

RECALCULATION OF FRANCHISE FEE OWED BY FORT
SUMTER TOURS, INC.

OCTOBER 5, 2000.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources,
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 3241]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 3241) to direct the Secretary of the Interior to recalculate the franchise fee owed by Fort Sumter Tours, Inc., a concessioner providing service to Fort Sumter National Monument in South Carolina, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. RECALCULATION OF FRANCHISE FEE.

(a) DEFINITIONS.—In this section:

(1) FRANCHISEE.—The term “franchisee” means Fort Sumter Tours, Inc., a concessioner providing service to Fort Sumter National Monument, South Carolina.

(2) SECRETARY.—The term “Secretary” means the Secretary of the Interior.

(b) RECALCULATION OF FRANCHISE FEE.—Not later than 30 days after the date of enactment of this Act, the Secretary shall—

(1) recalculate the amount (if any) of the franchise fee owed by the franchisee;
and

(2) notify the franchisee of the recalculated amount.

(c) ARBITRATION.—

(1) IN GENERAL.—If the amount of the franchise fee as recalculated under subsection (a) is not acceptable to the franchisee—

(A) the franchisee, not later than 5 days after receipt of notification under subsection (b)(2), shall so notify the Secretary; and

- (B) the amount of the franchise fee owed shall be determined through binding arbitration that provides for a trial-type hearing that—
- (i) includes the opportunity to call and cross-examine witnesses; and
 - (ii) is subject to supervision by the United States District Court for the District of Columbia in accordance with the title 9, United States Code.
- (2) SELECTION OF ARBITRATOR OR ARBITRATION PANEL.—
- (A) AGREEMENT ON ARBITRATOR.—For a period of not more than 30 days after the franchisee gives notification under paragraph (1)(A), the Secretary and the franchisee shall attempt to agree on the selection of an arbitrator to conduct the arbitration.
 - (B) PANEL.—If at any time the Secretary or the franchisee declares that the parties are unable to agree on an arbitrator—
 - (i) the Secretary and the franchisee shall each select an arbitrator;
 - (ii) not later than 10 days after 2 arbitrators are selected under clause (i), the 2 arbitrators shall select a third arbitrator; and
 - (iii) the 3 arbitrators shall conduct the arbitration.
- (3) COMMENCEMENT AND COMPLETION.—An arbitration proceeding under paragraph (1)—
- (A) shall commence not later than 30 days after the date on which an arbitrator or arbitration panel is selected under paragraph (2); and
 - (B) shall be completed with a decision rendered not later than 240 days after that date.
- (4) APPLICABLE LAW.—
- (A) RELEVANT TIME PERIOD.—The law applicable to the recalculation of the franchise fee under this subsection shall be the law applicable to franchise fee determinations in effect at the beginning of the period for which the franchise fee is payable.
 - (B) PREVIOUS DECISIONS.—No previous judicial decision regarding the franchise fee dispute that is the subject of arbitration under this subsection may be introduced in evidence or considered by the arbitrator or arbitration panel for any purpose.
- (5) FEES AND COSTS.—If the franchisee is the prevailing party in binding arbitration, the arbitrator or arbitration panel shall award the franchisee reasonable attorney's fees and costs for all proceedings involving the disputed franchise fee consistent with—
- (A) section 504 of title 5, United States Code; and
 - (B) section 2412 of title 28, United States Code.
- (d) BIDS AND PROPOSALS.—Until such date as any arbitration under this Act is completed and is no longer subject to appeal, the Secretary—
- (1) shall not solicit or accept a bid or proposal for any contract for passenger service to Fort Sumter National Monument; and
 - (2) shall offer to the franchisee annual extensions of the concessions contract in effect on the date of enactment of this Act.

PURPOSE OF THE BILL

The purpose of H.R. 3241 is to direct the Secretary of the Interior to recalculate the franchise fee owed by Fort Sumter Tours, Inc., a concessioner providing service to Fort Sumter National Monument in South Carolina, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

Fort Sumter Tours (FST) is a relatively small family owned and operated park concession providing visitor transportation, by boat, to Fort Sumter National Monument administered by the National Park Service. FST is currently the only concessioner which provides service for visitors to see Fort Sumter. FST has annual gross concession income of approximately \$2.2 million and provides employment for approximately 40 families. Since 1962, FST has provided exemplary service to Fort Sumter to the satisfaction of the public and the National Park Service.

In the mid-1980s the National Park Service required FST to make a capital investment of approximately \$1.5 million to improve visitor services. Given the size of the investment, a 15-year conces-

sions contract was executed in 1986. At that time a franchise fee, which by law is to reflect the “probable value” of the contract privileges, was established by the National Park Service at 4.25% of gross receipts. There was no change in the contract privileges, but at the end of the first five year period, the Park Service notified FST that based upon a five year reconsideration of the franchise fee (February 1992) the probable value of the contract privileges had increased. The Park Service demanded a new fee of 12% of gross receipts.

