated book value of such Concessionaire Facilities and Personal Property used by the temporary operator or the Department, and prorated for the amount of time they are in use by the temporary operator or the Department.
  - c. consent to the purchase of Concessionaire's inventory and supplies by the temporary operator or the Department for use or resale purposes. The temporary

operator or the Department must reimburse Concessionaire for any inventory and supplies purchased by Concessionaire and retained by the temporary operator or the Department for use or resale purposes. The value of the inventory and supplies retained by the temporary operator or the Department shall be determined by actual invoice amounts submitted to or paid by Concessionaire. .

- d. consent to the transfer of the “Intangible Items” as listed in the Settlement Agreement used at the Resort to a temporary operator, successor concessionaire or the Department for use or resale purposes..
- (d) The Department shall have a right to offset amounts owed to the Department against all amounts owed by the Department under this Agreement.
- (e) If any legal proceedings are brought by either party to this Agreement against the other in connection with the interpretation, application or performance of the terms and conditions of this Agreement, each party shall be required to pay its own attorney’s fees and costs in connection with such proceedings. All amounts due the Department by reason of any default on the part of Concessionaire shall accrue interest at the rate of one and one-half percent (1.5%) per month from the date the amount is due until paid.
- (f) In addition to the rights and remedies provided for herein, the Department and Concessionaire shall each have all remedies at law or in equity, all remedies being cumulative.

### **Section 13. Possessory Interest Provisions**

Possessory Interests for Government Facilities and Concessionaire Facilities shall be determined in accordance with ARSD 41:13. The Department shall have a right to offset amounts owed to the Department against all amounts owed by the Department for any Possessory Interests purchased by the Department.

### **Section 14. Indemnification, Waiver of Claims and Insurance**

- (a) Concessionaire agrees to defend, hold harmless and indemnify the State of South Dakota, its officers, agents and employees from and against any and all actions, suits, damages, liabilities and

expenses, including but not limited to attorneys' fees, in connection with the loss of life, personal injury and/or damages to property of third persons that may arise from or out of the occupancy, use or maintenance of the Resort, and as a result of performing services hereunder. This section does not require Concessionaire to be responsible for or defend against claims or damages arising solely from errors or omissions of the State, its officers, agents or employees. This indemnification shall survive the termination or expiration of this Agreement.

- (b) Concessionaire agrees that during the term of this Agreement Concessionaire shall maintain such insurance as Concessionaire deems necessary but agrees that the minimum amount of insurance Concessionaire shall acquire and maintain in full force and effect throughout the period of time covered by this Agreement shall be as set forth below. Concessionaire shall maintain the following coverages and limits, but may attain the same by means of supplementing the respective coverages with Excess Umbrella Liability
- (i) Commercial General Liability Insurance: Concessionaire shall maintain occurrence based commercial general liability insurance or equivalent form with a limit of not less than Two Million Dollars (\$2,000,000.00) for each occurrence and a per location aggregate limit of not less than Two Million Dollars (\$2,000,000.00). If such insurance contains a general aggregate limit it shall apply separately to this Agreement or be no less than two times the occurrence limit.
  - (ii) Business Automobile Liability Insurance: Concessionaire shall maintain business automobile liability insurance or equivalent form with a combined single limit of not less than One Million Dollars (\$1,000,000.00). Such insurance shall include coverage for owned, hired and non-owned vehicles.
  - (iii) Excess Umbrella Liability Insurance: This coverage may be used to supplement any of the above liability coverage policies in order to arrive at the required minimum limit of liability coverage. In addition, coverage shall be at least as broad as that provided by underlying insurance policies, and the limits of underlying insurance shall be sufficient to prevent any gap between such minimum limits and the attachment point of the coverage afforded under the "Excess Umbrella" liability policy.
  - (iv) Worker's Compensation Insurance and Unemployment Insurance: This coverage shall be as required by South Dakota law covering Concessionaire employees as will

protect itself and the State of South Dakota and agencies thereof from claims under the Worker's Compensation laws and unemployment insurance laws of the State of South Dakota.

- (v) Personal Property Insurance:
  1. Amount of Insurance: 100% of replacement value, without deduction for physical depreciation
  2. Insurance shall cover the Personal Property contained in all buildings, structures, improvements & betterments for all Government Facilities and Concessionaire Facilities and/or used in Concessionaire's operations.
  3. Coverage shall apply on an "All Risks" or "Special Coverage" basis.
  4. The policy shall provide for loss recovery on a replacement value basis, without deduction for physical depreciation.
  5. "Blanket Amount" insurance is to be provided. The amount of insurance (limit of liability) should represent no less than 100% of the replacement value of the sum total of all insured property, without deduction for physical depreciation.
  6. The coinsurance provision, if any, shall be waived or suspended by an Agreed Amount or Agreed Value clause.
  7. The vacancy and unoccupancy restriction, if any, must be eliminated for Personal Property that shall be vacant or unoccupied beyond any time period specified in the policy.
- (vi) Real Property Insurance: Concessionaire shall provide real property insurance to cover against loss to Concessionaire Facilities at 100% of replacement value (without deduction for physical depreciation).
- (c) These minimum requirements are subject to evaluation and revision every two years during the term of this Agreement or upon renewal or modification of this Agreement.
- (d) Concessionaire, prior to engaging in and/or providing the services described herein, shall furnish satisfactory proof of such insurance by filing with the Department, a Certificate of Insurance from the Insurance Company verifying and certifying to the existence and limits of the required insurance. Such Certificate shall provide therein that no cancellation of said insurance shall be made or

become effective without at least thirty (30) days' written notice being provided to the Department. Concessionaire is required to provide to the Department a current certificate of insurance at all times.

- (e) Concessionaire agrees to report to the Park Supervisor any event encountered in the course of performance of this Agreement which results in injury or loss to any person or property, or which may otherwise subject Concessionaire, the State of South Dakota and/or their respective officers, agents or employees to liability. Concessionaire shall report any such event to the Park Supervisor immediately upon discovery. Concessionaire's obligation under this section shall only be to report the occurrence of any event to the Park Supervisor and to make any other report provided for by Concessionaire's duties or applicable law. Concessionaire's obligation to report shall not require disclosure of any information subject to privilege or confidentiality under law (e.g., attorney-client communications). Reporting to the Park Supervisor under this section shall not excuse or satisfy any obligation of Concessionaire to report any event to law enforcement or other authorities under the requirements of any applicable law.
- (f) The Department has no obligation to and is not responsible for payment of any money to Concessionaire that results from disruption of services.
- (g) Except as set forth in Section 6(e), neither the Department nor Concessionaire shall be liable to the other, nor to any SubConcessionaires, for any loss or damage to any building, structure or other tangible property owned by the other, including but not limited to lost rents, income and profits, even though such loss or damage might have been occasioned by the negligence of such party, its employees, agents, contractors or invitees. Concessionaire shall include in any lease, contract or agreement with a SubConcessionaire a provision in accordance with this Subsection.

## **Section 15. Repair and Maintenance Reserve Provisions**

- a) Concessionaire shall establish a repair and maintenance reserve (the "Repair and Maintenance Reserve"). Concessionaire shall contribute to the Repair and Maintenance Reserve a sum no less than twopercent (2%) of the annual Gross Receipts.

This reserve shall be credited by the 15<sup>th</sup> of every month based upon the preceding month's Gross Receipts.

- b) Use of Funds. Funds in the Repair and Maintenance Reserve shall be used for the maintenance, repair and renovation of Concessionaire Facilities included in this Agreement.
  - (i) 20% of the total annual contribution may be expended by Concessionaire for repair and maintenance of Concessionaire Facilities on an emergency basis without prior approval. If not expended during any calendar year, the remainder shall be expended by Concessionaire under the provisions of Section 14 (b) (ii) hereof.
  - (ii) The remaining 80%, plus any amounts not expended under subsection (b)(i) of this Section 15 shall be administered and utilized for maintenance, repair and renovation of Concessionaire Facilities which projects have been previously approved by the Department.
  
- c) Unallowable Uses. Funds in the Repair and Maintenance Reserve shall not be used for the following:
  - (i) Seasonal salaries of Concessionaire's employees, SubConcessionaire's employees, and/or independent contractors performing housekeeping and grounds keeping activities associated with Concessionaire's and SubConcessionaire's respective operations.
  - (ii) Routine maintenance including, but not limited to, periodic and/or occasional inspection, adjustment, lubrication, cleaning, painting, replacement of parts, repairs, and other activities intended to prolong service and prevent unscheduled breakdown.
  - (iii) Preventative maintenance, including planned or scheduled servicing, inspection and adjustment activities that result in continued service, fewer breakdowns, and intended to prevent premature failure of equipment and materials.
  - (iv) New construction or additions to existing facilities.
  
- d) Possessory Interest. Concessionaire does not obtain any right to a Possessory Interest for repair and maintenance of Concessionaire Facilities funded from the Repair and Maintenance Reserve.
  
