PAY TO PLAY? THE PAST, PRESENT, AND FUTURE OF RECREATION FEES ON FEDERAL PUBLIC LANDS

by Adam Fisher

Adam Fisher is a 2024 J.D. candidate and Wyss Scholar at the University of Colorado School of Law.

SUMMARY

The United States has historically valued free access to most public lands. But federal land management agencies also rely on users' fee dollars to support critical operations. This tension between "free access" and "user pays" has been an important feature of public land law since the late 1800s. The primary statute at issue is the Federal Lands Recreation Enhancement Act (FLREA), which authorizes fees at some sites while mandating free access at others. As interest in outdoor recreation continues to grow, the public land system faces new challenges, including new environmental, behavioral, and experiential impacts. But FLREA is not up to the task, and its shortcomings have led to litigation, public frustration, and calls by members of Congress for increased agency transparency. This Article proposes updates to both FLREA and agency policies to ensure agencies consider appropriate alternatives before implementing new fees or reservation systems. It suggests agencies can implement these updates in a standardized and equitable manner that balances robust public access with resource protection.

For many, the idea of the federal public lands is foundational to the U.S. national identity.[1] But among those who care deeply about these lands, ideas differ greatly regarding how they should be managed. For example, commercial use of public lands has been a primary consideration of policymakers since at least the 1800s.[2] And public lands have been recognized and managed for their outstanding recreational and noneconomic values for just as long.[3] Thus, the need to balance recreational and commercial use is as old as the federal land management agencies themselves. And unsurprisingly, the question of who should bear the costs associated with public land use has been debated since the beginning of the Republic. This Article looks at the law surrounding recreation fees[4] on public lands and asks whether we must "pay to play," and, if so, when?

To begin, free public access is a long-standing aspect of the national conception of the public land system, and of

Author's Note: My thanks go out to Austa Parker, Mike Pappas, Chris Winter, Mark Squillace, Bob Keiter, Chris Williamson, Bob Ratcliffe, Matt Wade, Nick Wilkinson, Nate Lada, Justin Lefevre, Brian Malloure, Tom Isaacson, Liam Sterup, Melpomene Vasiliou, Brendan Carson, Matt Nykiel, Martin Zang, Alex Seidel, and Oren Brandvane for their contributions to this Article.

1. *See* John Leshy, Our Common Ground 45 (2021) (noting that taking "pride in the nation's landscapes, aptly called 'scenic nationalism' . . . took root in American culture" in the early 1800s). It is also important to acknowledge that the United States obtained a significant portion of its "public lands" from America's Indigenous inhabitants through a mix of conquests, treaties (often of last resort), and the machinations of federal Indian law.
2. See, for example, the long history of mining on the public domain, as evinced by the General Mining Law of 1872, which mandated that all "valuable mineral deposits in lands belonging to the United States . . . are hereby declared to be free and open to exploration." 30 U.S.C. §22.
3. In a 1907 publication, Gifford Pinchot, the U.S. Forest Service's (USFS') first chief, praised the national forests as "playgrounds." Tony Tooke, Chief, USFS, Speech at Outdoor Retailer Winter Market (Jan. 25, 2018), https://www.fs.usda.gov/speeches/sharing-stewardship-outdoor-recreation. Pinchot helped give birth to the modern definition of "conservation," which has guided much of federal public land policy since his time leading USFS. *See* Forest History Society, *Gifford Pinchot (1865-1946)*, https://foresthistory.org/research-explore/us-forest-service-history/people/chiefs/gifford-pinchot-1865-1946/ (last visited Jan. 2, 2024). As early as 1833, George Catlin published an article advocating for a "nation's Park, containing man and beast, in all the wild and freshness of their nature's beauty." Leshy, *supra* note 1, at 47.
4. This Article refers to public land "recreation fees" as a general term encompassing "entrance fees" (charges for general access); "amenity fees" (charges for the use of specific facilities within otherwise fee-free lands); and "permit fees" (charges for specific activities). It uses the term "reservation fees" to refer to fees collected to provide for reservation services, which are often assessed in addition to other forms of recreation fees.

its place in the American psyche.[5] As such, provisions for free access are written into the Federal Lands Recreation Enhancement Act (FLREA)—the primary statute governing recreation fees on public lands.[6] But while free access was the historic norm, land managers have relied on certain recreation fees for more than a century as well. The first recreation fees on federal public lands were applied at Mount Rainier in 1908,[7] and the institution of fee-based access, though normalized at hallmark sites, has remained controversial ever since. Still, today recreation, rather than commercial use, is the primary means by which Americans experience their public lands.[8]

Recreational use of public lands has skyrocketed in recent decades, especially during the COVID-19 pandemic.[9] For example, Bureau of Land Management (BLM) lands saw 54 million recreational visits in 2004, the year FLREA was enacted.[10] In 2021, that number was more than 80 million—an increase of 48%.[11] In 2020 alone, 7.1 million more Americans participated in outdoor recreation than did in 2019.[12]

As a result of this growth, both the natural environment and subjective visitor experience have suffered.[13] And federal land management budgets have not kept pace,[14] leaving land managers scrambling to provide quality experiences for the public while also fulfilling their resource protection mandates. Thus, land managers are increasingly turning to fees, gated access, and reservation systems to regulate use and manage impacts.[15] Recreation.gov, the exclusive online portal for these reservation systems, has proven both useful and controversial.[16] Perhaps unsurprisingly, federal public land law and policy have lagged behind these developments within the public land system.[17]

Specifically, the outdated legal framework anchored by FLREA simultaneously gives land managers too little guidance while adding unnecessary barriers to administrability. This has resulted in inconsistent application of fee and reservation requirements across the public land system, which has correspondingly impacted the visitor experience. FLREA's lack of either equity considerations or effective appeal mechanisms exacerbates this situation. And land managers' lack of transparency around the operation of Recreation.gov has drawn attention to these issues, to the extent that a lawsuit recently challenged the legality of its fee structure.[18] All of these issues present significant legal questions.

Thus, updates to the legal framework surrounding recreation fees, including reservation systems, are needed to ensure both the health of the federal public lands and the public's opportunities to enjoy them. Commonsense changes to this framework can provide land managers with guidance, protect the resources that make the public land system special, maintain robust public access, and help ensure that the public lands are welcoming to all.

Part I of this Article begins with a review of the history of recreation fees on federal public lands. This review pays special attention to two competing philosophies around the degree to which users should pay for the upkeep of public lands, since these philosophies still shape the debate around recreation fees today. The Article proceeds by discussing the events leading to the contemporary recreation fee regime.