According to Park Service guidelines (NPS-48), a franchise fee reconsideration takes place in two discrete steps. First the Park Service determines whether a change in the current franchise fee is warranted. If not, no further analysis is needed and the fee remains as is. If a change is found to be warranted, the second step involves the Park Service setting maximum amount of the franchise fee, and the calculation of that fee. In the case of FST, however, numerous and egregious errors were committed by the Park Service at both of these steps. At the first step, determining whether a franchise fee increase is warranted, the Park Service is supposed to compare concession net income with concession gross receipts, assets, and equity, then determine concession profitability, and then compare the profitability with other industry norms. With FST, however, the Park Service instead added FST’s concession and non-concession income and compared that with only the concession receipts, assets, and equity. The effect of this was to vastly overstate FST’s concession profitability by over 80% which led to nearly tripling the franchise fee. Had the Park Service not committed this error, under its own guidelines, the fee would have remained at 4.25%.

The situation worsened for FST with numerous other mistakes in the second step after the Park Service erroneously calculated that a franchise fee increase is warranted. For example, when setting the maximum franchise fee the Park Service also included the non-concession income, which allowed the maximum fee to be set at 16.6% instead of 8.7% if calculated correctly. Effectively, this exceeds the maximum fee permitted using the Park Service’s own guidelines by 73%.

Other examples of Park Service errors include: (1) inappropriate and inaccurate use of the Dun and Bradstreet Industry norms which were not derived from comparable industries, were not representative of FST, and did not offer a large enough sample size to make valid comparisons; (2) discounting the actual cost of a new vessel purchased by FST and used in the concession business; (3) disallowing substantial expenses incurred by FST ; and (4) assuming away legitimate equity invested by FST. Combined, these errors have led to an insurmountable and intolerable situation for FST.

Fort Sumter Tours, Inc. has been in continuous litigation with the Park Service over the increased franchise fee since 1993. FST has lost three court cases at the federal District Court and the U.S. Court of Appeal level, including a suit recently settled in favor of the federal government in the U.S. District Court for the District of Columbia. However, the issues of the actual data used in fee calculation and the additional non-concession income in the franchise

fee calculation were never addressed by the courts and never resolved.

H.R. 3241 will attempt to correct the calculation errors by requiring the Secretary of the Interior to reassess the franchise fees owed by Fort Sumter Tours Inc. This is to be done within 30 days of enactment and to the approval of Fort Sumter Tours Inc. If an acceptable agreement is not reached, the matter must be referred to binding arbitration under the National Parks Omnibus Management Act of 1998 (Public Law 105-391). The arbitration must commence no later than 30 days after Fort Sumter Tours Inc. deems the recalculation unacceptable.

H.R. 3241 assures that laws applicable to franchise fee determination at the time payment became due will be used during arbitration. Further, prior decisions regarding the franchise fee dispute may not be considered or used as evidence for any purpose. Reasonable legal fees and costs of the proceedings shall be awarded to Fort Sumter Tours, Inc. by the arbitrators Fort Sumter prevails.

COMMITTEE ACTION

H.R. 3241 was introduced on November 5, 1999, by Congressman Mark Sanford (R-SC). The bill was referred to the Resources Committee and within the Committee to the Subcommittee on National Parks and Public Lands. On March 30, 2000, the Subcommittee held a hearing on the bill. On April 13, 2000, the Subcommittee met to consider the bill. No amendments were offered, and the bill was ordered favorably reported to the full Resources Committee by a vote of 7-4, as follows:

106th Congress
Subcommittee on National Parks & Public Lands

RECORDED VOTES

Date: April 13, 2000 Time: _____

Bill Number/Subject Matter: HR 3241

Amendment Number _____ Offered By: _____

Roll Call: Passed: X Defeated: _____ (On Final Passage)

Voice Vote: Passed: _____ Defeated: _____

Republicans	Yea	Nea	Present	Democrats	Yea	Nea	Present
Hansen	X			<i>Romero-Barceló</i>		X	
Gallegly				<i>Rahall</i>			
Duncan	X			<i>Vento</i>			
Hefley				<i>Kildee</i>			
Pombo				<i>Christian-Christiansen</i>			
Cubin	X			<i>Kind</i>			
Radanovich				<i>Inslee</i>		X	
Jones	X			<i>Tom Udall</i>		X	
Cannon	X			<i>Mark Udall</i>		X	
Hill				<i>Crowley</i>			
Gibbons	X			<i>Holt</i>			
Souder							
Sherwood	X						
Total Republicans	7			Total Democrats		4	

On July 26, 2000, the Resources Committee met to consider the bill. An amendment in the nature of a substitute was offered by Congressman James V. Hansen (R-UT) which conformed the House bill to language in the Senate bill (S. 2231). The amendment was adopted by voice vote. No further amendments were offered and the bill, as amended, was ordered favorably reported to the House of Representatives by voice vote.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8, and Article IV, section 3 of the Constitution of the United States grant Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, credit authority, or an increase or decrease in tax expenditures. According to the Congressional Budget Office, the bill could affect offsetting receipts and the spending of those receipts, but concludes that the effect "would have no net impact on the federal budget."