- e) Approval process. An annual repair and maintenance plan of action shall be developed by Concessionaire and submitted to the Department for approval prior to the commencement date of this Agreement, and by November 1 of each year thereafter. The plan shall outline proposed repair and maintenance projects consistent with the above requirements for the succeeding calendar year. If Concessionaire and the Department cannot agree on the plan of

action, then the Commission shall make the final determination on the plan. The repair and maintenance plan shall be performed as approved prior to December 15 of the following year unless the approval contemplated the extension thereof, or unless an extension is granted by the Department. Concessionaire shall provide the Department with a detailed report of activities and the costs expended and incurred, for all annual repair and maintenance work completed. This report is due by January 1 of each year, unless an extension of time was granted.

- f) Carryover of funds on an annual basis. If a repair and maintenance project costs more than the balance included in the Repair and Maintenance Reserve, then Concessionaire, at Concessionaire's discretion may fund the repair and maintenance costs in excess of funds in the Repair and Maintenance Reserve. The excess costs shall be refunded, without interest, to Concessionaire from funding to occur in subsequent years.
- g) Treatment of reserve funds at end of term. The parties agree to make every effort to exhaust all funds in the Repair and Maintenance Reserve by the end of the Agreement term. If there is a surplus at the end of the term, any remaining Repair and Maintenance Reserve funds shall be transferred to the Department for the purpose of ongoing maintenance of Concessionaire Facilities associated with this Agreement. If there is a deficit at the end of the Agreement term, Department shall compensate Concessionaire for the amount of the deficit.
- h) If this Agreement is terminated by the Department before the established expiration date, the Department shall reimburse Concessionaire for the cost of approved repairs and maintenance activities expended by Concessionaire which have been prepaid but not recovered by application of the annual Repair and Maintenance Reserve.

## **Section 16. General Provisions**

- (a) Reference to the Department in this Agreement shall include the Department Secretary, Director of the Division of Parks and Recreation, Park Supervisor and their authorized representative(s).
- (b) Concessionaire shall comply with all federal, state and local laws, regulations, ordinances, guidelines, permits and requirements applicable to operating the Resort and providing services pursuant to this Agreement, and shall be solely responsible for obtaining current information on such requirements.

- (c) This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota. Any lawsuit pertaining to or affecting this Agreement shall be venued in Circuit Court, Sixth Judicial Circuit, Hughes County, South Dakota.
- (d) All other prior discussions, communications and representations concerning the subject matter of this Agreement are superseded by the terms of this Agreement, and except as specifically provided herein, this Agreement constitutes the entire agreement with respect to the subject matter hereof.
- (e) This Agreement and any operations and services authorized thereunder may not be assigned, sublet, extended, renewed or amended in any respect, except when agreed to in writing by the Department and Concessionaire.
- (f) Concessionaire may not use SubConcessionaires, subcontractors or sublessees to perform the services described herein without the express prior written consent of the Department. Concessionaire shall include provisions in its Department-approved SubConcessionaire agreements requiring its SubConcessionaires, subcontractors, or sublessees to comply with all provisions of this Agreement, to indemnify the Department, and to provide insurance coverage for the benefit of the Department in a manner consistent with this Agreement. Concessionaire shall cause its SubConcessionaires, subcontractors, sublessees, and their agents and employees to comply, with applicable federal, state and local laws, regulations, ordinances, guidelines, permits and requirements, and shall adopt such review and inspection procedures as are necessary to assure such compliance. Concessionaire shall remain responsible to the Department for obligations, responsibilities, and rights assigned to another by Concessionaire.

Concessionaire agrees and Department acknowledges that all records required under this Agreement shall be maintained in the name of and provided by \_\_\_\_\_ on behalf of Concessionaire.

- (g) In addition to the remedies afforded to the Department for breach of the terms of this Agreement, the Department reserves the right to bill Concessionaire for, and the Concessionaire agrees to pay to the Department, the actual costs incurred by the Department to provide any minimum required accommodations, facilities, services and merchandise for sale specified in Section 3 of this Agreement in the event Concessionaire fails to provide those minimum required accommodations, facilities, services and merchandise for sale.

- (h) In the event that a court of competent jurisdiction shall hold any provision of this Agreement unenforceable or invalid, such holding shall not invalidate or render unenforceable any other provision hereof.
- (i) Concessionaire acknowledges and supports the Department's effort to collect park entrance fees to provide for the continued maintenance of the South Dakota state park system.
- (j) In each instance where the consent, approval or acceptance of the Department is required under the terms of this Agreement, such consent, approval or acceptance shall be in writing and shall not be unreasonably withheld by the Department.
- (k) Concessionaire agrees that in performance of this Agreement it is acting as an "independent contractor" and not as an employee, representative or agent of the Department.
- (l) Any notice or other communication required under this Agreement shall be in writing and sent or delivered to the address set forth below. Notices shall be given by and to the Director on behalf of the Department, and by and to \_\_\_\_\_ on behalf of Concessionaire, or such authorized designees as either party may from time to time designate in writing.

Department

Director  
 Division of Parks & Recreation  
 523 East Capitol  
 Pierre, South Dakota 57501

Concessionaire

Notices or communications to or between the parties shall be deemed to have been delivered when mailed by first class mail, provided that notice of default or termination shall be sent by registered or certified mail or, if personally delivered, when received by such party. Copies of all correspondence from Concessionaire to the Department or Director shall be sent simultaneously to the Park Supervisor.

- (n) No amendment or modification of this Agreement shall be effective for any purpose unless the same be in writing and signed by authorized representatives of the parties.

**Section 17. Discrimination.**

Concessionaire shall not discriminate against any person based upon race, color, national origin, religion, sex and disability in the operation and maintenance of the Resort and shall fully comply with Title VI of the 1964 Civil Rights Act, and applicable federal and state laws and regulations.

Discrimination on the Basis of Residence. Discrimination on the basis of residence, including preferential reservation, membership or annual permit systems is prohibited except to the extent that reasonable differences in admission and other fees may be maintained on the basis of residence.

Concessionaire shall not discriminate on the basis of disability, and is subject to Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and applicable federal and state laws and regulations.

### **Section 18. Park Entrance License Provisions.**

- (a) All individuals entering or utilizing the Resort are subject to the park entrance license requirements and payment of the required fee except for the following:
  - (i) Employees or volunteers traveling under the most direct route from the park entrance to their designated work duty stations during designated working hours. The Park Supervisor shall provide Concessionaire with Resort employee entrance license exemption decals to display in their vehicles.
  - (ii) Any commercial or service vehicles doing direct business with the Resort.
- (b) Concessionaire shall take reasonable steps to ensure that its patrons, employees, agents, and volunteers comply with the park entrance license fee requirements.

## **Section 19. Resident Use**

Except for the on-site manager's residence located in the Resort office building, no portions of the facilities or Resort assigned hereunder shall be used for the purposes of seasonal or permanent residency unless authorized in writing by the Department.

## **Section 21. Surety Bond Requirement**

The Concessionaire will furnish the Department with a surety bond, certificate of deposit or other instrument as approved by the Department in the name of the Department of Game, Fish and Parks effective for each year of the lease in the amount of \$32,000.00 conditioning the Concessionaire's faithful fulfillment and performance of the terms and conditions of this Agreement. The surety bond, certificate of deposit or other approved instrument shall be released to the Concessionaire upon termination or expiration of the lease after all Franchise Fees, Promotion Fees and other charges owed to the Department have been paid in full and facilities have been returned to the Department in a condition consistent with the terms of this Agreement. Commencing on the effective date of this Agreement, and continuing each January thereafter during the term of this Agreement, the Department shall review the Concessionaire's performance of its duties and obligations under this Agreement, and shall, in its sole discretion, determine whether to release, reduce, or maintain the bonding requirements set forth in this Section 21.

## **Section 21. Procedure for Assignment, Sale or Transfer of Agreement**

The parties agree that the provisions of ARSD Article 41:13 shall apply to the sale, lease, or transfer of this Agreement.

END OF AGREEMENT TEXT

The above and foregoing CONCESSION AGREEMENT was approved by the Game, Fish and Parks Commission on \_\_\_\_\_, 2018 authorizing the Director of the Division of Parks and Recreation to execute the same on behalf of the Commission.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2018.

SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS

BY: \_\_\_\_\_  
Katherine Ceroll, Director  
Division of Parks and Recreation

CONCESSIONAIRE

BY: \_\_\_\_\_

## **List of Exhibits**

### Exhibit A

- A-1 – Land Assignments Map for area including Concessionaire and Government Facilities Assigned to the Concessionaire
- A-2 – List of Concessionaire Facilities and associated possessory interest
- A-3 – List of Buildings and Structures Constituting Government Facilities Assigned to the Concessionaire

### Exhibit B

PERFORMANCE STANDARDS FOR THE OPERATIONS AND  
MAINTENANCE OF THE LEWIS AND CLARK RESORT

### Exhibit C

TRANSITION TO A NEW CONCESSIONAIRE

### Exhibit D

ADMINISTRATIVE RULES OF SOUTH DAKOTA ARTICLE 41:13, PARK  
CONCESSION LEASES

# EXHIBIT A-1 RESORT AREA



**EXHIBIT A-1**

July 22, 2011

**EXHIBIT A-2**

List of Concessionaire Facilities and associated possessory interest

| <p align="center"><b>CONCESSIONAIRE IMPROVEMENT AUTHORIZATION<br/>AND<br/>DETERMINATION OF POSESSORY INTEREST<br/>South Dakota Division of Parks and Recreation</b></p> |     |  |   |
|---|-----|--|---|
| <p align="center"><b>Exhibit A-2 attached to and made part of Agreement:</b></p>  |     |  |   |
| <p align="center"><b>Concessionaire:</b></p>  |     | <p align="center"><b>Agreement (Effective Date):</b></p> |   |
| <p align="center"><b>Concessionaire Facilities and Associated Possessory Interest</b></p>   |     |  |   |
| Fac No  | Qty | Description  | Possessory Interest at Agreement Effective Date |
|   | 14  | 3 bedroom rental cabins                                  | 100%  |
|   | 3   | 2 bedroom rental cabins                                  | 100%  |
|   | 3   | Motel unit buildings w/ 8 individual rental units each   | 100%  |
|   | 1   | Group Lodge  | 100%  |
|   | 1   | Office and Manager residence building                    | 100%  |
|   | 1   | Garage   | 100%  |
|   | 1   | Storage shed   | 100%  |
|   | 1   | swimming pool  | 100%  |
|   | 1   | set playground equipment                                 | 100%  |
|   | 2   | picnic shelters  | 100%  |
|   | 2   | Volleyball courts  | 100%  |
|   | 1   | Basketball court   | 100%  |
|   |     | Above ground utilities                                   | 100%  |
|   |     |  |   |
|   |     |  |   |
|   |     |  |   |
|   |     |  |   |
|   |     |  |   |



## **EXHIBIT B**

### **PERFORMANCE STANDARDS FOR THE OPERATIONS AND MAINTENANCE OF THE LEWIS AND CLARK RECREATION AREA RESORT**

The following Performance Standards (“Standards”) of the operation and maintenance of the Resort sets forth the specific responsibilities to be performed by the Concessionaire as required by the Agreement entered into on \_\_\_\_\_ . These Standards are an integral element of the Agreement. These Standards set forth the general, operational and maintenance requirements of the Concessionaire with respect to all services, Government Facilities, Concessionaire Facilities and land assigned for use by the Concessionaire at the Resort, unless specifically provided for elsewhere in the Agreement between the parties. The Standards are subject to annual review and may be amended by mutual written agreement of the parties.

Any material deviation from the Standards set forth herein shall be a breach by the Concessionaire of the Agreement and shall be subject to the applicable terms and conditions set forth in the Agreement.

#### **Section 1. General**

All operations and activities shall be conducted in compliance with local, state and federal laws, regulations and standards applicable within the Resort. Use of the assigned area by the Concessionaire is limited to operation of the Resort set forth in the Agreement or as approved by the Department which are necessary to provide the minimum required and authorized services as outlined in Section 3 of the Agreement. The assigned area is defined by Exhibit A-1 of the Agreement. The Department reserves the right for the public to travel across the land, trails, and roads within the Resort boundaries. The Concessionaire shall not restrict access to public waters along the frontage of the Resort boundaries.

#### **Section 2. OPERATIONS**

##### **(a) Dates of Operation**

Resort facilities and services must be open and available to the public. The minimum season for all services is daily operation during May 1 until September 30<sup>th</sup> of each year. Concessionaire shall have access to the Resort at all times during the term of the agreement. During those periods when the facilities and services are not open to the public, the Concessionaire’s activities shall be limited to those necessary to accomplish its administrative, maintenance, capital improvement and security obligations and responsibilities under the Agreement. Any exceptions to this must

be approved by the Department. If the Resort is open or offering services beyond the minimum required dates as required by this Agreement, the Concessionaire must provide a schedule of the days, hours and services that shall be available to the Park Supervisor in advance of any changes in said schedule.

**(b) Hours of Operation**

- (i) On dates when the minimum required services are open and available to the public, operating hours shall be in accordance to the following schedule. Minimum hours of operation shall be required if this service is provided. Maximum hours of operation shall not be exceeded. Operating hours must be posted on the premises.

| <b>Operating Hours</b> |                    |                    |                   |                       |
|------------------------|--------------------|--------------------|-------------------|-----------------------|
|                        |                    | Minimum            | Maximum           | Minumum days          |
|                        |                    |                    |                   |                       |
|                        | All Resort service | 7:00 am to 10:00pm | 6:00am to 11:00pm | Monday Through Sunday |
|                        |                    |                    |                   |                       |

- (ii) Deviations from this standard must be submitted in writing and in advance of any modifications and shall be subject to approval by the Department.
- (iii) An authorized representative of the Concessionaire shall be available to the Department’s on-site representative at all times to respond to and handle emergencies. A listing of authorized Concessionaire representatives and their permanent residence telephone numbers shall be provided to the Department at the commencement of the Agreement and annually thereafter to be included in the annual operating plan. Modifications to the listing shall be communicated to the Department within twenty-four hours of the same.

**(c) Utilities**

Electricity – The Concessionaire shall be responsible for activating electrical service with the electric provider and paying directly to the provider all electrical costs attributable to usage of the Resort. The Concessionaire shall be responsible for maintenance of the electrical services that

serve the Resort. All electrical repairs shall be conducted by a qualified individual licensed by the South Dakota Electrical Commission.

- (i) Water – The Concessionaire shall be responsible for activating water service with the water provider and paying directly to the provider all water costs attributable to usage of the Resort. The Concessionaire shall be responsible for maintenance of the water systems that serve the Resort. All water system repairs shall be performed by a qualified individual licensed by the South Dakota Plumbing Commission, unless for emergency temporary repairs required to prevent or minimize property damage or for public safety.
- (ii) Sewer – The Department shall provide the waste water disposal service within the Resort. The Department shall be responsible for all major repairs and replacements required to maintain the sewer infrastructure. The Concessionaire shall be responsible for removal of all blockages of the sewer system within the Resort to ensure continuous availability of the sewer system for public use. All sanitary sewer collection system repairs shall be performed by a qualified individual licensed by the South Dakota Plumbing Commission, except for emergency temporary repairs required to prevent or minimize property damage or for public safety.  
The Concessionaire shall not discharge or permit to be discharged any chemicals, substances or materials into any sanitary or storm sewer system that are not lawful and labeled or designated as acceptable for such discharge into the sewer systems.
- (iii) Garbage Disposal – The Concessionaire shall be responsible for contracting with a local garbage hauler and paying all costs directly to the hauler. The Concessionaire is responsible for providing dumpsters and receptacles of which the size, locations, colors and construction are acceptable to the Park Supervisor. Dumpsters shall be emptied and maintained as to not allow or encourage overflowing garbage, offensive odors or other unsightly problems. No disposal of refuse of any type shall be permitted within the Park without approval of the Park Supervisor.
- (iv) Communications - The Concessionaire shall provide wireless internet services the Resort. Expenses for repairs

and maintenance of the telephone and wireless internet systems are the responsibility of the Concessionaire.

**(d) Department Activities**

The Department shall advise the Concessionaire in advance of activities other than maintenance, law enforcement and inspections to be conducted within the Resort, notwithstanding the Department's rights to access as specified in the Agreement.

**(e) Visitor Information**

- (i) The Department shall provide at no expense to the Concessionaire, and the Concessionaire shall make available and provide without charge to all patrons and Resort visitors, informational literature, safety precautions and notification of potential hazards with respect to Lewis and Clark Recreation Area.
- (ii) The Department shall cooperate with the Concessionaire in the distribution and communication of available concession services and customer satisfaction surveys, so long as all materials are provided to the Department free of charge, and Department resources are available to perform the requested distribution and/or communication.
- (iii) In an effort to evaluate and improve public services provided by Concessionaires throughout the state park system, the Department may wish to implement customer satisfaction surveys for Concessionaire patrons. The Concessionaire shall cooperate with the Department for the distribution, collection, and administration of any customer satisfaction surveys or comment cards.

**(f) Orientation Training for Resort and Park Employees**

- (i) All Resort employees and volunteers shall be expected to effectively and courteously respond to the public to inform them of all the Resort's and Park's services, activities, and information.
- (ii) The Concessionaire agrees on an annual basis to arrange for and allow Park employees to attend, or as otherwise agreed to be necessary by the Concessionaire and Park Supervisor, an orientation session scheduled and conducted by the Concessionaire to acquaint Park employees with the resources, features and services of Lewis and Clark

Recreation Area. Concessionaire employees, and designated representatives that are employed by the Concessionaire at the time that the training is offered, shall participate in training provided by the Department on Park regulations and informational topics

- (iii) The Concessionaire shall ensure that all of its employees are trained in risk management, customer relations, food safety (where applicable for staff involved in food handling) and alcohol server certification where applicable.

**(g) Advertising**

- (i) In addition to the provisions of ARSD § 41:13:02:08, use of the State seal, Department or other logos affiliated with the Division of Parks and Recreation, is expressly prohibited without prior written approval of the Department.
- (ii) Promotional material distributed within the Park is restricted to services and facilities within the Park and region and is subject to approval by the Park Supervisor.