Part II then moves to an examination of today's public lands, the emergence of reservation systems, and the legal framework governing recreation fees. Part III analyzes the legal and policy shortcomings of this recreation fee landscape. Part IV proposes updates to both FLREA and agency policies that would address these concerns. Specifically, the Article argues that both law and policy should provide agency decisionmakers with additional support to prepare the public land system for the "new normal" of increased recreational use. Part V concludes.

I. The History of Recreation Fees on Federal Public Lands

The modern public land system is primarily made up of lands managed by the National Park Service (NPS), U.S. Fish and Wildlife Service (FWS), and BLM—all through the U.S. Department of the Interior (DOI)—and the U.S. Department of Agriculture (USDA) Forest Service (USFS).[19] Agency recreation fees have been controversial since their inception,[20] and many of the same concerns remain highly relevant today. As explained by Rep. Rob Bishop (R-Utah), "Charging fees on the public lands is a complicated issue that Congress has been dealing with

5. *See infra* Section I.A.
6. *See* 16 U.S.C. §6802(d).
7. Barry Mackintosh, Visitor Fees in the National Park System: A Legislative and Administrative History pt. I (1983), https://www.nps.gov/parkhistory/online_books/mackintosh3/index.htm.
8. *See* Outdoor Industry Association, *2023 Outdoor Participation Trends Report*, https://outdoorindustry.org/resource/2023-outdoor-participation-trends-report/ (last visited Dec. 10, 2023).
9. *See infra* Section II.A.
10. BLM, Public Land Statistics 2004, at 187 (2005), https://www.blm.gov/sites/blm.gov/files/pls04.pdf.
11. BLM, Public Land Statistics 2021, at 170 (2022), https://www.blm.gov/sites/default/files/docs/2022-07/Public_Land_Statistics_2021_508.pdf.
12. Outdoor Foundation, 2021 Outdoor Participation Trends Report 3, https://outdoorindustry.org/wp-content/uploads/2015/03/2021-Outdoor-Participation-Trends-Report.pdf.
13. *Id.*
14. *Id.*
15. *See infra* Section II.B.
16. Recreation.gov, *Home Page*, https://www.recreation.gov/ (last visited Dec. 10, 2023); *see also infra* Sections III.A.2, III.B.2.
17. *See infra* Section III.A.1.
18. *See* Complaint, Wilson v. Booz Allen Hamilton, Inc., No. 1:23-cv-00043 (E.D. Va. filed Jan. 1, 2023), https://www.nationalparkstraveler.org/sites/default/files/attachments/recreation.gov_-_as_filed_complaint_0.pdf; *see infra* Section III.B.2. The suit was voluntarily dismissed by the plaintiffs in late September 2023. Kurt Repanshek, *Recreation.gov Lawsuit Withdrawn*, Nat'l Parks Traveler (Oct. 3, 2023), https://www.nationalparkstraveler.org/2023/10/recreationgov-lawsuit-withdrawn.
19. Public Lands Foundation, America's Public Lands: Origin, History, Future 8-11 (2014). The Bureau of Reclamation, U.S. Department of Defense, and U.S. Army Corps of Engineers also manage smaller portions of the public land system. While these agencies are important components of the public land system, this Article focuses on issues regarding recreation fees on lands managed by USFS, BLM, NPS, and FWS.
20. As discussed in Section I.A, *infra*, some believe that assessing fees for access to public lands is a form of double taxation. Mackintosh, *supra* note 7, pt. I.

since 1914."[21] Thus, a complete understanding of these issues requires a brief discussion of the origins of today's public land system.[22]

To begin, in 1812, the U.S. Congress created the General Land Office to survey and dispose of—rather than preserve—the public lands.[23] And with the help of Congress, the General Land Office eventually oversaw the transfer of two-thirds of the United States' 1.8-billion-acre public domain.[24] The public land system we recognize today arguably began with a wave of conservationist and preservationist thought led by figures like John Muir, Henry David Thoreau,[25] and George Catlin, which culminated in Congress' 1864 donation of Yosemite Valley to California as a state park.[26] Congress established the world's first national park—Yellowstone—in 1872.[27] Sequoia, Mount Rainier, Crater Lake, and other national parks soon followed.[28] These early parks were each under DOI's authority, but had no specific sub-entity responsible for their management.[29]

During this period, Congress also passed the Forest Reserve Act of 1891, which authorized the president to designate public domain lands in the western United States as "forest reserves."[30] Shortly thereafter, Congress created USFS and tasked it with managing these reserves to protect forests, secure a permanent supply of timber, and maintain water flows.[31] Gifford Pinchot, the first chief of USFS, explained that when these sometimes-conflicting interests needed to be reconciled, the question must always be answered "from the standpoint of the greatest good of the greatest number in the long run."[32] Later, Congress would codify this philosophy by enacting the Multiple-Use Sustained-Yield Act of 1960, which ordered USFS to administer the National Forest System "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[33]

In addition to managing their "own" lands, by 1916, DOI, USFS, and the War Department were also responsible for managing 14 national parks, 21 national monuments,[34] and a variety of other natural and historic sites.[35] To provide unified and comprehensive management for these lands, Congress passed the NPS Organic Act in 1916.[36] The NPS Organic Act explained that the purpose of the National Park System was "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner . . . as will leave them unimpaired for the enjoyment of future generations."[37] Next came FWS in 1940, whose purpose was protecting the wildlife and habitat set aside in the National Wildlife Refuge System.[38]

Most recently, among the primary land management agencies, Congress created BLM through the Federal Land Policy and Management Act of 1976 (FLPMA).[39] FLPMA dictates that BLM, like USFS, manage its lands "on the basis of multiple use and sustained yield."[40] FLPMA was also the official end to the United States' policy of disposition, and declared that moving forward the public lands

