

**SUPREME COURT OF ARIZONA**

STATE OF ARIZONA, ex rel.  
MARK BRNOVICH, Attorney General,

Petitioner,

v.

CITY OF PHOENIX, Arizona,

Respondent.

Arizona Supreme Court  
No. CV-20-0019-SA

**LEAGUE OF ARIZONA CITIES AND TOWNS'  
AMICUS BRIEF AND COMBINED APPENDIX  
IN SUPPORT OF RESPONDENT  
Filed with Consent of All Parties**

Mary R. O'Grady (011434)  
Joseph N. Roth (025725)  
OSBORN MALEDON, P.A.  
2929 North Central Avenue, Ste. 2100  
Phoenix, Arizona 85012  
(602) 640-9000  
mogrady@omlaw.com  
jroth@omlaw.com

Attorneys for Amicus Curiae League of  
Arizona Cities and Towns

# TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	3
INTRODUCTION .....	5
INTEREST AND IDENTITY OF AMICUS.....	6
ARGUMENT.....	7
I.    Article 9, Section 25 prohibits taxes or similar fees paid as a condition to conduct certain types of business throughout a taxing jurisdiction, not fees paid to use municipal property for business purposes.....	7
A.    The text of article 9, section 25 and other evidence of voter intent support the City’s interpretation.....	8
B.    The text of article 9, section 25 and other evidence of voter intent refute the Attorney General’s interpretation.....	13
II.   The Attorney General’s interpretation clashes with the Arizona Constitution and threatens the ability of Arizona’s towns and cities to manage their own property for the public good. ....	16
A.    The Attorney General’s interpretation conflicts with a municipality’s right to engage in any business or enterprise under article 13, section 5 of the Arizona Constitution.....	16
B.    The Attorney General’s interpretation impairs the ability to manage commercial use of government property in the public’s interest. ....	18
CONCLUSION .....	23
APPENDIX.....	APP026

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b>Cases</b>	
<i>A&amp;E Parking v. Detroit Metro. Wayne Cty. Airport Auth.</i> , 723 N.W.2d 223 (Mich. Ct. App. 2006).....	11
<i>Ariz. Early Childhood Dev. &amp; Health Bd. v. Brewer</i> , 221 Ariz. 467 (2009).....	11
<i>State ex. rel. Brnovich v. City of Tucson</i> , 242 Ariz. 588 (2017).....	17
<i>City of Phoenix v. Glenayre Elecs., Inc.</i> , 242 Ariz. 139 (2017).....	9
<i>Gabaldon v. State</i> , 228 Ariz. 323 (2011).....	9
<i>Jacksonville Port Auth. v. Alamo Rent-A-Car, Inc.</i> , 600 So.2d 1159 (Fla. Ct. App. 1992).....	11
<i>Normandin v. Encanto Adventures, LLC</i> , 246 Ariz. 458 (2019).....	9, 15
<i>Quality Educ. &amp; Jobs Supporting I-16-2012 v. Bennett</i> , 231 Ariz. 206 (2013).....	12
<i>Saban Rent-a-Car LLC v. Ariz. Dep't of Revenue</i> , 246 Ariz. 89 (2019).....	8, 9, 11, 14
<i>Sell v. Gama</i> , 231 Ariz. 323 (2013).....	12
<i>Shaffer v. Allt</i> , 25 Ariz. App. 565 (1976).....	17
<i>Sumid v. City of Prescott</i> , 27 Ariz. 111 (1924).....	17

<i>Trisha A. v. Dep't of Child Safety,</i> 247 Ariz. 84 (2019) .....	8
---	---

**Constitutional Provisions**

Ariz. Const. art. 2, § 34.....	16
Ariz. Const. art. 9, § 25.....	5, 23
Ariz. Const. art. 13, § 5.....	16, 17

**Statutes and Codes**

A.R.S. § 19-125 .....	12
Tucson City Code § 21-14.3 .....	20
Tucson City Code § 21-16 .....	20

**Other Authorities**

Antonin Scalia & Bryan A. Garner, <i>Reading Law</i> (2012) .....	8, 15
City of Chandler Fee Schedule (July 1, 2019) .....	22
City of Phoenix – Aviation Department, <i>Record Number of Passengers Traveled Through Phoenix Sky Harbor International Airport in 2019</i> , SkyHarbor.com (Jan. 28, 2020) .....	10
Official Horseshoe Bend Information, City of Page .....	21

## INTRODUCTION

From parks and lake marinas to libraries, convention centers, and baseball stadiums, Arizona's state government and its political subdivisions own and control a huge range of properties and enterprises for the public's benefit. Not surprisingly, many businesses are eager to provide services to the members of the public who use these spaces and, likewise, the government often seeks out businesses to provide services to improve the public's experience.

Like any property owner, the government-owner controls what businesses can use its property, on what terms, and at what cost. Private sports leagues pay to use a public park's fields and lights, concessionaires negotiate contracts to be allowed to provide catering and food service to sports fans or convention goers, or — at issue here — a rideshare company or a hotel with a courtesy shuttle pays a fee to stop at the airport's curb to pick up or drop off a passenger. The span of amounts and types of charges reflects the flexibility Arizona's governmental entities have in managing their own property.

The Attorney General now contends that the new constitutional provision at [article 9, § 25 of the Arizona Constitution](#) restricts how a

government may charge money as a condition for allowing commercial activity on government property. The League of Arizona Cities and Towns joins in the City's effort to show that the Attorney General's interpretation is wrong.

The League also is compelled to write separately because the Attorney General's interpretation guarantees unintended, negative consequences for Arizona. Arizona's governmental bodies should be able to manage commercial access to their properties in a way that takes advantage of new technologies, takes into account market realities, and promotes the public interest.

### **INTEREST AND IDENTITY OF AMICUS**

The League of Arizona Cities and Towns is a voluntary association, comprised of the 91 incorporated cities and towns of Arizona. The League represents the interests of Arizona cities and towns by acting as a collective voice in the legislature, agencies, and courts. The League members have a strong interest in this matter to ensure that [article 9, § 25 of the Arizona Constitution](#) is applied in a manner that adheres to the intent of Arizona's voters without encroaching on a municipality's authority to manage its own property and regulate how others may use municipal property for

commercial purposes. While this case involves Arizona’s largest city and major airport, the repercussions of this Court’s decision will impact all cities and towns, including rural communities that rely on user fees to sustain programs and activities on their property.

All parties have consented to the filing of this brief, and no persons or entities other than the League have provided financial resources for the brief’s preparation.

## ARGUMENT

**I. Article 9, Section 25 prohibits taxes or similar fees paid as a condition to conduct certain types of business throughout a taxing jurisdiction, not fees paid to use municipal property for business purposes.**

The League endorses the City’s interpretation of article 9, § 25.<sup>1</sup> As the City persuasively shows (at 23-34), the only reasonable interpretation of § 25’s text is that it applies to tax-like fees paid as a condition for performing

---

<sup>1</sup> The City also persuasively argues (at 14-22) that the Airport’s TNC fees are not “transaction-based” and so would not be subject to § 25 regardless of how the rest of § 25 is interpreted. The League agrees – the fee is based on a permittee’s access to the airport’s valuable curb space, not the rideshare transaction – but contends that municipalities should remain free to implement “transaction-based fees” as a condition to access municipal property for a commercial purpose, just as a private property owner would be able to do.

a type of service within a jurisdiction, not a fee paid for performing that service on a particular piece of the government's property.

**A. The text of article 9, section 25 and other evidence of voter intent support the City's interpretation.**

Without repeating each of the City's arguments, the League emphasizes that the City's interpretation is supported by the text and every other indicia of the voters' intent. *See Saban Rent-a-Car LLC v. Ariz. Dep't of Revenue*, 246 Ariz. 89, 95 ¶ 21 (2019) (the Court's "primary goal in interpreting" a constitutional amendment "is to effectuate the electorate's intent in adopting it").

**First**, the text supports the City. As the City explains (at 24), the phrase "the privilege to engage in . . . any service performed in this state" "refers to the threshold right to engage in the service in the taxing jurisdiction generally." This interpretation conforms with the commonly understood meaning of "privilege to engage in" a business, *see* City Br. at 24, and with the other uses of the word "privilege" in § 25, City Br. at 25. *See Trisha A. v. Dep't of Child Safety*, 247 Ariz. 84, 88 ¶ 17 (2019) (interpreting similar language consistently); *see also* Antonin Scalia & Bryan A. Garner, *Reading*



*Law* 170 (2012) (Under the presumption of consistent usage canon, “[a] word or phrase is presumed to bear the same meaning throughout a text.”).