**(h) Special Events**

- (i) Special events planned or promoted by the Concessionaire must be proposed in writing and receive prior written approval of the Department. Written proposals shall be made at least 15 days in advance of the planned special event.
- (ii) Special events are those activities which materially deviate from the minimum required and authorized services. In addition to the written approval of the Department, special events permits may be necessary. Conformance to all Department regulations related to special events shall be required.

**(i) Employees**

- (i) Any changes or appointments proposed by the Concessionaire to the management personnel who oversee all areas of the Resort are subject to Department approval.
- (ii) Each on-site manager must possess the necessary experience and expertise to ensure a high quality Resort operation. The Concessionaire shall employ only competent and orderly employees who shall keep themselves neat and clean and accord courteous and competent treatment and

service to all patrons. Whenever the Department notifies the Concessionaire that a Concessionaire employee is rude or discourteous to customers, disorderly, incompetent or unsatisfactory, the Concessionaire shall investigate the matter thoroughly, and take appropriate corrective action.

- (iii) The Department shall issue to all employees and volunteers of the Concessionaire a park entrance license exemption decal to be placed and properly displayed in employee and volunteer vehicles at all times when the vehicles are parked within the Resort. The exemption shall be valid only for current employees and volunteers of the Resort while actively working at the Resort. The exemption decal is valid for employees or volunteers traveling under the most direct route from the Park entrance to their designated work duty station, during designated working hours.
- (iv) In providing visitor services, the Concessionaire must require its employees to observe strict impartiality as to rates and services in all circumstances.
- (v) The Concessionaire shall ensure that its employees are hospitable and exercise courtesy and consideration in their relations with the public. The Concessionaire shall have its employees who come in direct contact with the public, so far as practicable, wear a uniform or badge by which they may be identified as the employees of the Concessionaire.
- (vi) The Concessionaire shall provide all personnel necessary to provide the visitor services required and authorized by this Agreement.
- (vii) The Concessionaire shall comply with all applicable laws relating to employment and employment conditions.
- (viii) The Concessionaire shall establish pre-employment screening, hiring, training, employment, termination and other policies and procedures for the purpose of providing visitor services through its employees in an efficient and effective manner and for the purpose of maintaining a healthful, law abiding, and safe working environment for its employees. The Concessionaire shall conduct appropriate background reviews of applicants to whom an offer for employment may be extended to assure that they conform to the hiring policies established by the Concessionaire.
- (ix) The Concessionaire shall review the conduct of any of its employees whose actions or activities are considered by the

Concessionaire or as reported to the Concessionaire by the Department to be inconsistent with the proper administration of the Area and enjoyment and protection of visitors and shall take such actions as are necessary to correct the situation.

- (x) The Concessionaire shall maintain, to the greatest extent possible, a drug free environment in the workplace and within the Resort. The Concessionaire shall publish a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, ingestion or use of a controlled substance is prohibited in the workplace and in the Resort, and specifying the actions that shall be taken against employees for violating this prohibition.

**(j) Signs**

- (i) The Department is responsible for providing and maintaining all traffic control signs within the Resort. The Concessionaire is responsible for providing and maintaining all other signs within the Resort. All signs must be approved in advance by the Department and be of a design and fabrication that is consistent with the signage program of the overall Park.
- (ii) No signs, permanent or temporary, may be erected or placed outside of the Resort, on Department property without the prior written approval of the Park Supervisor.
- (iii) All signs shall be of a professional quality appearance.
- (iv) Signs or other paraphernalia visible to the general public associated with political candidates or issues is expressly prohibited. There shall be no signs visible from outside the buildings within the Resort that contain any advertisements or insignia that identify with intoxicating beverages without the written permission of the Department.

**(k) Lost and Found**

Items found by or turned in to the Concessionaire shall be returned to the owner if identifiable. All other items shall be tagged, showing the location found, name and address of the finder and turned into the Concessionaire office.

**(l) Complaints**

- (i) It is anticipated that from time to time a minimal number of complaints shall be received from the public who utilize the Resort and its services. The Concessionaire shall document and attempt to resolve any and all such complaints, including forwarding a copy of any written communications regarding the same to the Department and the Park Supervisor.
- (ii) Any complaints regarding the Resort received by the Department shall be documented and forwarded to the Concessionaire for resolution.

**(m) Pets**

Pets maintained by Resort employees or guests must be kept under control in accordance with established state park rules. Pets shall not be allowed in public areas such as the restaurants and stores with the exception of service animals pursuant to SDCL §§ 20-12-23.2, 20-12- 23.4, and applicable federal laws.

**(n) Safety**

- (i) The Concessionaire must maintain and test all life and property safety equipment, devices and systems according to established and applicable laws, rules, regulations, and codes. Such equipment, devices, and systems may include but are not limited to smoke detectors, fire extinguishers, fire suppression systems, alarms, escape routes and egress openings. Any malfunctions of safety equipment, devices and systems must be reported to the Park Supervisor immediately.
- (ii) The Concessionaire shall immediately notify the Department of any accident of which it has knowledge involving visitors, patrons or employees. The Department shall immediately notify the Concessionaire of any accident that involves personal injury or property damage in the Resort in addition to any pending or actual litigation.
- (iii) The Concessionaire must provide and promote policies and training to its employees on how to detect, report and minimize any unsafe or hazardous situations.

**(o) Rentals**

- (i) All equipment offered to the public for rental shall be maintained in good operating condition and appearance. Defective or damaged equipment shall not be rented at any time.
- (ii) The Concessionaire shall reasonably attempt to ascertain the prospective renter's ability and competency to safely operate the item(s) being rented. Where reasonable doubt as to the required ability and competency exist, the Concessionaire may refuse to rent the item(s).
- (iii) The Concessionaire shall clearly indicate as part of the rental agreements utilized in its operation, the specific and implied liabilities resulting from a prospective customer's use of the rental equipment.

**(p) Merchandise, Convenience Items and Accessories Sales**

- (i) All merchandise, convenience items and accessories and the like sold or kept on the premises for sale shall be of high quality, wholesome and pure and shall conform in all respects to the applicable federal, state and municipal laws and regulations. No imitation, adulterated or misbranded article shall be sold or kept for sale. Concessionaire shall be responsible for collecting and remitting all sales taxes as required by law.
- (ii) Display areas and shelving are to be clean and attractive and the merchandise well-presented and uncluttered.
- (iii) No merchandise shall be sold which are obscene, sexually oriented, profane, vulgar or demeaning.
- (iv) Fireworks shall not be sold, stored or used at the Resort.

**(q) Resort Security**

Competent and appropriately trained personnel will be on security duty 24 hours per day during the required operating season. An on-site supervisor will reside in the Resort residence throughout the remainder of the year to provide security control. Primary consideration will be given to the safety of people, personal property and Resort facilities. The Concessionaire shall make arrangements with a local law enforcement agency for response service when enforcement situations arise in the Resort. Concessionaire will establish and share with the Department its

procedure(s) for contacting law enforcement personnel for assistance when needed.

**(r) Communications**

The Concessionaire and the Department shall work together to ensure efficient and convenient levels of communication between Resort patrons and the Concessionaire to ensure that Resort patron feedback, comments and complaints are coordinated in a timely and responsive manner. At a minimum, the Concessionaire will provide the following:

1. The Concessionaire will provide an after-hours phone number to contact Resort staff in the event of an emergency.
2. The Concessionaire shall provide a comment card system to be located at all key facilities at the Resort.

**SECTION 3. MAINTENANCE AND FACILITY IMPROVEMENTS**

**(a) General**

All maintenance and facility improvements shall meet all federal, state or local legal and regulatory requirements, including the Americans with Disabilities Act.

**(b) Plans and Materials**

- (i) Proposals by the Concessionaire to change physical facilities, both Government Facilities and Concessionaire Facilities, shall follow procedures outlined in ARSD Article 41:13.
- (ii) All plans and materials are subject to Department approval.

**(c) Maintenance Responsibilities-Concessionaire**

For the purpose of this Agreement, the term “maintenance” shall include, but not be limited, to all routine, preventative and cyclical maintenance of facilities, equipment, utilities, and grounds necessary for the quality operation and appearance of the Resort.

- (i) Buildings and Structures – The Concessionaire shall maintain all buildings and structures, including Government Facilities, assigned to or owned by the Concessionaire, including but not limited to painting, electrical and plumbing maintenance and cleaning. Maintenance and cleaning should be equivalent to that generally provided by skilled workers using commercial quality building maintenance

equipment and materials. Exterior and interior paint and roof colors must be approved in advance by the Department.