21. *See H.R. ___, "Federal Lands Recreation Enhancement Act," H.R. 2743, "Veterans Eagle Parks Pass Act"; and H.R. 3976, "Wounded Veterans Recreation Act": Hearing Before the H. Subcomm. on Public Lands and Environmental Regulation of the Comm. on Natural Resources*, 113th Cong. 2 (2014) (statement of Rep. Rob Bishop), https://www.govinfo.gov/content/pkg/CHRG-113hhrg87533/html/CHRG-113hhrg87533.htm.
22. A complete discussion of the origins of the public land system is well beyond the scope of this Article. For an excellent review of the history of America's public lands, see generally Leshy, *supra* note 1.
23. National Archives Catalog, *Department of the Interior. General Land Office. 1849-7/16/1946*, https://catalog.archives.gov/id/10457557 (last visited Dec. 10, 2023). Congress initially housed the General Land Office under the Department of the Treasury and transferred it to the newly created DOI in 1849.
24. Public Lands Foundation, *supra* note 19, at 4.
25. *See, e.g.*, Douglas Brinkley, *Thoreau's Wilderness Legacy, Beyond the Shores of Walden Pond*, N.Y. Times (July 7, 2017), https://www.nytimes.com/2017/07/07/books/review/douglas-brinkley-thoreaus-wilderness-legacy-walden-pond.html.
26. Barry Mackintosh, *The National Park Service: A Brief History*, NPS Hist. e-Libr. (1999), http://npshistory.com/publications/brief_history/index.htm. California would later return Yosemite Valley to federal management.
27. *Id.*
28. *Id.*
29. *Id.*
30. While USFS was initially housed in DOI, in 1905, President Theodore Roosevelt moved it to USDA. USFS, *Our History*, https://www.fs.usda.gov/learn/our-history (last visited Dec. 10, 2023).
31. Organic Act of 1897, 30 Stat. 11, *available at* https://www.publiclandsforthepeople.org/wp-content/uploads/2015/05/ORGANIC-ACT-OF-1897.pdf.
32. USFS, *The Greatest Good: Pinchot and Utilitarianism*, https://www.fs.usda.gov/greatestgood/press/mediakit/facts/pinchot.shtml (last visited Dec. 10, 2023).
33. 16 U.S.C. §531 states:
    (a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.
    (b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.
    See 16 U.S.C. §§528, 531.
34. Mackintosh, *supra* note 7, pt. I. Congress' passage of the Antiquities Act of 1906 grew out of a movement to protect the Indigenous cultural sites of the Southwest, and authorized the president to proclaim "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on public lands as national monuments. NPS, *National Park System Timeline (Annotated)*, https://www.nps.gov/parkhistory/hisnps/npshistory/timeline_annotated.htm (last visited Dec. 10, 2023).
35. NPS, *Quick History of the National Park Service*, https://www.nps.gov/articles/quick-nps-history.htm (last visited Dec. 10, 2023).
36. NPS, *Organic Act of 1916*, https://www.nps.gov/grba/learn/management/organic-act-of-1916.htm (last updated Apr. 22, 2021).
37. *Id.*
38. Public Lands Foundation, *supra* note 19, at 8. The National Wildlife Refuge System predates both NPS and USFS, and was created by President Roosevelt's designation of Pelican Island as the world's first wildlife refuge. DOI, *Explore America's Best-Kept Secret: National Wildlife Refuges*, https://www.doi.gov/photos/explore-america's-best-kept-secret-national-wildlife-refuges (last visited Jan. 2, 2024).
39. 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603.
40. 43 U.S.C. §1701(a)(7).

would be retained in federal ownership.[41] As agencies with broad multiple use mandates, USFS and BLM are distinct from the more narrowly focused NPS and FWS. NPS' mission prioritizes conservation and recreation, while FWS is tasked primarily with protection of wildlife and wildlife habitat. Due to these differing mandates, the law governing recreation fees treats NPS and FWS differently than it does BLM and USFS.[42]

To explain the contours of these differences, this part proceeds with a discussion of how competing fee philosophies have shaped the law, policy, and agency structures governing recreation on the public land system. It then reviews how increasing recreational use has contributed to agency budget shortfalls and other management concerns. Next, it considers how federal decisionmakers have responded to these developments, including a trend toward increased agency authority to assess user fees, and culminating with Congress' enactment of FLREA. Part I concludes by reviewing the emergence of reservation systems and Recreation.gov.

A. *The Competing "User Pays" and "Free Access" Philosophies*

The "user pays" philosophy of funding recreational services on public lands originated with the national parks themselves.[43] As with many proposed government programs, some early national park proponents assured Congress in 1872 that Yellowstone, and perhaps other parks, would be "self-supporting."[44] They envisioned that concessioner rents would fund the flagship parks, providing for both their administration and maintenance.[45] In line with the "user pays" philosophy, the federal government first levied recreation fees on public lands in 1908 at Mount Rainier, where it charged for automobile permits.[46] Other national parks followed suit.[47] Notably, beginning in 1918, fee revenues did not go to the parks themselves, but were instead deposited into the general Treasury.[48] But even accounting for recreation fees and concessioner rents, the early national parks rarely achieved self-supporting status, and federal appropriations were the norm.[49]

But some early policymakers opposed recreation fees in national parks, or at least approached them with caution. In 1918, for example, the Secretary of the Interior issued a key policy letter stating that "the development of the revenues of the parks should not impose a burden upon the visitor."[50] The letter also mandated that each national park have "a system of free camp sites . . . with adequate water and sanitation facilities."[51] Indeed, Congress effectively prohibited national parks from charging campground fees beginning in 1928—a policy that would go unchanged until 1965.[52] Illustrative of the free-access philosophy, a 1932 policy statement from the director of NPS explained that park administrators should "seek primarily the benefit and enjoyment of the people rather than financial gain and such enjoyment should be free to the people without vexatious admission charges and other fees."[53]

This "free access" philosophy is couched in the idea that since the public lands are owned and paid for by the public, charging fees to access these lands is a form of double taxation that unjustifiably forces Americans to pay to visit land they already own.[54] Indeed, the historic "public domain," which included all federally owned lands not designated to specific purposes, was freely open to recreation, commercial use, and even disposition. As modern remnants of the public domain, BLM- and USFS-managed lands are especially known for free access.[55] Further, except for NPS lands, recreational access to *all* public lands was generally free of charge until 1996.[56]

Even on NPS lands, the competing user-pays and free-access philosophies reached somewhat of an equilibrium in the 1940s through the 1960s. During this period, national park vehicle fees—which by then were broadly acknowledged to be "entrance fees"—remained the norm.[57] And although land managers increased recreation fees over time, fee revenues still fell far short of the costs of administrating and maintaining the national parks.[58]

B. *The Emergence of the Contemporary Recreation Fee Regime*

A combination of growing national park deficits, postwar public interest in outdoor recreation, and awareness of environmental degradation led Congress to enact a swath of recreation- and conservation-related bills in the decade between 1964 and 1974.[59] Most notable of these