Furthermore, longstanding interpretive canons confirm this interpretation. See *City Br.* at 27-28. Under the *ejusdem generis* canon, the catch-all phrase “any other transaction-based tax, fee, stamp requirement or assessment” must be “construed narrowly to . . . things of the same general nature or class as the more specific terms” preceding the catch-all phrase. *Saban*, 246 Ariz. 89, 100 ¶ 47 (Bolick, J. concurring) (applying *ejusdem generis* canon to “narrowly” interpret phrase “other special taxes”); *City of Phoenix v. Glenayre Elecs., Inc.*, 242 Ariz. 139, 146-47 ¶ 30 (2017) (rejecting “broad interpretation” and applying *ejusdem generis* rule to a catch-all term when it followed an enumerated list of a particular class of things). Likewise, the “closely related” canon of *noscitur a sociis* instructs that a term must be “interpreted in context of [its] accompanying words.” *Gabaldon v. State*, 228 Ariz. 323, 326 ¶ 13 (2011) (interpreting word “enterprise” more narrowly given other enumerated items in statute); *Normandin v. Encanto Adventures, LLC*, 246 Ariz. 458, 441-42 ¶¶ 11-12 (2019) (interpreting word “manager” to include characteristics shared with other entities listed in statute). Thus, the words “any other . . . fee” must be interpreted as similar to—of the “same

general nature or class” as – the preceding more specific terms (“any sales tax, transaction privilege tax, luxury tax, excise tax, use tax”).

Applying these canons, for the reasons explained in the City’s brief (at 32-34), the City’s transportation network companies (“TNC”) fees are not the sort of fee § 25 encompasses because they are categorically different from the types of taxes that § 25 specifically lists. The City’s TNC fees are not a tax or fee on the privilege to engage in a service – a rideshare driver can be a rideshare driver in Phoenix without paying the fee – but are instead a charge to use airport property to provide a service to customers going to and from the airport. The airport charges for its limited curb space just like it charges businesses to set up shop in its limited space for restaurants or newsstands. Like every other business that wants to market its offerings to the huge number of potential customers who use the airport (46 million in 2019)<sup>2</sup>, TNC companies must pay for access to the airport for that unique benefit.

---

<sup>2</sup> City of Phoenix – Aviation Department, *Record Number of Passengers Traveled Through Phoenix Sky Harbor International Airport in 2019*, SkyHarbor.com (Jan. 28, 2020), [https://www.skyharbor.com/Media\\_old/PressReleasess/2020/01/28/record-number-of-passengers-traveled-through-phoenix-sky-harbor-international-airport-in-2019](https://www.skyharbor.com/Media_old/PressReleasess/2020/01/28/record-number-of-passengers-traveled-through-phoenix-sky-harbor-international-airport-in-2019) (last visited March 3, 2020).

Indeed, several courts have upheld similar airport-access fees as lawful on this rationale. *See, e.g. A&E Parking v. Detroit Metro. Wayne Cty. Airport Auth.*, [723 N.W.2d 223, 229](#) (Mich. Ct. App. 2006) (summarizing similar cases nationwide and holding that fee charged to hotels, parking providers, and limousine companies to pay for use of airport roads to pick up customers was a permissible user fee, not an illegal tax, because those businesses obtained a benefit from use of the airport and could avoid the fees by “attempt[ing] to obtain business elsewhere”); *Jacksonville Port Auth. v. Alamo Rent-A-Car, Inc.*, [600 So.2d 1159, 1160](#) (Fla. Ct. App. 1992) (holding that access fee charged to offsite rental car companies was not unauthorized tax because the fee was for the rental company’s “use of” the airport’s “facilities which benefit” the rental company “by generating its business,” and rental company could “avoid the fee” by “obtaining its customers from another source”).

**Second**, the City’s interpretation matches what voters were told when they voted on Prop 126. *See Saban*, [246 Ariz. at 96 ¶ 25](#) (looking to publicity pamphlet to aid in determining the electorate’s intent (citation omitted)); *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, [221 Ariz. 467, 471 ¶ 14](#) (2009) (considering “statements of findings passed with the measure” and

information in the publicity pamphlet” to determine the purpose of an initiative). The League need not repeat the City’s examination (at 2, 29-32) of the Prop 126 publicity pamphlet and ballot measure but suffice to say that the voters were told – repeatedly and exclusively – that Prop 126 was about *taxes* on services, not user or access fees. Contradicting the Attorney General’s arguments in this case, Prop 126’s proponents went so far as to tell voters that the amendment would have no financial impact on government because governments do not tax these services. City App. Tab 1 at 27.

Most significantly, the actual ballot language told voters that a “yes” vote “would prohibit . . . a new or increased tax on services.” *Id.* at 34. This is language the Attorney General approved as providing a “summary of the principal provisions of the measure,” [A.R.S. § 19-125\(D\)](#), and “might [have been] the last or only description the electorate [saw] before voting on the measure,” *Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, [231 Ariz. 206, 208 ¶ 10](#) (2013). The Court should not stretch the meaning of “fee” in § 25 to cover a municipal access fee that is categorically different from the sort of “taxes” voters were led to believe was the point of the vote.

**Third**, the City’s interpretation is also far more sensible and avoids the absurd, destructive results discussed below. *See Sell v. Gama*, [231 Ariz. 323](#),

327 ¶ 16 (2013) (courts should not interpret laws to cause “an absurdity or constitutional violation”). The City’s interpretation does not minimize or neuter § 25; it respects the electorate’s desire to impose a substantial limit on a government’s ability to enact “any new taxes on services,” City App. Tab 1 at 24, without hamstringing a governing body’s ability to manage government property and enterprises for the public good.

**B. The text of article 9, section 25 and other evidence of voter intent refute the Attorney General’s interpretation.**

The Attorney General asserts that § 25’s use of the words “any other transaction-based . . . fee” and “any service” means that § 25 must have the broadest and farthest reach possible. Pet. at 17-18. With these boundless terms in hand, the Attorney General says (at 20) that § 25 applies to the TNC fees because they must be paid for the “privilege” to “provide these services commercially at the Airport.”

The Attorney General’s analysis is flawed. **First**, the text restricts the government’s ability to impose certain fees on the “privilege to engage” in “any service performed in the state,” not on “particular transactions” of the service in “particular locations.” Lacking other textual support, the Attorney General lets the word “any” do its textual heavy lifting. See Pet. at 18

(arguing that “electorate’s approval of the word, ‘any,’ supports an expansive reading of ‘transaction-based’ and ‘service’”).

But “any” cannot bear the weight. The Attorney General’s interpretation is so broad that it “would encompass” business activities “that voters clearly did not intend to be covered.” *See Saban*, [246 Ariz. at 95 ¶ 22](#) (rejecting overly broad construction because it “would encompass” items “the voters clearly did not intend to be covered”). The Attorney General’s interpretation does not distinguish between sales-tax-like fees and commonplace permitting and contractual arrangements governments make with businesses all the time, such as concessionaire contracts that require payment of a percentage of revenue (*see* [§ II.B](#) below). For example, under the Attorney General’s construction of “any . . . fee” and “any service,” can the City charge a per-car (or percentage of gross sales) fee for allowing a valet company to operate out of the airport’s garage and park visitors’ cars? After all, parking cars is a “service” and the valet company must pay the fee for the “privilege” to “provide these services commercially at the Airport,” (Pet. at 20). Nothing in § 25’s text or the publicity pamphlet even hints that § 25 has anything to do with such a common commercial arrangement, but the Attorney General’s interpretation puts it in doubt.

**Second**, the Attorney General ignores the other words in § 25: the enumerated list of specific kinds of taxes that § 25 prohibits. The Attorney General does not mention them, much less explain how “transaction-based . . . fee” should be interpreted in light of those other words. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 195-96 (2012) (explaining that “words grouped in a list should be given related meanings” (internal quotation marks and citation omitted)). In other words, the Attorney General fails to follow the canons of interpretation discussed above and instead analyzes the words “in isolation” without the “context of the accompanying words.” *Normandin*, 246 Ariz. at 460 ¶ 11 (“We do not determine the meaning of a word . . . in isolation.”).

**Third**, the Attorney General asserts (at 21) that the “publicity pamphlet for Prop 126 indicates that the electorate intended to prohibit increased or newly-imposed fees on ride-sharing services.” Where? As the City notes (at 30-32), nothing backs up the Attorney General. The fact is, there is not a single sentence in the publicity pamphlet, the actual ballot language approved by the Attorney General, or the Legislative Council’s analysis even hinting that fees charged to do business on airport property would become unlawful if Prop 126 passed.

**II. The Attorney General’s interpretation clashes with the Arizona Constitution and threatens the ability of Arizona’s towns and cities to manage their own property for the public good.**

Although the textual analysis should easily resolve in the City’s favor, the Court should reject the Attorney General’s construction for two additional reasons: (1) it provokes an unnecessary conflict with the rights of municipalities under [Article 13, section 5 of the Arizona Constitution](#); and (2) it would unnecessarily frustrate a municipality’s ability to manage commercial access to municipal property.