- (ii) Personal Property – The Concessionaire shall maintain all Personal Property assigned to or owned by the Concessionaire including, but not limited to painting, re-finishing, cleaning, and repairing. Maintenance and cleaning should be equivalent to that generally provided by skilled workers using commercial quality maintenance equipment and materials.
- (iii) Sidewalks, Steps, Decks and Landings – The Concessionaire shall maintain all concrete, sidewalks, steps, decks and landings within the Resort. All walking surfaces shall be in good condition, level, smooth, and properly positioned and secured. They must be sturdy, free from cracks, protruding nails or boards or uneven or broken surfacing.
- (iv) Grounds – Mowing, weed and pest control and landscaping within the Resort shall be the responsibility of the Concessionaire. The grounds shall be maintained at a level that will provide an attractive, safe, functional and nuisance-free environment.
- (v) Garbage and Trash – The Concessionaire shall be responsible for all litter pickup and removal of trash in the Concession Area. Garbage and trash from the Resort shall be disposed of on a regular basis through a Concessionaire maintained contract with a local garbage hauler. The Concessionaire shall provide outdoor receptacles in high traffic areas. All receptacles are to be provided by the Concessionaire and shall be kept clean, well maintained, serviceable and contained where necessary.
- (vi) Flagpoles, Television and Radio Antennas, Satellite Dishes – The Concessionaire shall provide maintenance for all masts and electronic systems for entertainment/communication devices. As with other structures, construction, modification or relocation of these devices require prior written approval of the Park Supervisor.
- (vii) Health and Safety – Facilities assigned to the Concessionaire are subject to periodic inspections for health and safety requirements. Repairs, corrections, improvements or operational changes determined necessary by the Department as a result of these inspections shall be at the sole cost and responsibility of the Concessionaire.

- (viii) Fire Protection Equipment – The Concessionaire shall provide and maintain in good working order, fire detection and protection systems that conform to and comply with applicable laws. The Concessionaire shall comply with all directives or recommendations of the Fire Marshall’s office.
- (ix) Locks – The Concessionaire shall provide the Park Supervisor with Resort facility keys or access codes necessary for security, emergency or other lawful purposes.
- (x) Winterizing Facilities – The Concessionaire is responsible for taking appropriate measures to protect all facilities for which the Concessionaire has maintenance responsibility. Protective measures may include (but not limited to), draining, blowing out and/or flushing of water lines, window bracing, and utility shut-offs. The Concessionaire is responsible for spring re-opening while it is the concessionaire.
- (xi) Snow Removal – The Concessionaire shall be responsible for snow removal within the Resort including parking lots and sidewalks that serve Concessionaire facilities. The Concessionaire is responsible for marking fire hydrants, propane tanks, and other fuel storage/dispensing facilities with snow stakes/flags and for keeping snow clear around hydrants.
- (xii) Retail Operations. All shelving and merchandise display areas shall be sound, secure, clean and presentable.
- (xiii) Removable equipment. All Concessionaire operated appliances, machinery, and equipment; including parts, supplies and related materials will be maintained, serviced, and repaired per manufacturer’s recommendations, and replaced as necessary.

**(d) Maintenance Responsibilities-Department**

- (i) Roads and Parking Lot – The Department will be responsible for maintenance of roads and parking lots within the Resort. This maintenance will include necessary crack seal, pothole repair and surfacing of paved areas. Snow Removal will be in accordance with Section 3 (d) (ii) of this Exhibit below.

- (ii) Snow Removal – The Department will be responsible for snow removal necessary to maintain access to the Office building. Snow removal will be performed on weekdays (Monday – Friday) during regular park employee work hours (8:00 a.m. – 5:00 p.m.). During these periods, the Department is not obligated to perform snow removal until snowfall, blowing and drifting have ceased. The Department cannot guarantee snow removal for the access road outside of regular park employee work hours, but agrees to cooperate if staff is reasonably available to perform such duties. .
- (iii) Government facilities – the Department shall be responsible for major repairs or replacement of facilities due to end of useful life.

#### **SECTION 4. INSPECTIONS AND AGREEMENT COMPLIANCE REVIEWS**

##### **(a) Maintenance Inspections**

- (i) Representatives from the Department and the Resort shall conduct preventative maintenance and inspections of the Resort grounds and facilities. At a minimum, at least one inspection will be held in the spring prior to Memorial Day and in the fall no later than October 31. The purpose of the inspection will be to identify the current conditions and maintenance levels of the facilities and Personal Property therein.
- (ii) Upon analysis of the results of the inspection, the Department will present the Concessionaire with a written list of maintenance objectives for which the Concessionaire is responsible in the Resort. The Department and the Concessionaire will jointly agree to the prioritization of the projects and the schedule for completing the identified maintenance work. The Department and Concessionaire shall also agree as to what projects are to be included to satisfy the Repair and Maintenance Reserve as required in Section 15 of the Concession Agreement. The Concessionaire shall submit a repair and maintenance program and plan to the Department for approval no later than November 1 of each year.
- (iii) In the event that the Concessionaire refuses or fails to perform any of the projects identified by a date and time specified in the written inspection report, the Department

specifically reserves the right to complete the project(s) and charge the resulting expenses to the Concessionaire.

**(b) Health, Safety, and Fire Inspections**

- (i) There may be other inspections as required by law or insurance policies pertaining to but not limited to health, safety, fire, and environmental rules and regulations that are the responsibility of other agencies or authorities. The Concessionaire must notify the Department in advance of any such inspection and allow Department staff to accompany the inspection.
- (ii) Copies of the inspection or report must be provided to the Department upon request. Any failures, substandard or otherwise unsatisfactory scores, inspections or individual components of an inspection must be reported to the Department immediately.

**(c) Agreement Compliance Audits**

- (i) The Department reserves the right to conduct Agreement Compliance Audits during the course of each Agreement year. The purpose of the Audit will be to ascertain on a qualitative and quantitative basis, the Concessionaire's compliance with all requirements of the Agreement. The form and content of such an audit may include but not be limited to inspections, product sampling, customer surveys, blind shopping, interviews and other techniques as required to satisfy the Department that all elements and requirements are being performed at a level consistent with the Standards and other covenants of the Agreement. A written summary of the results of the performance audit will be provided to the Concessionaire. When remedial actions are needed, a specific date will be given for a follow-up audit to ensure the necessary corrective measures have been taken. In the event that corrective measures have not been implemented by the date specified, the Department reserves the right to take the necessary action and then bill the Concessionaire for the direct cost of the corrective action taken.

## EXHIBIT C

### TRANSITION TO A NEW CONCESSIONAIRE

#### **Section 1. In General**

The Department and the Concessionaire hereby agree that, in the event of the expiration or termination of this Agreement for any reason (hereinafter "Termination" for purposes of this Exhibit) and the Concessionaire is not to continue the operations authorized under this Agreement after the Termination Date, the Department and the Concessionaire in good faith will fully cooperate with one another and with the new Concessionaire or Concessionaires selected by the Department to continue such operations ("New Concessionaire" for purposes of this Exhibit), to achieve an orderly transition of operations in order to avoid disruption of services to park area visitors and minimize transition expenses.

#### **Section 2. Cooperation Prior to the Termination Date**

Any time the Director notifies the Concessionaire that it will not continue its operations upon the Termination of this Agreement, the Concessionaire shall, notwithstanding such notification:

##### **(a) Continue Operations.**

Continue to provide visitor services and otherwise comply with the terms of the Agreement in the ordinary course of business and endeavor to meet the same standards of service and quality that were being provided previously, and with a view to maintaining customer satisfaction.

##### **(b) Continue Bookings.**

Continue to accept all future bookings for any hotel, lodging facilities, or other facilities and services for which advance reservations are taken; not divert any bookings to other facilities managed or owned by the Concessionaire or any affiliate of the Concessionaire; and notify all guests with bookings for any period after the Termination Date that the facilities and services are to be operated by the New Concessionaire. The Concessionaire may quote rates based upon rates approved by the Department. Promptly following notification to the Concessionaire by the Department of the selection of the New Concessionaire, the Concessionaire shall provide the New Concessionaire with a copy of Concessionaire's reservation log for visitor services as of the last day of the month prior to the selection of the New Concessionaire, and thereafter the Concessionaire shall update such log on a periodic basis (but no less frequently than thirty (30) days) until the Termination Date. The reservation log shall include, without limitation, the name of each

guest, and the guest's (1) address, (2) contact information, (3) dates of stay, (4) rate quoted, (5) amount of advance deposit received and (6) confirmation number, if applicable.

**(c) Designating a Point of Contact and Other Actions.**

Cooperate with the Department and the New Concessionaire to ensure the smooth transition of operations by: (1) designating one of the Concessionaire's executives as the point of contact for communications between the Concessionaire and the New Concessionaire; (2) providing the Department and the New Concessionaire with access to any assigned Real Property Improvements, including "back-of-house areas" and including copies of the keys to assigned Real Property Improvements; (3) providing the Department and the New Concessionaire with full access to the books and records, licenses and all other materials pertaining to any assigned Government Facilities and Concessionaire Facilities and the Concessionaire's operations in general; (4) providing the Department and the New Concessionaire with copies of all maintenance agreements, equipment leases (including short-wave radio) service contracts and supply contracts, including contracts for on-order merchandise (collectively, "Contracts"), and copies of all liquor licenses and other licenses and permits (collectively, "Licenses"); (5) allowing the New Concessionaire to solicit and interview for employment all of the Concessionaire's salaried and hourly employees, including seasonal employees through a coordinated process implemented by the Concessionaire; and (6) not entering into any contracts or agreements that would be binding on any assigned Government Facilities or Concessionaire Facilities or operations in general after the Termination Date without the prior written agreement of the New Concessionaire.

**(d) Financial Reports.**

Within 30 days after receipt of the notification of the selection of the New Concessionaire, provide the New Concessionaire with a financial report with respect to the operation of any assigned Real Property Improvements and the Concessionaire's operations in general as of the last day of the month prior to receipt of such notification.