41. Public Lands Foundation, *supra* note 19, at 11. "Disposition" was the United States' policy of selling or giving away large portions of the original public domain to private actors. *See also* National Archives Catalog, *supra* note 23.
42. *See infra* Section II.C.1.
43. Mackintosh, *supra* note 7, pt. I. Despite these assurances, Yellowstone required federal funding beginning in 1878.
44. *Id.*
45. *See id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *See id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*; Carol Hardy Vincent, Congressional Research Service, IF10151, Federal Lands Recreation Enhancement Act: Overview and Issues 2 (2023), https://sgp.fas.org/crs/misc/IF10151.pdf; *see, e.g.*, Western Slope No-Fee Coalition, *Home Page*, https://westernslopenofee.org/ (last visited Dec. 10, 2023).
55. To this day, BLM states that most of its lands other than "developed recreation facilities" are "open to dispersed camping, as long as it does not conflict with other authorized uses." BLM, *Camping on Public Lands*, https://www.blm.gov/programs/recreation/camping (last visited Dec. 10, 2023).
56. Robert B. Keiter, *The Emerging Law of Outdoor Recreation on the Public Lands*, 51 Env't L. 89, 143 (2021), *available at* https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1306&context=scholarship. It should be noted that while general access to non-NPS lands was free of charge, some additional services such as campgrounds did require fees prior to 1996.
57. Mackintosh, *supra* note 7, pt. II.
58. *Id.*
59. *Id.*

was the Land and Water Conservation Fund Act of 1965 (LWCF).[60] With the LWCF, Congress sought to strengthen the "health and vitality" of the public by providing funds for new federal recreation land acquisitions.[61] In doing so, the LWCF began the shift toward today's legal framework surrounding recreation fees.

Among the ways the LWCF sought to fund its acquisitions was by ending Congress' prohibition on NPS camping fees and "all other provisions of law that prohibit the collection of entrance, admission, or other recreation user fees or charges authorized by this Act."[62] It further authorized the president to designate "areas administered primarily for scenic, scientific, historical, cultural, or recreational purposes" where entrance fees would be charged.[63]

But the LWCF also prohibited recreation fees at areas where no "recreation facilities or services are provided at Federal expense."[64] For the first time, the LWCF also moved all proceeds from public land recreation fees (and certain other revenues) from the general Treasury to a special account funding the acquisition of new recreation lands.[65] Notably, equity considerations were incorporated into the LWCF's fee requirements, which stated that all fees "shall be fair and equitable, taking into consideration direct and indirect cost to the Government, benefits to the recipient, public policy or interest served, and other pertinent factors."[66]

After Congress enacted the LWCF in 1965, it subsequently passed a variety of amendments that changed the LWCF's recreation fee provisions,[67] culminating in the 1974 version, which stated that the agencies could charge daily recreation fees, provided:

> [I]n no event shall there be a charge by any such agency for the use . . . of drinking water, wayside exhibits, roads, overlook sites, visitors' centers, scenic drives, toilet facilities, picnic tables, or boat ramps . . . . And provided further, That in no event shall there be a charge for the use of any campground not having the following—tent or trailer spaces, drinking water, access road, refuse containers, toilet facilities . . . reasonable visitor protection, and simple devices for containing a campfire.[68]

These directives would primarily guide the administration of recreation fees for the next two decades[69] and provide the foundation for the legal framework governing today's recreation fees.

Next, noting the agencies' constant recreation budget shortfalls and maintenance backlogs, Congress established the Recreation Fee Demonstration Program (Fee Demo), which it authorized via a rider to the 1996 DOI appropriations bill.[70] Looking back, Fee Demo marked a shift toward the user-pays model that is still with us today. But Fee Demo was originally intended to be an experimental program, temporarily expanding the agencies' fee authority as compared to the LWCF.[71] For the first time, Fee Demo granted not only NPS, but also BLM, FWS, and USFS "complete discretion to establish both the amount and type of fees" to charge for recreational activities.[72] Also for the first time, Fee Demo allowed the agencies to retain fee revenues for the benefit of the site of collection, rather than send them to general Treasury accounts or the LWCF acquisition fund.[73] This "pay to play" model was intended to reinvest recreation fees at the location where they were collected, increasing revenues for land managers while also providing users with improved experiences at the sites they visited.[74]

Fee Demo was controversial, with some claiming that it was only fair that those who recreated on public lands should pay for them, while others argued that it both abandoned LWCF's concern for equity and created "perverse incentives" for land managers to inappropriately make management decisions based on market forces.[75] A 1998

60. *See* Keiter, *supra* note 56, at 95. For the purposes of this Article, some of the most notable were the Wilderness Act of 1964, the Wild and Scenic Rivers Act of 1968, the National Trails System Act of 1968, the National Environmental Policy Act of 1969 (NEPA), and the Endangered Species Act of 1973 (ESA).
61. The LWCF primarily funds its acquisitions through royalties paid on oil and gas leases on the outer continental shelf. Carol Hardy Vincent, Congressional Research Service, RL33531, Land and Water Conservation Fund: Overview, Funding History, and Issues 1 (2019), https://crsreports.congress.gov/product/pdf/RL/RL33531.
62. Mackintosh, *supra* note 7, pt II.
63. NPS, America's National Park System: The Critical Documents ch. 6 (Lary M. Dilsaver ed., 1994), https://www.nps.gov/parkhistory/online_books/anps/anps_6c.htm.
64. *Id.*
65. It is important to note that while the LWCF reserved recreation fee proceeds for acquiring new lands, it *did not* return those funds to their sites of collection—as the Recreation Fee Demonstration Program (Fee Demo) and FLREA would do in the future. Mackintosh, *supra* note 7, pt II.
66. LWCF, Pub L. No. 88-578, 78 Stat. 897, 898 (1964). LWCF's fee provisions were repealed and replaced by FLREA in 2004.
67. *See* Mackintosh, *supra* note 7, pt. III. Many of these amendments would also add additional funding to the LWCF.
68. *Id.* pt. IV. Notably, FLREA now predicates the charging of fees at most BLM and USFS lands on the presence of many of the amenities that the amended LWCF mandated be free of charge. *See infra* Section II.C.1.
69. *See* Scott Silver, *The Recreation Fee Demonstration Program and Beyond*, 22 Geo. Wright F. 68, 68 (2005), *available at* http://www.jstor.org/stable/43597947.
70. *Id.* at 68-70. That FLREA was passed via an appropriations rider is relevant because often riders get "lost" in Congress' effort to pass the larger appropriations bill, and thus do not receive the same attention as would an independently enacted piece of legislation.
71. As Scott Silver states:
    > [While] some have claimed that the purpose for the "demonstration" was to give the public a chance to weigh in on the subject. . . . In reality the purpose of the "demonstration" was to give the [agencies] a chance to demonstrate to Congress that a wider range of recreation fees that had been authorized by [the LWCF] could be charged and collected. Further purposes were to allow the agencies to demonstrate the merits associated with allowing fees to be retained and ultimately spent at the recreation sites where they were collected.