**A. The Attorney General’s interpretation conflicts with a municipality’s right to engage in any business or enterprise under article 13, section 5 of the Arizona Constitution.**

[Article 13, § 5 of the Arizona Constitution](#) assures that “[e]very municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation.” The Constitution also guarantees the right of the “state of Arizona and each municipal corporation . . . to engage in industrial pursuits.” [Ariz. Const. art. 2, § 34](#). As a result, cities, other municipalities, and the state itself operate airports, convention centers, state fairgrounds, and other enterprises.



When engaging in a business or enterprise, the government “is subject to the same rules and regulations which are imposed upon a private entity engaged in a like business.” *Shaffer v. Allt*, 25 Ariz. App. 565, 571 (1976) (citing *Sumid v. City of Prescott*, 27 Ariz. 111 (1924)), abrogated on other grounds in *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 603 ¶ 61 (2017). Consequently, a government-owner should be able to charge for access to its property for a commercial purpose just as a private owner could.

A private owner of an airport or other property plainly could prohibit commercial access to its curb space. A private hotel owner, for instance, could require all commercial drivers to pay the hotel a fee to drop off guests in front of the door rather than outside the hotel’s gates. The Attorney General’s interpretation, however, insists that § 25 now prohibits the government from imposing such fees because they are fees on the “right to provide . . . services at the” particular location. See Pet. at 20. The Attorney General’s interpretation creates unnecessary tension between the two constitutional provisions. Section 25 should not and need not be interpreted to diminish the government’s authority to engage in its own business or enterprise under article 13, § 5.

The City's interpretation of § 25 avoids any conflict between § 25 and article 13, § 5, by giving both independent meaning and force. Under the City's interpretation, § 25 still imposes a limitation on the City's future taxing authority as the electorate intended. The City could not, for instance, require a payment (whether called a "sales tax," "transaction privilege tax" or "fee") for every haircut a barber performs within the City of Phoenix. At the same time, § 25 would not prohibit the City from exercising its authority to engage in business and manage its own property by charging the same barber a per-haircut fee as part of a lease of space inside the City's airport.

**B. The Attorney General's interpretation impairs the ability to manage commercial use of government property in the public's interest.**

The Attorney General's interpretation is an alarming one for the League's members (and should be for the state government and the public). As the City suggests (at 36), if the Attorney General prevails in this case, then the government may not be able to charge many fees for use of government-owned properties such as "convention centers, public parks, town squares, parking lots, and sports arenas." This is not just conjecture. If the City's rideshare airport pick-up and drop-off fees fall under § 25, then the Court can be assured that a wave of challenges will follow to any number of fees

and other charges that voters could not have anticipated would fall under § 25.

Several points merit the Court's attention. **First**, the state and municipalities charge fees based on a percentage of sales all the time. *See* [Ariz. Const. art. 9, § 25](#) (prohibiting taxes or fees on "the gross receipts of sales or gross income derived from, any service performed in this state"). For example, the State has negotiated concessionaire contracts with service providers at state parks that provide exclusive access to the parks to sell concessions in exchange for a "concession fee" that is "a percentage of the annual adjusted gross revenue that is generated from all sales and services provided." League Appendix at League [APP027](#); *see also* League [APP033](#) (agreement providing exclusive access to provide concession and boat rental services includes payment of 15% of all watercraft rentals). Similar arrangements are common for the various municipalities that own sports stadiums. *See, e.g.*, League [APP039](#) (City of Tempe "Non-Spring Training Concession Agreement" grants certain "exclusive right" of access to sell concessions and catering services at stadium in exchange for a percentage of gross revenues).

Before this case, no one would have contended that these bilateral agreements are at risk under § 25. But, according to the Attorney General, the “concession fees” here are potentially just as vulnerable as the City’s TNC pick-up and drop-off fees. Both fees are required as a condition for the “privilege” of doing a service at a particular location. And if “concession fees” imposed pursuant to a negotiated agreement are permissible under § 25 but the TNC fees are not, § 25 would merely micromanage how government may run its own properties. It would dictate the form of fees that are imposed for the commercial use of government property rather than the substance.

Indeed, the City of Tucson puts the concession fee directly in its code. Under [§ 21-16\(2\)\(5\)](#) of the Tucson City Code, when there is a “park special event” that will earn revenue, the Parks and Recreation director is authorized to negotiate special event rates “in an amount not to exceed 5 percent of revenue potential from the use.” And if performers sell tickets to a concert, Tucson can charge fees of “one dollar per ticket sold” – i.e., a “transaction-based fee” charged for the privilege of selling musical services at a Tucson-owned park. *Id.* [§ 21-16\(4\)\(7\)\(1\)](#). *See also* City of Tucson City Code [§ 21-14.3](#) (authorizing Parks and Recreation director “to negotiate

charges for a percentage of parking or concessions revenue to be generated by an event” at Tucson’s Hi Corbett Stadium). Nothing in the text or information provided to the voters supports applying § 25 to any of these fees, but the Attorney General’s interpretation puts them at risk.

**Second**, the Attorney General’s interpretation threatens other very common user and access fees that have nothing to do with sales taxes. Some fees are necessary to control access and provide funds to maintain highly trafficked nature sites. For instance, the City of Page controls access to the famous Horseshoe Bend along the Colorado River. Page charges an “entrance fee” of between \$35 and \$140 for every single commercial van or bus that enters. *See* Official Horseshoe Bend Information, City of Page, <https://cityofpage.org/official-horseshoe-bend-information>. There is no meaningful difference between Page’s Horseshoe Bend fees and the fee a commercial ground transportation provider pays when it stops at dedicated curb space at the airport.

Fees for sporting events and tournaments are another common example. Many cities maintain soccer or baseball fields and charge for their use. For instance, Chandler charges commercial users \$17.00 per hour for a “ball field reservation-Tournaments/Leagues” and a “gate fee” of \$100 per

event for tournaments. Non-commercial users pay a lower price. *See* City of Chandler Fee Schedule (July 1, 2019) *available at* <https://www.chandleraz.gov/sites/default/files/fee-schedule.pdf>. These fees are arguably for the “privilege” of engaging in the service of organizing a tournament at Chandler’s park in the same way the TNC fee is paid for the “privilege” of providing rideshare services “commercially at the Airport.” *Pet. at 20.* In that case, Chandler would find itself in the bizarre situation where it could increase fees on non-commercial users to cover costs of maintaining the parks but could never add or increase fees on commercial users.

These are just a few examples of the varied types of fees that could be swept up in § 25 if the Court adopts the Attorney General’s essentially limitless interpretation. As discussed above, the City’s interpretation is far more sensible. It gives § 25 independent force and meaning – the provision sharply limits the ability to collect taxes on services – without unduly disrupting the functioning of local government.

At the same time, the City’s interpretation avoids the irrational result of prohibiting fees or fee increases for the commercial use of public property but leaving all other fees for the use of public property unaffected. Rather

than insulate commercial users from user and access fees, the more reasonable and plausible interpretation is that § 25 simply does not apply to fees associated with the use of public property.

User and access fees are needed to pay for and maintain these valuable public resources. If governments cannot increase or impose these types of user fees, their existence will be jeopardized and the financial burden of maintaining them (if they survive) will shift to non-commercial users or the entire electorate instead of requiring those benefiting from their commercial use of government property to pay for that use. Section 25 does not impose that type of limit on government's authority over the use of its property.

### **CONCLUSION**

The Court should reject the Attorney General's position. If adopted, the Attorney General's interpretation would hamstring local government's ability to design fees to efficiently manage access and maintenance of public property and enterprises. The City's airport fees are a sensible way to charge for commercial access to a scarce and valuable resource. The Court should hold that the fees at Sky Harbor Airport that are the subject of the Attorney General's petition do not violate article 9, § 25.

RESPECTFULLY SUBMITTED this 3rd day of March, 2020.

OSBORN MALEDON, P.A.

By /s/ Joseph N. Roth  
Mary R. O'Grady  
Joseph N. Roth  
2929 North Central Avenue, Ste. 2100  
Phoenix, Arizona 85012

Attorneys for Amicus Curiae League of  
Arizona Cities and Towns in Support of  
Respondent



THIS PAGE INTENTIONALLY LEFT BLANK

**APPENDIX  
TABLE OF CONTENTS\***

<b>Description</b>	<b>Appendix Page Nos.</b>
Slide Rock State Park Concession Agreement [excerpts]	APP027 - APP032
Lake Havasu State Park Concession Agreement [excerpts]	APP033 - APP038
City of Tempe Concession Agreement [excerpts]	APP039 - APP041

---

\* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).