Thereafter, the Concessionaire shall update such financial report on a periodic basis (but no less frequently than thirty (30) days) until the Termination Date. Such financial report shall include, at a minimum:

- (i) A balance sheet for the Concessionaire's assigned Real Property Improvements, if any;
- (ii) a schedule of pending accounts payable; and
- (iii) a schedule of pending accounts receivable.

**(e) Inventory and Personal Property.**

Provide the New Concessionaire with a complete, detailed and well-organized list of physical inventory, supplies, and other Personal Property owned or leased by the Concessionaire in connection with its operations under the Agreement (including a list of such items that are on-order) The list shall be provided to the New Concessionaire within thirty (30) days following receipt of the notification of the selection of the New Concessionaire, shall be updated monthly thereafter, and shall designate those items that the Concessionaire believes are essential to maintaining the continuity of operations or the special character of its operations. The Concessionaire shall assist the New Concessionaire in reviewing and validating the list.

**(f) Other Information and Reports.**

Provide the New Concessionaire with all other information and reports as would be helpful in facilitating the transition, including, without limitation, a list of maintenance records for the Concessionaire's operations for the period of one year prior to notification of the selection of the New Concessionaire, and complete information with respect to: (1) utilities, including gas and electric; (2) telephone service; (3) water service; and, (4) specific opening and closing procedures. Such information shall be provided within thirty (30) days after receipt of notification of the selection of the New Concessionaire, and shall be updated periodically (but no less frequently than thirty (30) days) until the Termination Date.

**(g) Access to Facilities**

Provide the New Concessionaire reasonable access to Concessionaire Facilities and Government Facilities to facilitate the transition and transfer.

**(h) Other Cooperation.**

Provide the Department and the New Concessionaire with such other cooperation as may be reasonably requested.

**Section 3. Cooperation Upon the Termination Date.**

Upon the Termination Date, the Concessionaire shall:

**(a) Transfer of Contracts and Licenses.**

Cooperate with the transfer or assignment of all Contracts and Licenses entered into by the Concessionaire that the New Concessionaire elects to assume.

**(b) Reservation Systems.**

- (a) Provide the New Concessionaire with an update of the reservation log through the Termination Date;
- (b) disconnect its operations from the Concessionaire's centralized reservation system, if any; and
- (c) cooperate with the New Concessionaire in transitioning to the New Concessionaire's reservation system.

**(c) Fees and Payments.**

Within ten (10) days after the Termination Date, the Concessionaire shall provide the Department with an itemized statement of all fees and payments due to the Department under the terms of the Agreement as of the Termination Date, including, without limitation, all deferred, accrued and unpaid fees and charges. The Concessionaire shall, within ten (10) days of its delivery to the Department of this itemized statement, pay such fees and payments to the Department. The Concessionaire and the Department acknowledge that adjustments may be required because of information that was not available at the time of the statement.

**(d) Access to Records.**

Notwithstanding any other provision of this Agreement to the contrary, upon the Termination Date, the Concessionaire shall make available to the Department for the Department's collection, retention and use, copies of all books, records, licenses, permits and other information in the Concessionaire's possession or control that in the opinion of the Department, are related to or necessary for orderly and continued operations of the related facilities and services.

**(e) Removal of Marks.**

Concessionaire shall within thirty (30) days after Termination, remove (with no compensation to Concessionaire) all items of inventory and supplies as may be marked with any trade name or trademark belonging to the Concessionaire.

**(f) Other Cooperation.**

Provide the Department and the New Concessionaire with such other cooperation as may be reasonably requested.

**ARTICLE 41:13****PARK CONCESSION LEASES**

|          |                                   |
|----------|-----------------------------------|
| Chapter  |                                   |
| 41:13:01 | Definitions.                      |
| 41:13:02 | General provisions.               |
| 41:13:03 | Expiration or amendment of lease. |
| 41:13:04 | Sale of interest in lease.        |

**CHAPTER 41:13:01****DEFINITIONS**

|             |              |
|-------------|--------------|
| Section     |              |
| 41:13:01:01 | Definitions. |

**41:13:01:01. Definitions.** Terms used in this article are defined as follows:

(1) "Concessionaire," an operator of resort, restaurant, or marina services in the state park system who is authorized under a written lease or agreement directly with the Department of Game, Fish and Parks;

(2) "Concessionaire facilities," buildings, structures, fixtures, and other improvements permanently affixed to a building, structure, or lands subject to concession leases or agreements in such a manner as to be a part of the realty, provided by the concessionaire at the concessionaire's expense for the purposes of its concession lease or agreement. This term includes marina docks and slips provided by the concessionaire;

(3) "Government facilities," any buildings, structures, utility systems, fixtures, and other improvements permanently affixed to a building, structure, or lands subject to the concession leases or agreements that are constructed or acquired by the government and provided by the government for use by the concessionaire as provided in a concession lease or agreement;

(4) "Possessory interest," the financial interest of a concessionaire in concessionaire facilities, but not in the land on which such facilities are located, and in improvements to government facilities made at the concessionaire's expense with prior written approval of the commission;

(5) "Fair market value," as defined by the Uniform Standards of Professional Appraisal Practice, copyright 2003, by The Appraisal Foundation;

(6) "Personal property," any equipment, furniture, and goods necessary for concession operations that is not recognized as a fixture;

(7) "Commission," the South Dakota Game, Fish and Parks Commission;

(8) "Department," the South Dakota Department of Game, Fish and Parks; and

(9) "Qualified appraiser," a professional appraiser who holds the designation of a member of the Appraisal Institute or other similar designation.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**Reference:** **Uniform Standards of Professional Appraisal Practice**, 2003 edition, The Appraisal Foundation. Copies may be obtained from The Appraisal Foundation, 1029 Vermont Avenue, N.W., Suite 900, Washington, DC 20005-3517. Cost: \$20.

## CHAPTER 41:13:02

### GENERAL PROVISIONS

#### Section

|             |   |
|-------------|---|
| 41:13:02:01 | Application of article.   |
| 41:13:02:02 | Establishment of possessory interest.   |
| 41:13:02:03 | Compliance with performance standards.  |
| 41:13:02:04 | Treatment of personal property.   |
| 41:13:02:05 | Franchise fee.  |
| 41:13:02:06 | Repair and maintenance reserve.   |
| 41:13:02:07 | Fees, rates, and prices for services and merchandise offered by a concessionaire. |
| 41:13:02:08 | Names, logos, trademarks, and copyrights.   |
| 41:13:02:09 | Information and reporting.  |
| 41:13:02:10 | Insurance.  |
| 41:13:02:11 | Collateral.   |
| 41:13:02:12 | Breach of lease or agreement.   |

**41:13:02:01. Application of article.** Unless an existing concession lease or agreement provides to the contrary, this article applies to new leases of concessionaires executed after the effective date of this article. As it relates to the current concession leases or agreements for Custer State Park and Spring Creek Resort, the following sections from the existing (1990) administrative rules shall apply between the effective date of this article and the expiration of the current lease in effect: subdivision 41:13:01:01(4), § 41:13:02:02, and §§ 41:13:03:02 to 41:13:03:04, inclusive.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:02. Establishment of possessory interest.** A possessory interest may be established by a concessionaire in concessionaire facilities or government facilities to the extent the interest is purchased from a previous concessionaire, or paid for and constructed by the concessionaire with prior approval from the commission. Before construction, the commission shall identify all improvements and additions to the concession as either concessionaire facilities

or government facilities. Possessory interest shall be transferred at the time a concession lease or agreement is executed and shall be so acknowledged in the new concession lease or agreement. Possessory interest values, including initial values at the beginning of a concession lease or agreement, shall be defined in or included as an exhibit to that document. The approval process for crediting of a possessory interest for improvements and additions funded by the concessionaire shall be defined in the lease or agreement with prior approval of the commission.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:03. Compliance with performance standards.** A concession lease or agreement shall include minimum performance standards. The concessionaire shall comply with these performance standards to the satisfaction of the commission. Such compliance constitutes satisfactory performance of the terms of the concession lease or agreement. Failure to comply with such standards constitutes grounds for termination of the concession lease or agreement.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:04. Treatment of personal property.** A concessionaire shall provide and be responsible for the maintenance, upkeep, and replacement of any personal property required under the terms of a lease or agreement.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:05. Franchise fee.** The concession lease or agreement shall provide for payment of a franchise fee or other monetary consideration as determined by the commission. In establishing a fee the concessionaire's reasonable opportunity to realize a profit on its operations commensurate with its capital invested and the obligations assumed shall be considered. A franchise fee shall be subordinate to protecting park values and providing quality visitor service.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:06. Repair and maintenance reserve.** In addition to a franchise fee, the concession lease or agreement may contain provisions that require the concessionaire to set aside a percentage of gross receipts or otherwise establish a reserve fund for repair, maintenance, and renovation to be used by the concessionaire for maintenance, repair, and renovation of concessionaire facilities and government facilities located in park areas and utilized by the concessionaire in the concessionaire's operations. The concessionaire and the commission shall review the reserve fund on an annual basis and agree upon a budget for the use of the reserve fund for the year in advance. The lease or agreement shall included project review and approval procedures. Projects to be funded entirely with reserve funds are not eligible for possessory interest credit. In certain circumstances, the lease or agreement or the commission may authorize the expenditure of repair and maintenance reserve funds or the establishment of another reserve for