3. Government Reform Oversight Findings. Under clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform on this bill.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 3, 2000.

Hon. DON YOUNG,
*Chairman, Committee on Resources,
U.S. House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3241, a bill to direct the

Secretary of the Interior to recalculate the franchise fee owed by Fort Sumter Tours, Inc., a concessioner providing service to Fort Sumter National Monument in South Carolina.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 3241—A bill to direct the Secretary of the Interior to recalculate the franchise fee owed by Fort Sumter Tours, Inc., a concessioner providing service to Fort Sumter National Monument in South Carolina

H.R. 3241 would require the National Park Service (NPS) to recalculate the franchise fee that it charges to Fort Sumter Tours, Inc. (FST), a concessioner providing transportation to visitors at Fort Sumter National Monument. If the recalculated fee is not acceptable to FST, a new fee would be established through binding arbitration. The bill would require that the arbitrator award FST reasonable legal costs of all proceedings involving the fee dispute if the concessioner is the prevailing party.

CBO cannot estimate the budgetary impact of H.R. 3241 because it would probably depend on the outcome of a legal proceeding that has not yet occurred. We expect that the dispute over the FST franchise fee of between 4.25 percent (which is what the company currently pays the NPS) and 12 percent (which is the adjusted rate established by the agency in 1991).

Under the higher rate of 12 percent, the federal government could receive about \$3 million in fees, interest, and penalties owed by FST since 1991. This amount could be collected—and spent—in the absence of legislation because the NPS has recently begun administrative action to collect it. (To date, FST has not paid the higher rate.) If the lower rate would be chosen by an arbitrator, the government would lose the \$3 million owed to it (assuming that the arbitrator would make the lower rate retroactive to 1991). In addition, if the arbitrator would deem FST to be the prevailing party, the government would have to pay about \$500,000 in legal costs that have been incurred by the company over the past several years to dispute the 12-percent rate. According to the Department of the Interior, this payment would be made from appropriated NPS funds, assuming the availability of the necessary amounts.

What would happen to annual franchise fees after arbitration is also uncertain, CBO expects that by the time a decision would be reached, the FST concession contract will be expired.

Annual offsetting receipts (and associated direct spending) from franchise fees after 2001 would depend on the outcome of competitive bidding for the concession.

H.R. 3241 could affect offsetting receipts (a credit against direct spending) and the spending of those receipts; therefore, pay-as-you-go procedures would apply. CBO estimates, however, that because the NPS would probably have been allowed to spend the amounts that it would have received in the absence of arbitration, the loss of such amounts would have no net impact on the federal budget.

The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On October 2, 2000, CBO transmitted a cost estimate for S. 2331, a similar bill ordered reported by the Senate Committee on Energy and Natural Resources on September 20, 2000. The two estimates reflect differences in the two versions of the legislation, primarily the treatment of legal expenses of FST if the company would be deemed the prevailing party.

The CBO staff contact for this estimate is Deborah Reis, who can be reached at 226–2860. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

DISSENTING VIEWS

There is no justification for this legislation and its approval would set an unwise precedent. As a result, we urge our colleagues to oppose H.R. 3241.

Fort Sumter Tours (FST) has had a contract with the National Park Service (NPS) to operate a tour boat service to and from Fort Sumter National Monument since 1961. The Fort is accessible only by boat and virtually all of its 230,000 annual visitors must use FST.

In 1986, FST renewed its contract with the NPS, which now runs through December 31, 2000. The contract set FST's franchise fee at 4.25% of gross receipts and specified that the fee was to be recalculated every five years. Importantly, the contract specified that, while FST could request advisory arbitration to help resolve disputes, the only appeal of a fee recalculation was to the Secretary of the Interior.

In 1991, the NPS notified FST of its intention to raise the franchise fee from 4.25% to 12% of gross receipts for the second five-year contract period (June 1991 to June 1996). FST objected, claiming that the NPS had made numerous accounting and mathematical errors in its fee recalculation. However, rather than entering advisory arbitration as provided for in the concessions contract, FST sued the NPS in federal court in South Carolina where it lost at trial and on appeal (the Supreme Court declined to review the case). Subsequently, FST re-filed its lawsuit in federal court in the District of Columbia, where it again lost both at trial and on appeal. Throughout the litigation, NPS stood by the new fee but did not terminate the FST contract despite the fact that FST has only been paying 4.25% since 1986. FST currently owes the NPS more than \$2 million in back fees, penalties and interest.