# OFFER

AZ Recreation Company LLC  
PO Box 4069, Sedona, AZ 86336  
(P) 928-301-2544 (F) 928-862-2205

Slide Rock State Park Concession  
Solicitation # ADSP016-00005387

## OFFER

### TO THE STATE OF ARIZONA:

The Undersigned hereby offers and agrees to furnish the material, service or construction in compliance with all terms, conditions, specifications and amendments in the Solicitation and any written exceptions in the offer. Signature also certifies Small Business status.

AZ Recreation Company LLC

Company Name

PO Box 4069

Address

Sedona, AZ 86340

City State Zip

will\_arizona@yahoo.com

Contact Email Address

Signature of Person Authorized to Sign Offer

Will Newman

Printed Name

President

Title

Phone: 928-301-2544

Fax: 928-862-2205

By signature in the Offer section above, the Offeror certifies:

1. The submission of the Offer did not involve collusion or other anticompetitive practices.
2. The Offeror shall not discriminate against any employee or applicant for employment in violation of Federal Executive Order 11246, State Executive Order 2009-9 or A.R.S. §§ 41-1461 through 1465.
3. The Offeror has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted offer. Failure to provide a valid signature affirming the stipulations required by this clause shall result in rejection of the offer. Signing the offer with a false statement shall void the offer, any resulting contract and may be subject to legal remedies provided by law.
4. The Offeror certifies that the above referenced organization X IS/    IS NOT a small business with less than 100 employees or has gross revenues of \$4 million or less.

## ACCEPTANCE OF OFFER

The Offer is hereby accepted.

The Contractor is now bound to sell the materials or services listed by the attached contract and based upon the solicitation, including all terms, conditions, specifications, amendments, etc., and the Contractor's Offer as accepted by the State.

This Contract shall henceforth be referred to as Contract No. ADSP016-114302

The effective date of the Contract is January 1, 2016

The Contractor is cautioned not to commence any billable work or to provide any material or service under this contract until Contractor receives purchase order, contract release document or written notice to proceed.

State of Arizona  
Awarded this 25 day of November 20 15

Procurement Officer



# Request for Proposal Background

**Arizona State Parks**  
1300 W. Washington  
Phoenix, AZ 85007  
(602) 542-6937

Contract No: ADSP016-116302  
Description: Concessionaire Slide Rock State Park

## 1. Introduction

The Arizona State Parks Board (“ASPB”) is seeking proposals from qualified firms or individuals to develop and operate a concession operation at Slide Rock State Park (“Slide Rock” or “the Park”). The intent is to create a partnership between the Concessionaire and the ASPB (through Arizona State Parks (“ASP”) or “Agency”) that will expand revenue-producing services and enhance ASP’s brand through a joint marketing effort (Note: Pursuant to a separate agreement, the U.S. Forest Service emblem must be included on all official documents, signage, etc.). The Concessionaire must have the requisite experience, expertise, and resources to operate and develop an expanded concessionaire operation.

**Mission Statement:** Managing and conserving Arizona’s natural, cultural and recreational resources for the benefit of the people, both in our Parks and through our Partners.

**Vision Statement:** Arizona State Parks is indispensable to the economies, communities, and environments of Arizona.

## 2. Slide Rock State Park: Background

Slide Rock is a top tourist destination and has served as a site for number of Hollywood movies. Visitors enjoy sliding down a slick natural water chute, as well as wading and sunning along the creek. Arizona State Parks manages the area in cooperation with the U.S. Forest Service.

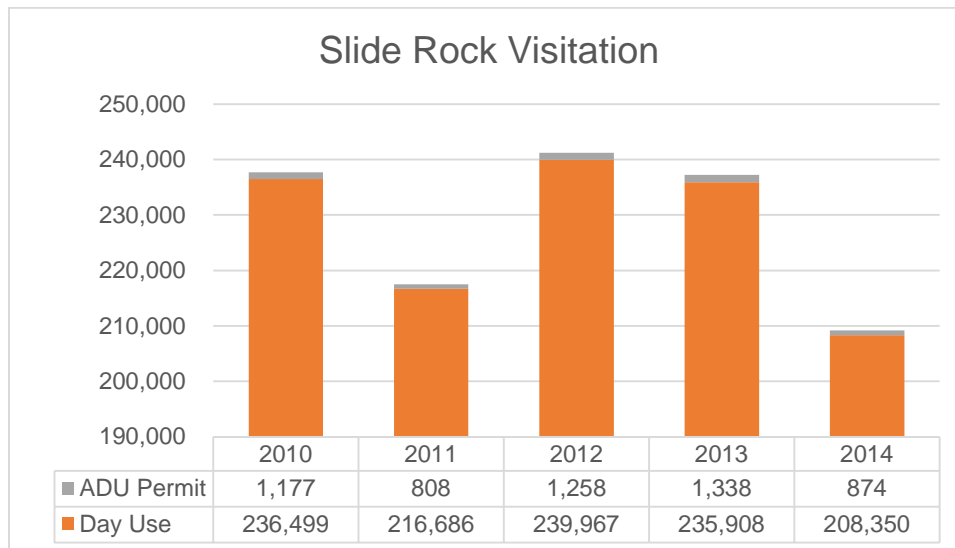
On July 10, 1985, Arizona State Parks purchased the park property from the Arizona Parklands Foundation. The Park was dedicated in October 1987 and accepted into the National Register of Historic Places on December 23, 1991.

## 3. Park Visitation and Seasonality

**Note on Historical Data:** The ASPB makes no guarantees regarding future visitation. This historical data has been developed internally and is provided for informational purposes only.

Total visitation has averaged nearly 230,000 people over the last five years. There is no camping at Slide Rock so all visitation is from day use and annual pass holders. The following graph provides a visual representation of park visitation over the last five years.

**Exhibit 1 Slide Rock State Park Visitation**



\*2014 visitation data impacted by a closure due to wildfire

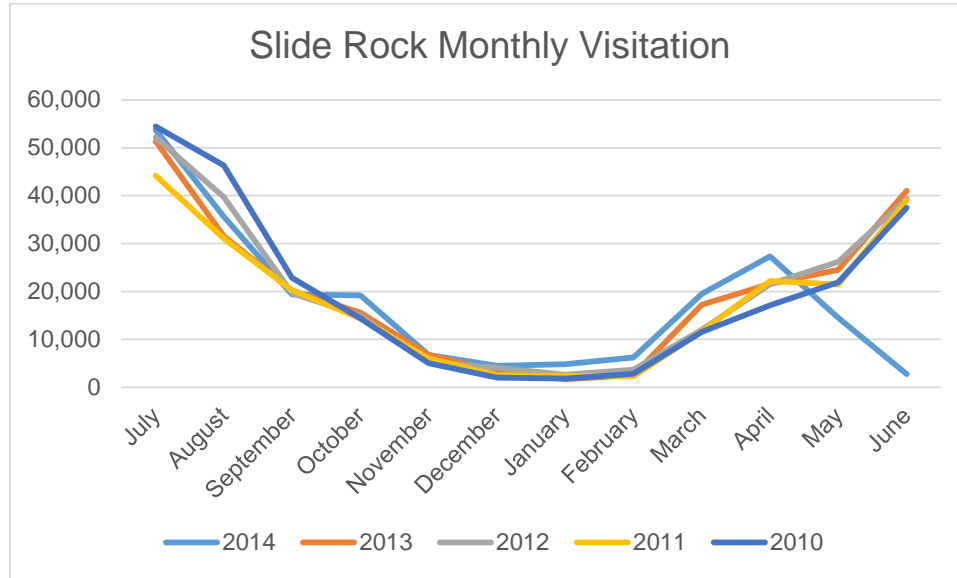


# Request for Proposal Background

Arizona State Parks  
1300 W. Washington  
Phoenix, AZ 85007  
(602) 542-6937

Contract No: ADSP016-116302  
Description: Concessionaire Slide Rock State Park

## Exhibit 2 Slide Rock State Park Seasonality



\*2014 visitation data impacted by a closure due to wildfire

### 4. Concession Opportunity

The Concessionaire will have the opportunity to maintain a retail and food and beverage operation in the Slide Rock Market ("Market"). The Market includes space for souvenir and general merchandise displays, as well as limited space for snack bar items including hot dogs, pizza, and microwaveable foods. The following chart identifies the required and authorized services for this contract. Required services mean services that must be offered. Authorized services mean services that may be offered.

Note: The following chart identifies the required and authorized services under the Agreement. Required services must be offered. Authorized services may be offered, if pre-approved by the ASPB or its designee.