the replacement of personal property if the personal property is integral to the visitor experience or visitor safety. The concessionaire shall maintain the reserve fund. The concessionaire shall provide the commission with an annual accounting of the reserve fund's use. The commission and the concessionaire shall make every effort to expend all reserve funds by the end of the lease or agreement term. If there is a surplus at the end of the lease or agreement term, any remaining reserve funds shall be transferred to the commission for the purpose of ongoing maintenance of concessionaire facilities and government facilities associated with the respective concession lease or agreement. If there is a deficit at the end of the lease or agreement term, the concessionaire shall be granted possessory interest credit in the amount of the deficit.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:07. Fees, rates, and prices for services and merchandise offered by a concessionaire.** All fees, rates, and prices offered to the public by a concessionaire shall be reasonable and comparable to the fees, rates, and prices offered for similar services in the region of the concessionaire's operations or outside the region if similar services are not provided in the region. In addition, the commission reserves the right to establish reasonable standards as to the nature, type, and quality of the concessionaire's service and merchandise.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:08. Names, logos, trademarks, and copyrights.** Any names, logos, trademarks, or copyrights developed during or pursuant to a concession lease or agreement that in any way associates with, identifies, implicates, or infers an affiliation with the State of South Dakota Division of Parks and Recreation or the state park system, must receive prior approval from the commission and belongs to the state upon creation and continues in the state's exclusive ownership upon termination of the lease or agreement.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:09. Information and reporting.** The department, commission, or their representative shall have access to concessionaire books and records for the purposes of examination. The lease or agreement shall include requirements for reporting of financial data or reports, including any audit requirements and other operation reports and indicate the required frequency of the reporting. The lease or agreement shall include provisions that the concessionaire waive any right to the confidentiality of propriety information concerning the lease or agreement that the department determines to include in a prospectus issued under this article.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:10. Insurance.** The lease or agreement shall include minimum requirements for insurance, including types of insurance and amounts of coverage levels, and those to be named as additionally insured.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:11. Collateral.** The lease or agreement may require the concessionaire to furnish appropriate forms of collateral to insure performance of the obligations included in the lease or agreement.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:02:12. Breach of lease or agreement.** The lease or agreement shall contain provisions addressing breach of the lease or agreement by the commission or the concessionaire.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

## **CHAPTER 41:13:03**

### **EXPIRATION OR AMENDMENT OF LEASE**

Section

|                            |  |
|----------------------------|--|
| 41:13:03:01                | Duration of concession lease or agreement.   |
| 41:13:03:02                | Procedure to determine compensation to a concessionaire upon expiration of lease or agreement. |
| 41:13:03:03                | Procedure for binding arbitration.   |
| 41:13:03:04                | Compensation to concessionaire.  |
| 41:13:03:05 to 41:13:03:07 | Repealed.  |
| 41:13:03:08                | Responsibilities and procedures prior to issuance of new lease or agreement.                   |
| 41:13:03:09                | Procedures for selection and award.  |
| 41:13:03:10                | Prospectus requirements.   |
| 41:13:03:11                | Principal selection factors.   |
| 41:13:03:12                | Publication of notice of issuance of prospectus.   |
| 41:13:03:13                | Minimum period to respond to prospectus.   |
| 41:13:03:14                | Rejection by commission.   |
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| 41:13:03:16                | Requirements in the event of termination or expiration.  |

**41:13:03:01. Duration of concession lease or agreement.** The concession lease or agreement, except for existing concession leases or agreements under negotiation, amendment, or

renegotiation on the effective date of this article, may be issued for a term that the commission determines is required to allow the concessionaire a reasonable opportunity to realize a profit on the concessionaire's operations commensurate with the concessionaire's capital invested and the obligations assumed for the planned and negotiated investments by a concessionaire.

If, during the term of a concession lease or agreement, the commission and concessionaire agree that an authorized major addition, renovation, repair, or replacement should be made to the concessionaire's facilities or governmental facilities, to be provided by the concessionaire at the concessionaire's expense, the commission may extend the lease or agreement as provided in this section. At such time, all terms and conditions of the lease shall be reevaluated. This paragraph does not apply during the last 18 months before the expiration of the concession lease or agreement.

During the term of the concession lease or agreement, but not during the last 18 months before the expiration of the concession lease or agreement, the concessionaire may present to the commission for authorization a proposal for a major project that the concessionaire believes warrants an extension to the lease or agreement. This proposal shall include the following:

- (1) A description of the proposed project, including consistency with park goals, and a description of why the improvements are in the public interest;
- (2) An independent assessment of the market and financial viability of the proposed project;
- (3) An independent cost estimate of the proposed project; and
- (4) An analysis of the number of additional years required as part of the extension of the lease or agreement.

The commission shall review the proposal within 60 days and evaluate the proposal using the criteria listed above.

If determined by the commission to be in the public's best interest, the commission may at least 12 months prior to the termination of an existing concession lease or agreement negotiate with the concessionaire new lease terms and conditions. If the commission determines not to negotiate or the concessionaire does not accept the commission's terms and conditions, the existing agreement shall terminate according to the terms of the agreement. The commission shall select and award a new concession or lease agreement as provided in § 41:13:03:09 and this chapter. Nothing in this section is intended to provide a concessionaire with any expectation of concession lease or agreement extension or renewal.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:02. Procedure to determine compensation to a concessionaire upon expiration of lease or agreement.** Prior to the expiration of a concession lease or agreement, the following procedure shall be used:

- (1) At least 12 months before expiration of a concession lease or agreement the commission shall determine the fair market value of the possessory interest of the concessionaire in the concessionaire facilities or government facilities pursuant to the end date of the contract and subdivision 41:13:03:04(1). The fair market value shall be determined by an appraisal performed by a qualified appraiser. A copy of the appraisal shall be provided to the concessionaire upon its

completion. The department and the concessionaire shall each pay 50 percent of the cost of the appraisal. Upon recommendation of the department, the department and concessionaire shall mutually select the qualified appraiser. If agreement cannot be reached within 15 days, the commission shall have the final determination of the qualified appraiser;

(2) If the department or the concessionaire is not satisfied with the appraised fair market value, either party may request in writing, within 30 days after receipt of the appraisal value, that the fair market value be determined by binding arbitration as provided in § 41:13:03:03; and

(3) Upon receipt of the appraisal or the valuation determined by arbitration, the commission shall prepare and publish a prospectus containing the valuation of the possessory interest of the concessionaire facilities or government facilities in an attempt to find a qualified successor concessionaire.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:03. Procedure for binding arbitration.** The procedure for binding arbitration is as follows:

(1) The department or concessionaire may, by written notice to the other within 30 days after receipt of the appraisal, appoint an arbitrator of its choice. The other party, by written notice within 15 days after receipt of notice, shall appoint a second arbitrator of its choice. In default of a second appointment, the first arbitrator appointed shall be the sole arbitrator;

(2) When two arbitrators have been appointed, they shall, if possible, agree on a third arbitrator and appoint the arbitrator by written notice signed by them. A copy of their notice shall be mailed to each party within 15 days after notice has been given of the appointment of a second arbitrator;

(3) If 18 days elapse after the appointment of the second arbitrator without notice of appointment of the third arbitrator, then both parties shall select the third arbitrator from members of the alternative dispute resolution section of the State Bar of South Dakota; and

(4) The arbitrators shall hold an arbitration hearing at a location determined by the arbitrators within 30 days after the final appointment of the arbitrators. The arbitrators shall allow each party to present their case, evidence, and witnesses, if any, in the presence of the other party and shall determine the fair market value of the property.

Each party shall pay the cost and expense of its appointed arbitrator. The costs and expenses of a sole arbitrator or the third arbitrator shall be paid equally by the department and the concessionaire.

The determination of the majority of the arbitrators is binding on the parties to the arbitration although each party retains his right to appeal any questions of law arising at the hearing.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**Cross-Reference:** Evidence, SDCL title 19.

**41:13:03:04. Compensation to concessionaire.** Compensation for a possessory interest held by the concessionaire upon expiration of the concession lease or agreement, unless otherwise provided in the lease or agreement, shall be determined as follows:

(1) Possessory interest in concessionaire facilities or government facilities authorized by the commission shall be valued for purposes of compensation to the concessionaire by the successor concessionaire at fair market value; and

(2) No compensation is due the concessionaire from a successor concessionaire for the concessionaire's personal property used in operations under a lease or agreement. However, a successor concessionaire may purchase such personal property from the concessionaire subject to mutually agreed upon terms;

(3) The department retains the option to purchase concessionaire possessory interest in concessionaire facilities if the Legislature appropriates funds for acquisition in the amount of the fair market value or the value determined by arbitration as provided in § 41:13:03:03; and

(4) If the department chooses not to issue a subsequent lease or agreement, the department retains the option to direct the concessionaire to remove the concessionaire facilities from the park and restore the premises to the extent that the facilities had an impact upon the grounds. In this situation, the concessionaire shall be compensated for the concessionaire's possessory interest in concessionaire facilities or government facilities in the amount of book value and the cost to the concessionaire of restoring the premises to the extent that the facilities had an impact on the grounds. Book value is the unrecovered cost of the possessory interest in concession facilities or government facilities that have been identified in the lease or agreement and are represented as such on the concessionaire's federal tax return or audited financial statements.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:05. Preferential right of renewal.** Repealed.