    Id. at 70.
72. S. Rep. No. 108-233 (2004), *available at* https://www.govinfo.gov/content/pkg/CRPT-108srpt233/html/CRPT-108srpt233.htm.
73. *Id.* Under Fee Demo, 80% of total agency fee revenues were retained at the site of collection, while 20% were "returned to the agency for expenditure on national priorities." Importantly, this is different than what the LWCF authorized, which was for fee revenues to go into a special Treasury fund used for acquiring new public lands. *See supra* note 65.
74. S. Rep. No. 108-233, *supra* note 72.
75. Silver, *supra* note 69, at 73-74; Kira Dale Pfisterer, *Foes of Forest Fees: Criticism of the Recreation Fee Demonstration Project at the Forest Service*, 22 J. Land Res. & Env't L. 309, 328 (2002); *see generally* Brandon C. Marx, *Why*

U.S. General Accounting Office report noted that while visitation rates remained largely unaffected by the new fees, coordination among agencies was "erratic," "led to confusion," and included instances where backcountry visitors unknowingly crossed land management borders and were charged multiple fees.[76] Indeed, sometimes the agencies even brought suits against users for nonpayment of $5 fees imposed under Fee Demo.[77] The user defendants often prevailed in these cases, with courts finding the fees inappropriate.[78] In other instances, the court found for the defendant by simply dismissing the case before it even reached the merits.[79]

Despite Fee Demo's shortcomings, in 2004, Congress adopted many of its core ideas by passing FLREA.[80] FLREA's purpose was to provide the agencies with a revenue stream independent of the appropriations process, while also guaranteeing that the agencies provided visitors with amenities in return for their fee dollars.[81] But despite FLREA's goal of providing agency funding, prior to its enactment, Rep. George Radanovich (R-Cal.) opened a U.S. House of Representatives Subcommittee on National Parks, Recreation, and Public Lands hearing by clarifying that "fees collected under this fee program were to supplement, not replace, annual appropriations."[82] He continued to note that while Fee Demo had been popular in some circles and had raised important revenues, it had also "created a great deal of animosity among some of the very recreational users it was designed to support."[83]

Thus, to respond to these concerns, FLREA imposed some meaningful limitations on agency fee authority. For example, FLREA's fee definitions and limitations attempted to standardize how the agencies could implement various recreation fees.[84] FLREA similarly made efforts to address agency concerns around consistent funding, primarily through its 10-year authorization, which included adoption of Fee Demo's provisions allowing the agencies to assess and retain site-specific recreation fees.[85] FLREA also provided for a new interagency pass (now known as the America the Beautiful pass series).[86]

But while prior to FLREA's enactment DOI had explained that it was "committed to revaluating the recreation fees charged and their impact on low- and middle-class visitors," FLREA failed to include any substantive equity requirements.[87] And despite equity concerns, philosophical disagreements, and occasional litigation challenging agencies' assessment of recreation fees,[88] FLREA remains the primary statute governing both commercial[89] and noncommercial recreation fees on the public lands.[90]

C. *The Evolution of Reservation Systems*

NPS implemented the first campground reservation system in 1973,[91] and since then reservation systems[92] have become an increasingly relevant component of the recreation fee regime on public lands. Originally, each agency managed its reservations independently and internally, or later through third-party contracts.[93] But beginning in 1995, several agencies formed an agreement to create the National Recreation Reservation Service, which began providing multi-agency reservation services soon afterwards.[94] The National Recreation Reservation Service was operated via a third-party contract with concessioner ReserveAmerica and launched its first online sales website in 1999.[95]

As public demand for campgrounds and select ticketed locations grew, in 2002, the George W. Bush Administration created Recreation One Stop, the federal program that currently oversees the agencies' joint reservation services, including Recreation.gov.[96] NPS chose to remain indepen-

Not Make It Voluntary? Controversy Over the Recreation Fee Demonstration Program and Liability Implications for Federal Land Managers, 17 J. Env't L. & Litig. 423 (2002).

76. U.S. General Accounting Office, GAO/RCED-99-7, Recreation Fees: Demonstration Fee Program Successful in Raising Revenues but Could Be Improved 2-6 (1998), https://www.gao.gov/assets/rced-99-7.pdf.
77. *See* Marx, *supra* note 75, at 435-36; *see, e.g.*, United States v. Maris, 987 F. Supp. 865 (D. Or. 1997) (finding that USFS could not assess fees on a motorist because merely driving through a portion of a national forest was not "recreational use" subject to a fee under Fee Demo).
78. *See* Marx, *supra* note 75, at 435-36; *see, e.g.*, *Maris*, 987 F. Supp. 865.
79. *See* Marx, *supra* note 75, at 435-36; *see, e.g.*, *Maris*, 987 F. Supp. 865.
80. 16 U.S.C. §§87 et seq.
81. *See A Bill to Improve Recreational Facilities and Visitor Opportunities on Federal Recreational Lands by Reinvesting Receipts From Fair and Consistent Recreational Fees and Passes: Hearing on H.R. 3283 Before the H. Subcomm. on National Parks, Recreation, and Public Lands, of the Comm. on Resources*, 108th Cong. 1 (2004) (statement of Rep. George Radanovich, Member, H. Resources Comm.).
82. *Id.*
83. *Id.* Representative Radanovich also explained that "many in the audience have heard those horrible stories where an agency actually began charging for a view off the side of a road."
84. 16 U.S.C. §§6801-6802 (defining and explaining limitations for "standard amenity recreation fees," "expanded amenity recreation fees," "entrance fees," "special recreation permit fees," and "recreation fees"); *see also* S. Rep. No. 108-233, *supra* note 72.
85. 16 U.S.C. §§6801-6802; *see also* S. Rep. No. 108-233, *supra* note 72. FLREA also retained Fee Demo's 80/20 split for fee revenues remaining at the site of collection, prohibited DOI from using more than 15% of total fee revenues for administering the fee program, and ordered the Secretary of the Interior to submit a report on the fee program to Congress every three years. Congress has reauthorized FLREA on an annual basis each year since its original authorization expired in 2014.
86. 16 U.S.C. §6804.
87. S. Rep. No. 108-233, *supra* note 72. Recall that nearly 40 years earlier the LWCF required recreation fees to be "fair and equitable." LWCF, Pub L. No. 88-578, 78 Stat. 897 (1964).
88. *See infra* Section II.C.
89. This Article primarily addresses noncommercial recreation. As noted in Part IV, *infra*, outfitters and other agency permittees are currently making progress in their efforts to update FLREA's provisions related to commercial use.
90. Interagency Recreation Fee Program, *Federal Lands Recreation Enhancement Act (FLREA)*, https://doi.sciencebase.gov/flrea/&data (last visited Dec. 10, 2023). Examples of related non-FLREA authorities include statutes and agency policies on topics like NPS concessions, agency cost recovery, commercial use fees and permits, transportation assessment fees, and bonding.
91. Mackintosh, *supra* note 7, pt. IV.
92. This Article uses the term "reservation system," generally, to include reservations for campgrounds, day-use, timed-entry, permits, and so on.
93. *See, e.g.*, National Park Reservation Service, Reserved Family and Group Camping (2000), http://npshistory.com/brochures/reservation-system-2000.pdf.
94. Recreation One Stop Program Management Office, Recreation.gov Operating Procedures Manual 4 (2014), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3806156.pdf. NPS operated its independent reservation service through a third-party contractor, Spherix.
95. *Id.*
96. Joe Meade, Director of Recreation, Heritage, and Volunteer Resources, National Forest System & Rick Delappe, Program Manager, Recreation One