### Exhibit 3 Required and Authorized Services

Required	Authorized
Food and Beverage	Beer Garden
Retail	Famers' Market
Vending	Participation in Special Events
Mobile Food/ Merchandise Cart	Locker and Towel Rentals

The authorized services include a mobile food and/or merchandise cart. The Market is conveniently located between the parking lot and the stairway leading to the water. In addition, a mobile cart could be utilized to provide a convenient way for visitors to make purchases during the peak sales periods. Special events, a beer garden, farmers' markets, and locker and towel rentals are authorized. The ASPB encourages Concessionaire's ideas for additional concepts, designs, and plans, as well as ideas for additional pre-approved authorized services that will better serve visitors' needs.

### 5. Historical Concessionaire Revenue

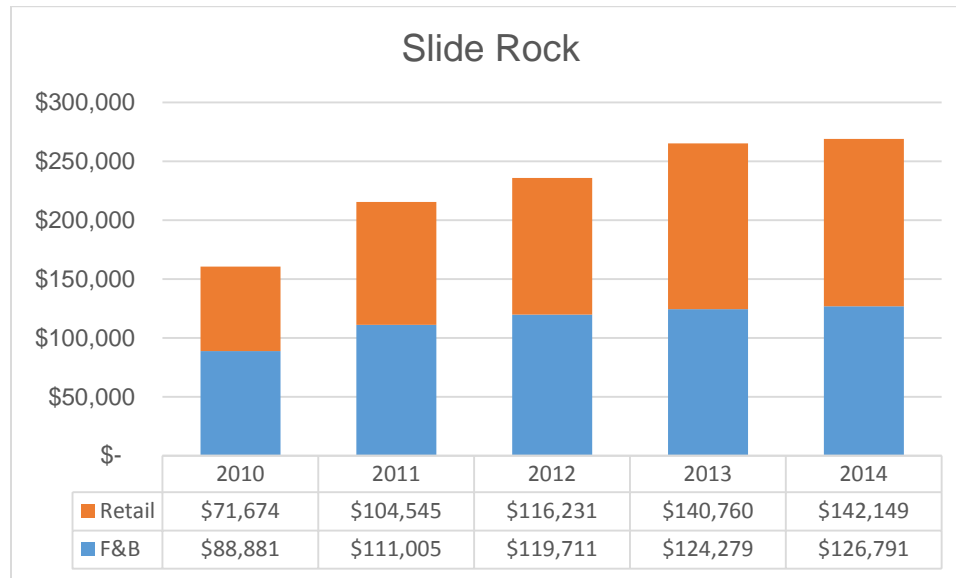


# Request for Proposal Background

**Arizona State Parks**  
1300 W. Washington  
Phoenix, AZ 85007  
(602) 542-6937

Contract No: ADSP016-116302  
Description: Concessionaire Slide Rock State Park

## Exhibit 4 Historical Concessionaire Revenue



### 6. Future Business Opportunity

The response to the RFP requires the Concessionaire to develop financial projections that are based on operations required by this Agreement. To assist the Concessionaire in the development of projections, the ASPB has provided information that may assist the Concessionaire in developing projections of future concessionaire fees. Concessionaires will compile and prepare their own financial projections, based on their independent assumptions and industry knowledge. **Please note:** The operating projections are simply estimates that are based on assumptions developed from publicly available historical data, industry standards, and other comparable information from similar park facilities.

The ASPB **does not guarantee** that these projections will materialize, and it assumes no liability regarding the accuracy of the projections presented. Concessionaires will compile and prepare their own financial projections based on their independent assumptions and industry knowledge.

### 7. Projected Revenue

#### Exhibit 5 Projection Ranges – Required

Department	2016 Range
Visitation	\$220,000-235,000
Food and Beverage	\$135,000-\$150,000
Retail	\$155,000-\$175,000

### 8. Property Investment Analysis

#### 8.1. Property

##### 8.1.1. Real Property

Arizona State Parks will provide to the Concessionaire a 1,040 Square Foot Building (See Exhibit H). The building will be provided for use at no additional cost.

##### 8.1.2. Personal Property



# Request for Proposal Background

Arizona State Parks  
1300 W. Washington  
Phoenix, AZ 85007  
(602) 542-6937

Contract No: ADSP016-116302  
Description: Concessionaire Slide Rock State Park

The ASPB will not provide any State facilities for use by the Concessionaire; however it will provide a land area for the Concessionaire's personal property relating to the concession operation.

## 8.2 Working Capital, Inventory and Pre-Opening Costs

### 8.2.1 Working Capital

Working capital includes merchandise inventory, accounts receivable, and accounts payable. The ASPB estimates working capital as the deduction of accounts payable from the sum of ending inventory and accounts receivable. These have been assumed to be included in the estimation of the minimum recommended Concession Fee.


### 8.2.2 Production of Collateral Materials

The production of collateral materials includes estimated expenses for developing brochures, advertising, and web-based promotional items. These requirements have been assumed to be included in the estimation of the minimum recommended concession fee.

## 9. Concession Fee

Current Concessionaire is paying the following fees:

Revenue Category	Percentage to ASPB
Minimum Guarantee	The greater of \$10,000 annually, or percentage of adjusted gross revenue as follows:
Store Sales	5% of adjusted gross revenues up to \$200,000, 6% of adjusted gross revenues between \$200,001 and \$250,000, 7% of adjusted gross revenues between \$250,001 and \$300,000, 8% of adjusted gross revenues over \$300,000.

	<h1>Request for Proposal Fee Calculation Sheet</h1>	<b>Arizona State Parks</b> <b>1300 W. Washington</b> <b>Phoenix, AZ 85007</b> <b>(602) 542-6937</b>
	Contract No: ADSP016-116302 Description: Concessionaire Slide Rock State Park	

**Fee Calculation Sheet**

**1. Concession Fee**

The Concessionaire must propose a concession fee as a component of the Concessionaire’s submitted response to this RFP. This fee will be a percentage of the annual adjusted gross revenue that is generated from all sales and services provided by the Concessionaire during the term of the Agreement.

Concessionaires shall list below percentage of gross sales/revenue to be paid to Arizona State Parks. Please submit price within the line items of Procure AZ. Prices may be provided by category or an annual fee overall.

<b>Store Sales (Gift Shop) up to \$250,000</b>	<u>7</u> % of all store merchandise sales and vending machine sales.
<b>Store Sales (Gift Shop) \$250,000-\$400,000</b>	<u>8</u> % of all store merchandise sales and vending machine sales.
<b>Store Sales (Gift Shop) Above \$400,000</b>	<u>9</u> % of all store merchandise sales and vending machine sales.

**2. Facility Maintenance Fee-Offset**

- 2.1. Subject to pre-approval of the ASPB or its designee and at the sole discretion of the ASPB or its designee, the Concessionaire may perform or provide specific planned maintenance repairs to or replacements of the Park grounds, amenities, facilities, structures, roads, trails, or similar such State-owned property, in lieu of making required concession fee payments under this contract. Such pre-approved facility maintenance repairs may potentially offset certain concession fees. The amount of any offset will be determined solely at the discretion of the ASPB or its designee. All requests for approval must include at least the following:
  - 2.1.1. A signed pre-authorization form for each specific fee-offset purchase or project.
  - 2.1.2. Complete and accurate invoices and accounting to support approved fee-offset purchases.
  - 2.1.3. Complete and accurate invoices for subcontractors, rental services, and other such approved services used in the completion of the fee offset project or purchase.
  - 2.1.4. An accounting for any additional fee-offset-related expenses incurred by the Concessionaire.
- 2.2. The Concessionaire’s assigned local representative must work closely with the assigned ASPB representative to ensure that all facility maintenance repair fee-offset projects and purchases are in compliance with the ASPB’s standards for safety requirements, as well as all applicable state and federal laws. Fee-offset maintenance projects will not relieve the Concessionaire of its ordinary maintenance and repair obligations under the terms and conditions of the Agreement.





# Request for Proposal Offer and Acceptance

ARIZONA STATE PARKS  
1300 W. Washington  
Phoenix, AZ 85007  
(602) 542-6937

Solicitation No: ADSP016-00005383  
Description: Concessionaire Lake Havasu State Park

## OFFER

### TO THE STATE OF ARIZONA:

The Undersigned hereby offers and agrees to furnish the material, service or construction in compliance with all terms, conditions, specifications and amendments in the Solicitation and any written exceptions in the offer. Signature also certifies Small Business status.