H.R. 3241 would have Congress intervene in this ongoing dispute by directing the Secretary of the Interior to recalculate the franchise fee that, according to the bill, is "allegedly" owed by FST. Further, the legislation specifies that if the recalculation is not acceptable to FST, the franchise fee owed shall be determined through binding arbitration. In addition, the legislation states that none of the previous court decisions regarding the fee dispute may be "introduced into evidence or considered by the arbitrators for any purpose." In effect, H.R. 3241 would have the congress re-write contractual provisions agreed to by both parties in 1986 to provide Fort Sumter Tours a remedy not contained in the original contract, that of binding arbitration.

The consequences of such a step for the Park Service would be very serious. The NPS is currently party to thousands of concessions and other contracts, the terms of which are relied upon to allow our National Park system to function. Should we pass H.R. 3241, it will be clear that those contract terms are reliable only

until Congress decides to alter them. Never again will NPS be able to enter a contract with the assurance that the contract terms will not be altered during the life of the contract. Never again will a party contracting with the NPS be assured that the agreement they are signing today will be the same agreement in effect tomorrow. It is difficult to imagine how the NPS, or any other contractor, might accomplish its mission under these circumstances.

Furthermore, passage of this measure would override the decisions of two Federal District Courts, two Federal Courts of Appeals and the U.S. Supreme Court and would specify that those decisions are to be ignored in the arbitration proceeding mandated by the bill. With passage of this measure, the Congress would erase a decade of jurisprudence in this case and then mandate that all parties ignore everything gleaned from those decisions.

Proponents of the bill argue such intrusion into the judicial process is necessary because none of the courts mentioned above reached the issue FST claims is central to its case, namely that the NPS made several mathematical mistakes in recalculating FST's franchise fee in 1991. This is both true and irrelevant.

FST voluntarily elected to ignore the appeals process provided for in its contract and instead sought judicial review. The courts held that, under the terms of that contract, the franchise fee was reviewable by the Secretary but not by the courts and that such a system of review is reasonable. If what FST wanted was a review of the mathematical calculations underlying the new fee, it should have used the appeals process set out in the contract to which they agreed. That FST failed in its attempts to secure from the courts relief to which it was not entitled is neither surprising nor a justification for Congressional intervention.

In addition to the National Park Service and the Judiciary, H.R. 3241 has negative policy ramifications for the Congress itself. Rather than focusing on the significant policy issues raised by the concessions system throughout our national parks, this bill would establish a precedent for Congress to intervene on a case by case basis to mandate specific remedies for individual concessioners. Neither the hearing record in this case, nor the legislation itself provide an explanation of why this case was worthy of legislative action. As a result, it is unclear on what basis Congress might refuse to consider future legislation re-writing each and every disputed contract in the park system.

In addition to these policy concerns, H.R. 3241 represents poorly crafted legislation. The bill mandates that, if the concessioner is the "prevailing party" in this arbitration, he shall be awarded his attorney's fees. Given the length of this litigation, we can only assume this represents a significant sum of money. However, the legislation fails to define the term "prevailing part." The NPS position is that FST owes \$2.2 million while FST's position is unclear but may be that they owe nothing. Given the wide variety of decisions an arbitrator might reach when the parties are more than \$2 million apart, determining whether or not FST is owed attorney's fees may be impossible.

Finally, the legislation mandates that, despite the fact that FST's current contract expires this December, the National Park Service will be required to offer FST annual contract renewals for as long

as this arbitration, and any appeals, are pending. Given FST's penchant for endless, and so far fruitless appeals, this could guarantee FST the concession at Fort Sumter for a fifth decade or more, presumably at whatever fee they are willing to pay. Not only does this violate every principle of our concessions system, it also allows FST to continue building on its \$2.2 million dollar unpaid debt. How large might the loss to taxpayers be if the Park Service ultimately prevails but, thanks to passage of this bill, FST has had another ten or more years to rack up a debt they cannot satisfy?

Fort Sumter Tours has enjoyed a tax-payer subsidized, government-sponsored monopoly for almost forty years. Over those four decades, FST's business has expanded consistently and is now a multi-million dollar operation involving a variety of non-concessions activities including dinner cruises and sightseeing tours. FST has shown itself to be fully capable of defending itself and has had its day in court on a number of occasions. FST does not need a legislative remedy nor do the facts of this case merit one. Given the disastrous ramifications of granting FST such a remedy, this legislation should be defeated.

GEORGE MILLER.
FRANK PALLONE.
MARK UDALL.
CARLOS ROMERO-BARCELO.
JOSEPH CROWLEY.

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