dent, and operated its own reservation system through a separate third-party concession until 2006, when a vast majority of NPS units joined Recreation.gov.[97] Today, the United States outsources the operation of Recreation.gov and its associated call center through a multi-year, competitively bid contract.[98] Under this contract, the concessioner provides the agencies with comprehensive web services, database management, and customer services, as well as marketing and communications supporting outdoor recreation.[99]

II. Today's Public Lands and Recreation Fees

Recreating on public lands is more popular than ever, with 54% of Americans recreating outdoors in 2021.[100] This increased use has brought new challenges to the public land system, as evinced by the House Subcommittee on Oversight and Investigations' decision to hold a hearing in December 2022 on overcrowding in national parks.[101] These developments have turned the outdoor recreation industry into one of the largest sectors of the U.S. economy, and overwhelmed land managers. As a result, land managers have increasingly turned to reservation systems—mostly routed through Recreation.gov—to manage recreational use. FLREA, the key law governing both recreation fees and reservation systems, has not kept up with these developments.

This part begins by detailing the scope of today's public land system and the growing importance of outdoor recreation. It next moves to a discussion of reservation systems and their increasing application across the public lands. The part concludes by examining the current legal framework surrounding recreation fees and reservations—paying special attention to FLREA and associated case law.

A. *The Contemporary Public Land System*

As of 2020, the agencies managed roughly 515.3 million acres, making up about 27% of the land in the United States.[102] Recreation on these public lands has seen incredible growth over the past several decades. Total visitation on agency lands peaked at 651.7 million in 2019,[103] and is rapidly returning to pre-pandemic levels.[104] But much of this use is concentrated in a few high-use areas, especially on NPS lands, leading to significant overcrowding.[105] For example, Rocky Mountain National Park saw visitation grow from 3.1 million visits in 2001 to a peak of nearly 4.7 million in 2019.[106] And when the pandemic shuttered many established recreation sites, recreationists often turned to less-developed lands, resulting in significant behavioral, experiential, and environmental impacts.[107] While visitation to such sites has dropped from pandemic highs, it often remains greater than pre-pandemic levels, forcing land managers to adjust to increased use of less-developed areas.[108]

Still, a significant number of sites across the public land system do not assess recreation fees, especially on BLM- and USFS-administered lands.[109] For example, recreational visitation across DOI-administered lands (which do not include USFS lands) is split roughly evenly between fee and non-fee sites, with fee sites typically receiving about 5%-15% more visits than non-fee sites.[110] Across all agencies, recreation fee revenues reached a combined high of $442.4 million in 2019.[111] While the agencies still collect most of this revenue on-site, the proportion of fee revenues generated through Recreation.gov is increasing rapidly.[112] Pursuant to FLREA, 80%-100% of recreation fees are

Stop, Examining the Future of Recreation.gov, Statement Before the Interior Subcomittee, House Committee on Oversight and Government Reform (May 24, 2016), https://www.doi.gov/ocl/recreationgov [hereinafter Examining the Future of Recreation.gov]; Recreation One Stop Program Management Office, *supra* note 94, at 1-4.

97. Examining the Future of Recreation.gov, *supra* note 96; Recreation One Stop Program Management Office, *supra* note 94, at 1-4; *see also Spherix Snubbed for Fed Camping Contract, Again*, Md. Daily Rec. (June 22, 2005), https://thedailyrecord.com/2005/06/22/spherix-snubbed-for-fed-camping-contract-again/.
98. Examining the Future of Recreation.gov, *supra* note 96.
99. *Id.*
100. Outdoor Industry Association, *supra* note 8.
101. House Natural Resources Committee Democrats, *Oversight Hearing: Lessons From the Field: Overcrowding in National Parks*, https://naturalresources.house.gov/hearings/lessons-from-the-field-overcrowding-in-national-parks (last visited Dec. 10, 2023).
102. Carol Hardy Vincent et al., Congressional Research Service, R42346, Federal Land Ownership: Overview and Data i (2020), https://sgp.fas.org/crs/misc/R42346.pdf.
103. DOI & USDA, Implementation of the Federal Lands Recreation Enhancement Act: Report to Congress 2021, at 13 (2021) [hereinafter FLREA Report] (download available at https://doi.sciencebase.gov/flrea/&data).
104. *See, e.g.*, NPS, *Social Science: Annual Visitation Highlights*, https://www.nps.gov/subjects/socialscience/annual-visitation-highlights.htm (last updated Nov. 8, 2023).
105. *See* Michael T. Reynolds, Regional Director, NPS, Impacts of Overcrowding in Our National Parks on Park Resources and Visitor Experiences, Statement Before the Senate Energy and Natural Resources Subcommittee on National Parks (July 28, 2021), https://www.doi.gov/ocl/national-parks-overcrowding.
106. In 2021, Rocky Mountain National Park saw 4.4 million visits, which is rapidly approaching its pre-pandemic peak. NPS Integrated Resource Management Applications Portal, *Annual Park Recreation Visitation (1904-Last Calendar Year): Rocky Mountain NP*, https://irma.nps.gov/STATS/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20(1904%20-%20Last%20Calendar%20Year)?Park=ROMO (last visited Dec. 10, 2023).
107. *See, e.g.*, USFS, U.S. Forest Service National Visitor Use Monitoring Survey Results National Summary Report: Data Collected FY 2017 Through FY 2021, at 3 (2022), https://www.fs.usda.gov/sites/default/files/2021-National-Visitor-Use-Monitoring-Summary-Report.pdf; FLREA Report, *supra* note 103, at 9; *see also How COVID-19 Is Crushing Our Climbing Areas*, Access Fund (Oct. 2, 2020), https://www.climbing.com/news/how-covid-19-is-crushing-our-climbing-areas/ (noting that some locations were reporting a 300% increase in visitation).
108. *See* USFS, *supra* note 107, at 3; *see, e.g.*, Shannon Mullane, *Visitation Spikes at National Forests, and Southwest Colorado Is No Exception*, Durango Herald (June 8, 2021), https://www.durangoherald.com/articles/visitation-spikes-at-national-forests-and-southwest-colorado-is-no-exception/.
109. *See* FLREA Report, *supra* note 103, at 7. On NPS lands, 156 of 423 sites collect recreation fees, while 163 of 568 FWS sites, 425 of 3,700 BLM sites, and 3,879 of nearly 30,000 USFS sites collect fees.
110. *See id.* at 13. Because USFS does not differentiate between FLREA and non-FLREA sites in its sampling process, its visitation estimates are not included in these figures.
111. *Id.* at 14-15.
112. *Id.* at 14.