Wet Monkey Power Sports Boat Rentals

Company Name

1685 INDUSTRIAL BLVD.

Address

Lake Havasu City, Az 86403

City

State

Zip

lets monkey@gmail.com

Contact Email Address

Signature of Person Authorized to Sign Offer

CHRIS PATTERSON

Printed Name

Owner / Operator

Title

Phone: 928 855-2022

Fax: 928 680-7671

By signature in the Offer section above, the Offeror certifies:

1. The submission of the Offer did not involve collusion or other anticompetitive practices.
2. The Offeror shall not discriminate against any employee or applicant for employment in violation of Federal Executive Order 11246, State Executive Order 2009-9 or A.R.S. §§ 41-1461 through 1465.
3. The Offeror has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted offer. Failure to provide a valid signature affirming the stipulations required by this clause shall result in rejection of the offer. Signing the offer with a false statement shall void the offer, any resulting contract and may be subject to legal remedies provided by law.
4. The Offeror certifies that the above referenced organization  IS /  IS NOT a small business with less than 100 employees or has gross revenues of \$4 million or less.

## ACCEPTANCE OF OFFER

The Offer is hereby accepted.

The Contractor is now bound to sell the materials or services listed by the attached contract and based upon the solicitation, including all terms, conditions, specifications, amendments, etc., and the Contractor's Offer as accepted by the State.

This Contract shall henceforth be referred to as Contract No. adsp016-116304

The effective date of the Contract is January 1, 2016

The Contractor is cautioned not to commence any billable work or to provide any material or service under this contract until Contractor receives purchase order, contract release document or written notice to proceed.

State of Arizona

Awarded this 25 day of November 2015

Procurement Officer



# Request for Proposal Background

**Arizona State Parks**  
1300 W. Washington  
Phoenix, AZ 85007  
(602) 542-6937

Contract No: ADSP016-116304  
Description: Concessionaire Lake Havasu State Park

## 1. Introduction

The Arizona State Parks Board (“ASPB”) is seeking proposals from qualified firms or individuals to develop and operate a concession operation at Lake Havasu State Park (“Lake Havasu” or “the Park”). The intent is to create a partnership between the Concessionaire and the ASPB (through Arizona State Parks (“ASP”) or “Agency”) that will expand revenue-producing services and enhance ASP’s brand through a joint marketing effort (Note: Pursuant to a separate agreement, the U.S. Forest Service emblem must be included on all official documents, signage, etc.). The Concessionaire must have the requisite experience, expertise, and resources to operate and develop an expanded concessionaire operation.

**Mission Statement:** Managing and conserving Arizona’s natural, cultural and recreational resources for the benefit of the people, both in our Parks and through our Partners.

**Vision Statement:** Arizona State Parks is indispensable to the economies, communities, and environments of Arizona.

## 2. Lake Havasu State Park: Background

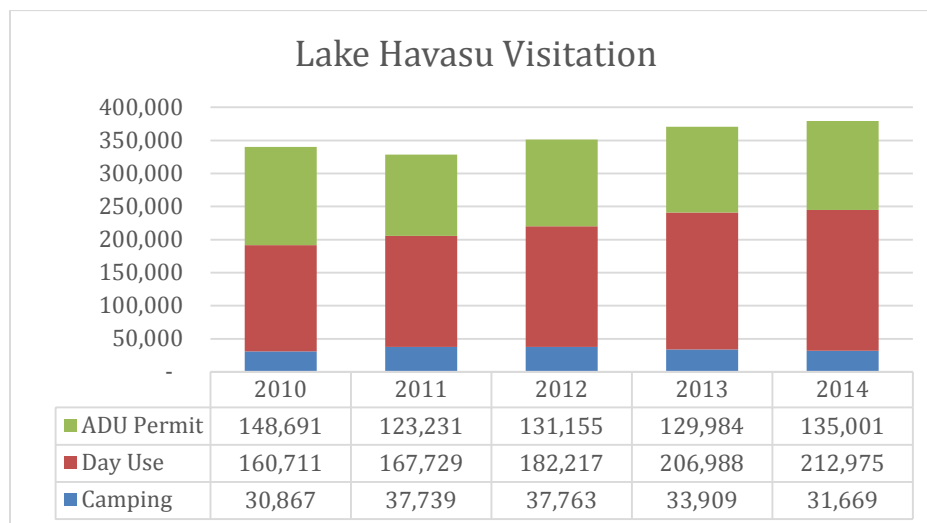
The scenic shoreline of Lake Havasu State Park is an ideal place to enjoy beautiful beaches, nature trails, boat ramps, and convenient campsites. This spot is truly a watersport haven located near the famous London Bridge of Lake Havasu City. The park offers 3 boat ramps, 47 campsites, a special events area (not available on holiday weekends), picnic area, and beach area. The Mohave Sunset Trail (1.75 miles) winds its way through the lowland desert and along the shoreline. The Arroyo-Camino Interpretive Garden showcases the diverse life that exists within the park and this area of the desert. Birds, lizards, and desert cottontails are common sights.

## 3. Park Visitation and Seasonality

**Note on Historical Data:** The ASPB makes no guarantees regarding future visitation. This historical data has been developed internally and is provided for informational purposes only.

Total visitation has averaged approximately 355,000 people over the last five years and reached nearly 390,000 in 2014. Over the last five years total visitation has grown by a compound annual growth rate of approximately 3.1 percent. Visitation is primarily made up of day use visitors although camping has averaged 34,000 visitors per year or approximately 10 percent of visitation. The following graph provides a visual representation of park visitation over the last five years.

**Exhibit 1 Lake Havasu State Park Visitation**



Lake Havasu’s visitation revolves around water sports including boating, swimming, and enjoying the new and improved state park beaches. Since water based activities are heavily dependent on weather, Lake Havasu’s



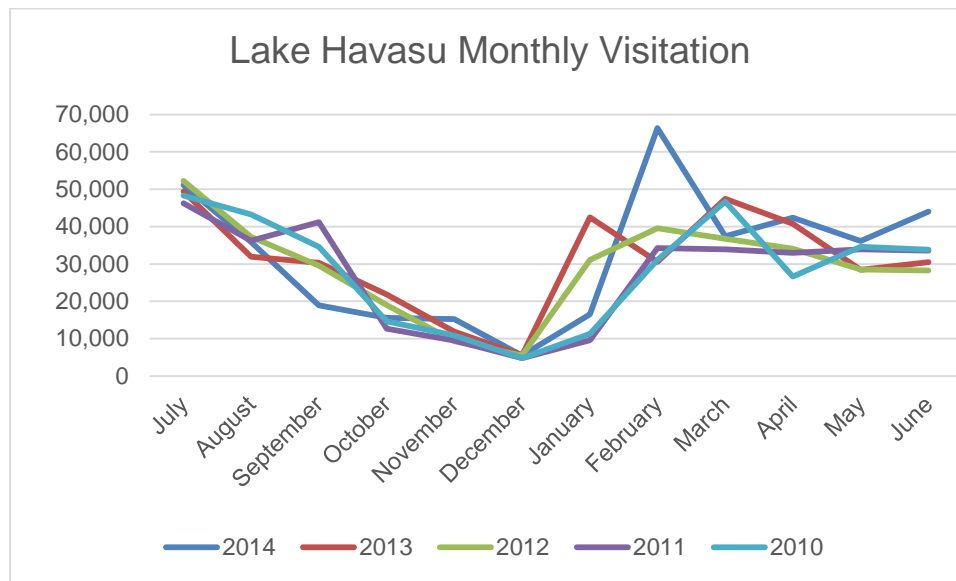
# Request for Proposal Background

Arizona State Parks  
1300 W. Washington  
Phoenix, AZ 85007  
(602) 542-6937

Contract No: ADSP016-116304  
Description: Concessionaire Lake Havasu State Park

visitation follows the same seasonality patterns as other lake-based parks. Peak season runs from February through August when 75 percent of visitation occurs. The remaining 25 percent of visitors arrive from September through January.

## Exhibit 2 Lake Havasu State Park Seasonality



### 4. Concession Opportunity

The ASPB is offering the opportunity for the concession operator to provide several visitor services in the park. The current concession operation utilizes 1,440 square foot pre-manufactured unit retail store. The concession unit may be used for general store merchandise, camping supplies, prepared foods, and fuel sales operation and watercraft related merchandise and/or services at Lake Havasu State Park. The operator shall be the sole boat and PWC rental operation for the entire park. However, the Park provides commercial permits to a number of local watercraft rental operations, which are allowed to launch their rented watercraft. Each of these rental companies is required to purchase a park pass in order to gain entrance to the park for their rental clients. Retail can include a variety of items ranging from general merchandise, grocery, and souvenirs. The marina store provides space for watercraft rental operations, fishing license sales, and fishing bait and tackle sales.

Note: The following chart identifies the required and authorized services under the Agreement. Required services must be offered. Authorized services may be offered, if pre-approved by the ASPB or its designee.