**Source:** 16 SDR 148, effective March 21, 1990; repealed, 32 SDR 55 effective October 17, 2005.

**41:13:03:06. Procedures for preferential right of renewal.** Repealed.

**Source:** 16 SDR 148, effective March 21, 1990; repealed, 32 SDR 55, effective October 17, 2005.

**41:13:03:07. Consideration by commission.** Repealed.

**Source:** 16 SDR 148, effective March 21, 1990; repealed, 32 SDR 55, effective October 17, 2005.

**41:13:03:08. Responsibilities and procedures prior to issuance of new lease or agreement.** Prior to the issuance of a new concession lease or agreement, the commission may require the assistance of the concessionaire in developing materials for a public solicitation. This assistance may include access to facilities and records for performing a condition assessment of the facilities (including concessionaire facilities and government facilities), listings of personal property, financial and utilization reports, and other cooperation. The concessionaire shall provide such assistance as reasonably requested. Prior to commencement of the steps included in this section, the concessionaire and the commission shall agree on terms of confidentiality and treatment of provided information not addressed in § 41:13:02:09.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:09. Procedures for selection and award.** Except as provided in § 41:13:03:01, the commission shall award concession leases or agreements through a public solicitation process. The public solicitation process shall commence with the issuance of a prospectus. The prospectus shall invite the public to submit proposals for the contract. The prospectus shall describe the terms and conditions of the concession lease or agreement to be awarded and the procedures to be followed in the selection of the best proposal. The commission may not issue a prospectus earlier than 12 months prior to the expiration of a related existing concession lease or agreement.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:10. Prospectus requirements.** The prospectus shall include:

- (1) Minimum visitor service requirements;
- (2) The minimum franchise fee or other forms of consideration required by the state;
- (3) Lease term;
- (4) Minimum performance standards;
- (5) Measures requested to ensure the protection and preservation of park resources;
- (6) Capital investments, if any;
- (7) Facilities and services provided to the concessionaire by the state for the concessionaire's use and operation over the course of the lease;
- (8) An estimate of the possessory interest compensation due to the existing concessionaire at signing;
- (9) Gross receipts by category for the last three years and the most recent year's concessionaire's personal property and merchandise inventory;
- (10) Selection factors, including minimum requirements; and
- (11) Other such information that the commission may deem necessary to assist bidders in the preparation of a prospectus.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:11. Principal selection factors.** The principal selection factors are:

- (1) Managerial experience;
- (2) Financial capabilities;
- (3) Franchise fees and benefits offered to the department and the state; and
- (4) Any other criteria considered by the commission to be pertinent, including any additional proposed capital investment.

A prospectus shall indicate the maximum potential scoring available for each of the selection factors.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:12. Publication of notice of issuance of prospectus.** Upon issuance of the prospectus, the department shall publish notice of issuance in a manner selected to notify persons likely to be interested in providing a response to the prospectus. Notice shall include a narrative description of the prospectus; the solicitation process; where to obtain a copy of the prospectus; and the place, date, and time responses to the prospectus are due. Two publications of the notice of issuance of the prospectus in at least three newspapers of general circulation in different parts of the state, with the first publication seven to ten days prior to the second, shall be construed as compliance with the publication requirement.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:13. Minimum period to respond to prospectus.** Interested parties shall have a minimum of 30 days to respond to the prospectus, with the actual numbers of days to be specified in the prospectus.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:14. Rejection by commission.** A proposal may be rejected by the commission if the proposal has not met the minimum requirements and is unresponsive to criteria outlined in the prospectus.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:15. Proposal review -- Selection of successor -- Continuation of existing lease.** Six months prior to the expiration date of the concession lease or agreement, the department shall review the proposals it has received from prospective concessionaires.

Three months prior to the expiration date of the concession lease or agreement, the commission shall select the successor concessionaire based upon criteria outlined in the prospectus.

If the commission does not find a qualified prospective concessionaire or does not select a successor concessionaire by the expiration date of the concession lease or agreement, the commission may continue the existing concession lease or agreement on an annual basis.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:03:16. Requirements in the event of termination or expiration.** Upon termination of the lease or agreement for any reason, or upon its expiration, and except as otherwise agreed upon between the concessionaire and the department, the concessionaire shall, at the concessionaire's expense, promptly vacate the area defined in the lease or agreement. The concessionaire shall remove all personal property and repair any damage caused by installation or removal of such personal property, except as agreed upon between the concessionaire and the department.

In addition to these actions, the lease or agreement may include specific actions to be taken by the concessionaire to assist in the continuation of operations.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

## **CHAPTER 41:13:04**

### **SALE OF INTEREST IN LEASE**

#### Section

- 41:13:04:01     Conflicting rules not applicable to Custer State Park.
- 41:13:04:02     Assignment, sale, or transfer.
- 41:13:04:03     Sale -- Change in controlling interest.
- 41:13:04:04     Notice of intent to sell, bankruptcy, or insolvency.
- 41:13:04:05     Department to issue prospectus.
- 41:13:04:06     Repealed.
- 41:13:04:06.01   Procedures for selection and award under sale and transfer.
- 41:13:04:07     Repealed.

**41:13:04:01. Conflicting rules not applicable to Custer State Park.** Any application of a rule in this chapter that conflicts with SDCL 41-17-22.4 does not apply to concessionaire leases of property located in Custer State Park.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:04:02. Assignment, sale, or transfer.** A concessionaire may assign, sell, or transfer the concessionaire's possessory interest in a concession lease or agreement in the event of death to

a beneficiary, assignment for collateral purposes to a lender, or a transfer to existing partners or shareholders only with prior written approval of the commission.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:04:03. Sale -- Change in controlling interest.** The sale referred to in § 41:13:04:02 includes any sale, assignment, or transfer of an interest in a concession lease or agreement, assets not in the ordinary course of business, shares of stock, or any other interest in the business entity, including a corporation, partnership, or other association of persons, which has the effect of transferring controlling interest of the business entity from that which was present at time of execution of the original lease or agreement or as subsequently approved by the commission to another person or business entity.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:04:04. Notice of intent to sell, bankruptcy, or insolvency.** A concessionaire shall submit in writing to the department notice of the concessionaire's intention or desire to sell, assign, or transfer any of the property referred to in § 41:13:04:02. The notice of intent is not effective for purposes of this chapter if it is submitted within 18 months of the expiration of the concession lease or agreement. The notice of intent can be withdrawn at any time by the concessionaire if all reasonable costs and expenses incurred by the department for the prospectus are paid by the concessionaire.

The concessionaire shall give the commission notice, within five days, after the filing of any petition in bankruptcy, filing any petition seeking relief under any federal bankruptcy laws, or making any assignment for the benefit of creditors. The concessionaire shall also give the commission, within five days, notice of any petition or other proceeding against the concessionaire for the appointment of a trustee, receiver, or liquidator, or the taking by any person or entity of the rights granted by the concession lease or agreement, or any part thereof upon execution, attachment, or other process of law or equity.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:04:05. Department to issue prospectus.** Upon receipt of the notice of intent to sell, the commission shall prepare and the department shall publish a prospectus for the lease of its facilities and the sale and transfer of the possessory interest of the concessionaire in government facilities or concessionaire facilities used to provide the concession services in an attempt to find a qualified successor concessionaire. The concessionaire shall provide to the department for inclusion in the prospectus a listing of personal property that the concessionaire is willing to sell to a successor concessionaire as provided in subdivision 41:13:03:04(2). This listing and any value the concessionaire provides for this personal property to the department shall be included in the prospectus for informational purposes. The value of the concessionaire's possessory interest in concessionaire facilities or government facilities shall be in accordance with subdivision 41:13:03:02(1) and the value shall be published accordingly in the prospectus. With the approval

of the commission, the prospectus may or may not be consistent with the terms of the existing concession lease or agreement. If a written agreement is not reached within six months from the first publication of the prospectus and approved by the commission, the commission may, if requested in writing by the concessionaire, publish another prospectus as provided in this section.

**Source:** 16 SDR 148, effective March 21, 1990; 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:04:06. Commission to select successor.** Repealed.

**Source:** 16 SDR 148, effective March 21, 1990; repealed, 32 SDR 55, effective October 15, 2005.

**41:13:04:06.01. Procedures for selection and award under sale and transfer.** The commission shall select the successor concessionaire based upon criteria outlined in the prospectus.

**Source:** 32 SDR 55, effective October 17, 2005.

**General Authority:** SDCL 41-17-1.1(6).

**Law Implemented:** SDCL 41-17-1.1(6).

**41:13:04:07. Consideration by commission.** Repealed.

**Source:** 16 SDR 148, effective March 21, 1990; repealed, 32 SDR 55, effective October 17, 2005.