retained and reinvested at the collecting site, including 100% of revenues at BLM sites.[113]

But these revenues represent a relatively small portion of the agencies' overall recreation-related budgets, and they still face imposing deferred maintenance backlogs. Unfortunately, data on agency recreation funding and spending is limited due to a lack of reporting requirements and the difficulty of assessing costs for programs that support multiple agency purposes.[114] That said, the data do show that from 2010 through 2019, the agencies had access to a total of approximately $3.1 billion annually for recreation spending.[115] Far from the self-supporting ideal of early national park advocates, this indicates that during this period fee revenues only made up about 14% of the agencies' combined recreation spending.

However, in real dollars, the percentage of appropriations dedicated to recreation has fallen over recent decades for many agencies, even where overall appropriations have grown.[116] And due to the uneven distribution of use across the public land system—combined with FLREA's requirement that a large portion of recreation fees be returned to the site of origin—the reality is that the public land system is one of "haves" and "have-nots."[117]

Symptomatic of this situation, as of 2022, the agencies had a combined deferred maintenance backlog of approximately $35.53 billion.[118] NPS was responsible for 59% of that backlog, but a recent infusion of funding could impact that number. The Inflation Reduction Act of 2022 allocated $200 million to NPS for deferred maintenance.[119] NPS received another $1.33 billion for deferred maintenance from the Great American Outdoors Act of 2022, and additional funding from the 2023 appropriations bill.[120] Time will tell whether this funding will significantly reduce NPS' backlog, and whether the other agencies receive similar congressional attention.

The growth of the outdoor recreation industry over the past decade provides additional evidence that the public land system must grapple with a "new normal." For example, in 2022, the outdoor recreation industry accounted for 2.2% of U.S. gross domestic product.[121] That year, it also generated an estimated $1.1 trillion in economic output and supported 4.98 million jobs—3.2% of all employment in the United States.[122]

B. *The Growth of Reservation Systems and Recreation.gov*

Factors including increased recreational use, growth in user demand for online services, and the COVID-19 pandemic have led land managers to increasingly implement reservation systems as recreation management tools. These reservation systems take a variety of forms, and range from campground reservations, to permits for specific activities, to timed-entry systems for general day use. Overall, there appears to be a trend toward land managers requiring reservations for high-use sites and activities that previously operated on either an unlimited or a first-come, first-served basis.

When required, virtually all reservations for recreational public land access and agency-provided services are routed through Recreation.gov.[123] Recreation.gov is currently operated by Booz Allen Hamilton under contract from the agencies.[124] The specifics of the contract between the

113. *Id.* at 6.

114. U.S. Government Accountability Office, GAO-21-592, Report to Congressional Committees—Federal Lands and Waters: Information on Agency Spending for Outdoor Recreation Is Limited i (2021), https://www.gao.gov/assets/gao-21-592.pdf.

115. *See id.* Of these funds, NPS and FWS represent $1.5 and $1.3 billion, respectively, while USFS spends approximately $225 million, and BLM has approximately $77 million available annually for recreation spending.

116. Tate Watkins, Property and Environment Research Center, How We Pay to Play: Funding Outdoor Recreation on Public Lands in the 21st Century (2019), https://www.perc.org/wp-content/uploads/2019/05/how-we-pay-to-play.pdf; Laura B. Comay, Congressional Research Service, R42757, National Park Service (NPS) Appropriations: Ten-Year Trends (2022), https://sgp.fas.org/crs/misc/R42757.pdf.

117. Interview with Bob Ratcliffe, retired NPS Division Chief for Conservation, Recreation, and Community Assistance Programs (Feb. 13, 2023) (on file with author) [hereinafter Ratcliffe Interview]. The "haves" are flagship, high-use land management units, which generate significant recreation fee revenues. The "have-nots" are less-visited units whose fee revenues are relatively insignificant, or, at free sites, nonexistent.

118. Carol Hardy Vincent, Congressional Research Service, R43997, Deferred Maintenance of Federal Land Management Agencies: FY2013-FY2022 Estimates and Issues i (2023), https://crsreports.congress.gov/product/pdf/R/R43997. This is despite Congress' passage of the Great American Outdoors Act, which both created a new fund to address overdue maintenance needs, mandated a total of $1.9 billion in annual maintenance spending by the agencies, and authorized permanent funding for the LWCF. DOI, *Great American Outdoors Act*, https://www.doi.gov/gaoa (last visited Dec. 10, 2023).

119. News Release, NPS, National Park Investments in 2023 Will Improve Access and Facilities Across the Country, Enhance Climate and Fire Resilience, Further Connect People With Their National Parks (Feb. 1, 2023), https://www.nps.gov/orgs/1207/national-park-investments-in-2023.htm.

120. *Id.*

121. News Release, Bureau of Economic Analysis, Outdoor Recreation Satellite Account, U.S. and States, 2022 (Nov. 17, 2023), https://www.bea.gov/sites/default/files/2023-11/orsa1123.pdf.