### Exhibit 3 Required and Authorized Services

Required	Authorized
Retail	Beer Garden
Food and Beverage	Dry Storage
Equipment/Watercraft Rentals	Mobile Food/Merchandise Stations within the Park
Fuel Sales	Vending Machines
Watercraft related merchandise and/or services	Moorings
	Guided Tours
	Special Events

The authorized services include an outdoor Beer Garden, mobile food stations within the park, vending machines, dry storage, mooring and guided tours. Arizona State Parks has also authorized mooring operations within the channel and dry storage within the park. A new bathroom project will open up approximately 500 SQ. FT. of extra retail space



# Request for Proposal Background

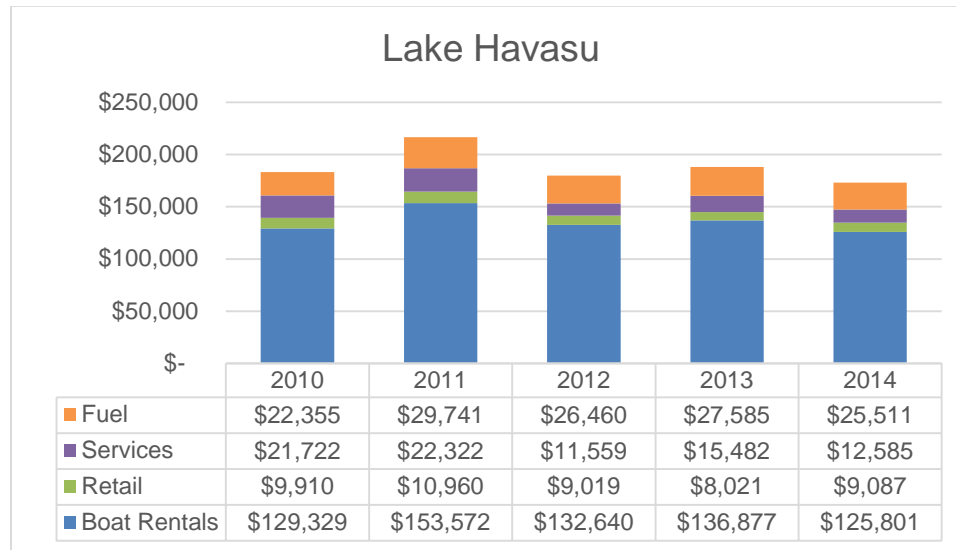
**Arizona State Parks**  
1300 W. Washington  
Phoenix, AZ 85007  
(602) 542-6937

Contract No: ADSP016-116304  
Description: Concessionaire Lake Havasu State Park

on the southern end of the Park and Arizona State Parks has authorized mobile carts to provide greater services to visitors while they are on the beaches. Arizona State Parks is open to Offeror's ideas for additional authorized services that would serve visitor needs.

## 5. Historical Concessionaire Revenue

### Exhibit 4 Historical Concessionaire Revenue



## 6. Future Business Opportunity

The response to the RFP requires the Concessionaire to develop financial projections that are based on operations required by this Agreement. To assist the Concessionaire in the development of projections, the ASPB has provided information that may assist the Concessionaire in developing projections of future concessionaire fees. Concessionaires will compile and prepare their own financial projections, based on their independent assumptions and industry knowledge. **Please note:** The operating projections are simply estimates that are based on assumptions developed from publicly available historical data, industry standards, and other comparable information from similar park facilities.

The ASPB **does not guarantee** that these projections will materialize, and it assumes no liability regarding the accuracy of the projections presented. Concessionaires will compile and prepare their own financial projections based on their independent assumptions and industry knowledge.

## 7. Projected Revenue

### Exhibit 5 Projection Ranges – Required

Department	2016 Range
Visitation	\$375,000-\$425,000
Fuel	\$30,000-\$45,000
Services	\$10,000-\$20,000
Retail	\$5,000-\$10,000
Rentals	\$140,000-\$175,000

## 8. Property Investment Analysis

### 8.1. Property



# Request for Proposal Background

**Arizona State Parks**  
**1300 W. Washington**  
**Phoenix, AZ 85007**  
 (602) 542-6937

Contract No: ADSP016-116304  
 Description: Concessionaire Lake Havasu State Park

### 8.1.1. Real Property

ASPB will provide to the Concessionaire the following State-owned facilities for use by the Concessionaire at no additional cost:

- A building that is approximately 2,750 + - Sq. ft.
- A Fuel Resale Tank and dispensing system holds an estimate of 250 gals
- Awning in the back of the store is estimated to be 12x24 ft.
- Docks for mooring rental watercraft

### 8.1.2. Personal Property

The ASPB will not provide any State facilities for use by the Concessionaire; however it will provide a land area for the Concessionaire's personal property relating to the concession operation.

## 8.2 Working Capital, Inventory and Pre-Opening Costs

### 8.2.1. Working Capital

Working capital includes merchandise inventory, accounts receivable, and accounts payable. The ASPB estimates working capital as the deduction of accounts payable from the sum of ending inventory and accounts receivable. These have been assumed to be included in the estimation of the minimum recommended Concession Fee.


### 8.2.2. Production of Collateral Materials

The production of collateral materials includes estimated expenses for developing brochures, advertising, and web-based promotional items. These requirements have been assumed to be included in the estimation of the minimum recommended concession fee.

## 9. Concession Fee

Current Concessionaire is paying the following fees:

Revenue Category	Percentage to ASPB
Minimum Guarantee	The higher of \$18,000 annually, or percentage of adjusted gross revenue as follows:
Years 1-3	8% of all sales and rental income net of sales taxes and fishing license sales, up to \$300,000, 10% of all sales and rental income net of sales taxes and fishing license sales over \$300,000.
Years 4-10	8% of all sales and rental income net of sales taxes and fishing license sales up to \$300,000, 10% of all sales and rental income net of sales taxes and fishing license sales between \$300,000 and \$500,000, and 12% of of all sales and rental income net of sales taxes and fishing license sales over \$500,000.
Gasoline Sales	2% on all Gasoline Sales

	<h1>Request for Proposal Fee Calculation Sheet</h1>	<b>Arizona State Parks</b> <b>1300 W. Washington</b> <b>Phoenix, AZ 85007</b> <b>(602) 542-6937</b>
	Contract No: ADSP016-116304 Description: Concessionaire Lake Havasu State Park	

**Fee Calculation Sheet**

**1. Concession Fee**

The Concessionaire must propose a concession fee as a component of the Concessionaire’s submitted response to this RFP. This fee will be a percentage of the annual adjusted gross revenue that is generated from all sales and services provided by the Concessionaire during the term of the Agreement.

Concessionaires shall list below percentage of gross sales/revenue to be paid to Arizona State Parks. Please submit price within the line items of Procure AZ. Prices may be provided by category or an annual fee overall.

<b>Store Sales (Gift Shop)</b>	<u>15</u> % of all store merchandise sales and vending machine sales.
<b>Watercraft Rentals</b>	<u>15</u> % of all boat rentals.
<b>Franchise Fee</b>	\$ <u>0.00</u> Annually

**2. Facility Maintenance Fee-Offset**

- 2.1. Subject to pre-approval of the ASPB or its designee and at the sole discretion of the ASPB or its designee, the Concessionaire may perform or provide specific planned maintenance repairs to or replacements of the Park grounds, amenities, facilities, structures, roads, trails, or similar such State-owned property, in lieu of making required concession fee payments under this contract. Such pre-approved facility maintenance repairs may potentially offset certain concession fees. The amount of any offset will be determined solely at the discretion of the ASPB or its designee. All requests for approval must include at least the following:
  - 2.1.1. A signed pre-authorization form for each specific fee-offset purchase or project.
  - 2.1.2. Complete and accurate invoices and accounting to support approved fee-offset purchases.
  - 2.1.3. Complete and accurate invoices for subcontractors, rental services, and other such approved services used in the completion of the fee offset project or purchase.
  - 2.1.4. An accounting for any additional fee-offset-related expenses incurred by the Concessionaire.
- 2.2. The Concessionaire’s assigned local representative must work closely with the assigned ASPB representative to ensure that all facility maintenance repair fee-offset projects and purchases are in compliance with the ASPB’s standards for safety requirements, as well as all applicable state and federal laws. Fee-offset maintenance projects will not relieve the Concessionaire of its ordinary maintenance and repair obligations under the terms and conditions of the Agreement.

NON-SPRING TRAINING CONCESSION AGREEMENT  
City Contract Number: T14-117-01

This Non-Spring Training Concession Agreement ("Agreement") is made and entered into this 1 day of March, 2014 by and between the City of Tempe, an Arizona municipal corporation ("CITY") and Legends Hospitality, LLC a Delaware limited liability company ("CONCESSIONAIRE").

RECITALS

A. WHEREAS, the CITY owns and operates Tempe Diablo Stadium and the surrounding improved real property (the "Premises") located in Tempe, Arizona, and as more particularly defined in the Lease Agreement between the Team and the CITY, dated November 18, 2004, CITY contract number C2004-252 (the "Lease"); and

B. WHEREAS, the CITY has granted to Angels Baseball LP, a California limited partnership, d/b/a the Angels, a Major League Baseball club (the "Team"), the rights to use the Premises for spring training baseball games and other events; and

C. WHEREAS, CONCESSIONAIRE and the Team have entered into a separate agreement (the "Team Agreement") pursuant to which the Team has granted CONCESSIONAIRE certain concessions rights at Team events on the Premises during the Team's occupancy period for Spring Training as defined in the Lease; and

D. WHEREAS, the CITY desires to exercise its rights under Section 8(b) of the Lease to negotiate a separate agreement for concession services with the CONCESSIONAIRE for the City's Non-Spring Training season uses of the Premises, and CONCESSIONAIRE desires to enter into such an agreement on the terms and conditions hereinafter set forth.

NOW, THEREFORE, for and in consideration of the mutual covenants and promises of the parties hereto and upon the express terms and conditions hereafter set forth, it is agreed by and between the parties as follows:

AGREEMENT

1. DEFINITIONS: The following terms shall be defined as follows:

(a) The term "**gross revenues**" means the total amount received by, or accruing to, CONCESSIONAIRE from all sales, for cash or credit, whether collected or not, pursuant to the terms of this Agreement. Gross revenues do not include sales and use taxes or taxes of similar nature; gratuities collected for and on behalf of CONCESSIONAIRE'S employees; receipts from purveyors related to returns, manufacturers' and/or distributors' rebates and awards; or credit and debit card transaction fees. In cases where any sales tax is prepaid by the CONCESSIONAIRE, as a result of which it is not separately collected by the CONCESSIONAIRE, the amount of the tax on retail sales so paid by the CONCESSIONAIRE shall be excluded from gross revenues.

(b) The term "**Stadium**" shall mean Tempe Diablo Stadium, Tempe, Arizona.

(c) The term "**concessions**" includes and means the concession stands, bar and liquor dispensing facilities, and all hawking of food and beverages, vending machines, the dispensing of food, alcoholic and non-alcoholic beverages in the Stadium, and all food and beverages catered to individuals or groups within the Stadium.

(d) The term “**parking lots**” shall mean the paved areas adjacent to the Stadium devoted to Stadium parking.

(e) “**Contract Year**” means each one-year period commencing on February 1, the first Contract Year to commence on February 1, 2014 or the effective date of formal action by CITY and CONCESSIONAIRE whichever occurs later. For the purposes of this Agreement and for any financial accounting used to calculate payments to CITY, the “Contract Year” shall be the period of Non-Spring Training use as defined in the Lease annually which may be amended from time to time by mutual agreement between the CITY and Team and which may apply to this Agreement with CONCESSIONAIRE.

2. CONCESSIONS: The CITY hereby hires CONCESSIONAIRE, and CONCESSIONAIRE agrees to operate the concessions at the Stadium for the sale of food and beverages during the Non-Spring Training season during the term of this Agreement.

3. FINANCIAL TERMS: Not later than the 20th day of each month following the end of a quarter (quarters shall be January-March, April-June, July-September, October- December), CONCESSIONAIRE, shall deliver to CITY a true and correct statement of gross revenues derived by CONCESSIONAIRE from the sale of food and beverage products (including all catered food and beverages) during that quarter for any and all Non-Spring Training uses of the stadium in which the CONCESSIONAIRE had applicable sales. Simultaneously with the delivery of each such statement, CONCESSIONAIRE shall pay to the CITY:

(a) Twenty percent (20%) of gross revenues as defined in paragraph 1(a) above, for all non-catered concessions.

(b) Twenty-five percent (25%) of gross revenues as defined in paragraph 1(a) above, for all catered concessions, unless agreed upon in writing by both parties prior to the sale of such catered concessions.

4. RESTRICTIONS ON SALES BY OTHERS: The CITY hereby grants and confers upon the CONCESSIONAIRE the exclusive right at the Stadium throughout the term of this Agreement to sell food and beverages at Non-Spring Training season uses. The CITY further grants CONCESSIONAIRE a non-exclusive right to sell food and beverages in all parking lots as defined in paragraph 1(d). CONCESSIONAIRE shall have no right to sell novelties of any type at Non-Spring Training uses. The CITY shall use its best efforts so as not to permit or allow any salesperson or vendor to sell or distribute any food or beverage products, in the Stadium at any time when concessions are being operated by CONCESSIONAIRE or at reasonable times before and after such operation. From time to time there may be events scheduled at the Stadium for which the anticipated crowds are too small to warrant CONCESSIONAIRE'S performance of concessions services. In such event, CONCESSIONAIRE may, on a case-by-case basis, waive its exclusive rights to allow others to perform such operations, which waiver will not be withheld by CONCESSIONAIRE unreasonably; provided that CONCESSIONAIRE shall not be required to permit any third party to use any of CONCESSIONAIRE'S food service equipment at the stadium. Where CONCESSIONAIRE so chooses to waive its exclusive rights, CONCESSIONAIRE shall not be entitled to request a buyout or any form of compensation from third parties in exchange for CONCESSIONAIRE'S waiver. At the request of the CITY, the CITY and the CONCESSIONAIRE may meet annually to review the granting by CONCESSIONAIRE of such waivers during the prior year.



5. POWERS RESERVED TO CITY. The quality, quantity, price and brands of all items of food, liquor, beer and other items to be sold under this Agreement shall be determined by the CONCESSIONAIRE after consultation with the CITY and the CONCESSIONAIRE shall attempt to satisfy every reasonable request of the CITY. In general, prices charged by the CONCESSIONAIRE shall be comparable to prices charged at comparable facilities.

6. DEFAULT BY CONCESSIONAIRE. In the event that the CONCESSIONAIRE shall commit a material breach of any term, condition, or covenant contained herein and shall fail to cure same within twenty (20) day after receipt of written notice from the CITY so to do, then the City may, at its option, terminate this Agreement by complying with Section 13 below; provided, however, that if such default by its nature cannot be cured within twenty (20) days and does not involve the payment of money, then if the CONCESSIONAIRE shall not immediately upon notice from the CITY commence curing such default and diligently and continuously pursue such remedy and cure such default within three (3) days, then CITY may, at its option, terminate this Agreement by complying with Section 13 below. The termination of this Agreement by the CITY because of the happening of said events of default shall be without prejudice to any claims which the CITY may have against the CONCESSIONAIRE growing out of the CONCESSIONAIRE'S default under this Agreement. No failure of the CITY to exercise any right, power or privilege shall operate as a waiver thereof, or as a waiver of any other right.

7. HOLD HARMLESS: CONCESSIONAIRE shall indemnify, defend and save harmless the CITY, its employees, officers and directors, from any and all alleged claims, demands, suits, actions, proceedings, loss, cost and damages of every kind and description, including reasonable attorney's fees or litigation expenses, which may be brought or made against or incurred by the CITY, its employees, officers and directors, on account of loss of or damage to any property or for injuries to or death of any person caused by, arising out of any act, omission, professional error, fault, mistake or negligence of CONCESSIONAIRE, its employees, agents or representatives, in connection with or incident to the performance of this Agreement. The CONCESSIONAIRE'S obligation under this paragraph does not extend to any liability ultimately determined by law or judicial order to have been caused by or arising out of any act, omission, professional error, fault, mistake, negligence or willful misconduct of the CITY, or its employees, officers and directors. The CONCESSIONAIRE shall require any subcontractor to indemnify and defend the CITY, its employees, officers and directors, by inserting indemnity language equal to this paragraph, in any subcontract agreement or arrangement the CONCESSIONAIRE enters into related to this Agreement.

8. INSURANCE: Prior to commencing any work or services under this Agreement, CONCESSIONAIRE shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons and damages to property, which may arise from or in connection with the performance of the work hereunder by the CONCESSIONAIRE, his agents, representatives, employees, or subcontractors, from the use, occupancy, or operations of the CONCESSIONAIRE at the Stadium for the sale of the CONCESSIONAIRE'S products as follows:

(a) Commercial General Liability: \$10,000,000 combined single limit per occurrence for bodily injury and property damage, including coverage for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products, completed operations, and product liability. The general aggregate limit shall apply separately to this project/location or the general aggregate shall be twice the required occurrence limit.

(b) Automobile Liability: \$5,000,000 combined single limit per accident for bodily injury and property damage, including coverage for owned, hired, and non-owned vehicles as applicable.

(c) Workers' Compensation and Employers Liability: Workers' Compensation and Employers Liability statutory limits as required by the State of Arizona.