122. *Id.* Further, the outdoor recreation industry generates more gross annual economic output than "industries such as mining, utilities, farming and ranching, and chemical products manufacturing." Outdoor Recreation Roundtable, *National Recreation Economic Data: Outdoor Recreation Drives the American Economy*, https://recreationroundtable.org/resources/national-recreation-data/ (last visited Jan. 2, 2024). Noting both the outdoor industry's reliance on, and impacts to, public lands, some have recommended tapping into this economic engine through a "backpack tax" to help fund the public land system. *See, e.g.*, Christine Peterson, *Is It Finally Time for the Backpack Tax?*, Outside Bus. J. (Aug. 24, 2022), https://www.outsideonline.com/business-journal/issues/is-it-finally-time-for-the-backpack-tax-2/; *see also* H. Spencer Banzhaf & V. Kerry Smith, *Financing Outdoor Recreation* (National Bureau of Economic Research, Working Paper No. 27541, 2022), https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=3658836.

123. There are a few examples of campgrounds in the public land system that are not reservable through Recreation.gov. To the author's knowledge, these are all operated by third parties through special agreements, rather than by the agencies directly. The Grand Teton Climbers' Ranch, operated by the American Alpine Club in Grand Teton National Park, is one example. American Alpine Club, *Grand Teton Climbers' Ranch*, https://americanalpineclub.org/grand-teton-climbers-ranch/ (last visited Dec. 10, 2023). In Yellowstone, Xanterra Travel Collection® manages several campgrounds, in addition to a full suite of other park amenities. Yellowstone National Park Lodges, *Who We Are*, https://www.yellowstonenationalparklodges.com/who-we-are/ (last visited Dec. 10, 2023).

124. *See* Meredith Somers, *Amid Bid Battle, Recreation.gov Has High Hopes for Connecting Vacationers With Federal Data*, Fed. News Network (Feb. 23, 2017), https://federalnewsnetwork.com/technology-main/2017/02/amid-bid-battle-recreation-gov-high-hopes-connecting-vacationers-federal-da-

agencies and Booz Allen are confidential, but its value has been reported at $182 million.[125] The federal program manager who oversees the Recreation.gov contract explained in court documents that under the contract, Booz Allen earns "a commission for each transaction it processes."[126] He further explained:

> The commissions vary depending on the type of inventory being sold (for example a campsite reservation) and the channel through which the transaction was made (for example, online or on the phone). The contract supports the addition of a processing fee to the full cost of the reservation transaction as a reasonable commission for providing the online platform. . . . The processing fees charged by the contractor for each transaction are set by the competitively bid contract and are remitted to the contractor.[127]

These Recreation.gov "processing" fees include "reservation fees," "cancellation fees," and "lottery fees," among others.[128] While we do not know exactly how much Booz Allen profits from these fees, we do know that of the $462.9 million in total agency fee revenue for 2021, $37.1 million went to pay for the administration of Recreation.gov.[129] We also know that agency annual revenues from Recreation.gov have steadily increased from $46.4 million in 2015 to $105 million in 2020.[130] The Recreation.gov site currently hosts roughly 4,200 reservable facilities and activities, including more than 113,000 individual sites, and sees more than 21 million annual users,[131] each paying fees ranging from $2-$10 per transaction. There are currently several pending Freedom of Information Act requests—and requests from members of Congress—seeking additional details from the agencies regarding the Booz Allen contract.[132]

Campground reservations are the oldest and most normalized form of recreation reservations in the public land system. But the number of reservable campsites on public lands has not kept pace with the growth in visitation.[133] While NPS campgrounds have always been popular, recently campgrounds managed by other agencies are seeing increased use as well, especially following the COVID-19 pandemic.[134] In many cases, this growth in demand has led land managers to convert previously dispersed campsites into reservable fee sites—a move that provides for improved management of impacts, but reduces fee-free and spur-of-the-moment recreation opportunities.[135]

Land managers are also increasingly implementing permit- or ticket-based reservation requirements for specific activities. Some activities that have historically required permits, like harvesting Christmas trees on USFS lands, or wilderness camping, remain essentially unchanged and have simply migrated to Recreation.gov.[136] But land managers are also increasingly requiring reservations for amenities that previously operated on a first-come, first-served basis—like picnic areas[137]—as a means of managing increased use and crowding.[138]

A relative newcomer, timed-entry reservations have proven to be the most controversial of the new reservation systems.[139] While they take a variety of forms, at bottom, timed-entry systems prohibit access to public lands unless would-be visitors have made a reservation prior to their visit. For simplicity of terminology, this Article includes day-use reservations within the umbrella of "timed-entry" reservations.[140] First implemented in Muir Woods National

ta/. The 10-year contract for operating Recreation.gov is reportedly worth $182 million.

125. *See, e.g.*, Lindsay DeFrates, *No, Rec.gov Doesn't Fund Public Lands*, Outdoor Project (July 8, 2019), https://www.outdoorproject.com/articles/no-recgov-doesnt-fund-public-lands.
126. Declaration of Richard B. DeLappe ¶ 5-6, Kotab v. Bureau of Land Mgmt., No. 2:20-cv-01957-JAD-EJY (D. Nev. Aug. 23, 2021). The request for proposals that solicited bids for the current contract also explains that the winner will receive an initial five-year contract, which can be extended up to five additional years upon satisfactory performance. SAM.gov, *Recreation One Stop Support Services*, https://sam.gov/opp/f0732d4e9fecc37c2b8fa157ae92f9c4/view (last visited Dec. 19, 2023) (download file labeled "R1S_Support_Services_-_RFP_Draft_ _Feb_2_2015_-_Final.pdf").
127. Declaration of Richard B. DeLappe, *supra* note 126, at ¶ 5-6.
128. Lori Sonken & Kurt Repanshek, *Lawsuit Alleges Recreation.gov Is Cluttered With "Junk Fees," Seeks Millions in Refunds*, Nat'l Parks Traveler, https://www.nationalparkstraveler.org/2023/02/lawsuit-alleges-recreationgov-cluttered-junk-fees-seeks-refunds (last visited Dec. 10, 2023).
129. Vincent, *supra* note 54, at 1.
130. FLREA Report, *supra* note 103, at 36.
131. Recreation.gov, *About Recreation.gov*, https://www.recreation.gov/about-us (last visited Dec. 10, 2023).
132. Sonken & Repanshek, *supra* note 128; Interview with Chris Williamson, NPS Fee Program Manager (Feb. 22, 2023) (on file with author) [hereinafter Williamson Interview]; Press Release, Office of Congressman Ryan Zinke, Zinke Calls for Investigation Into Recreation.gov Contract & Glacier National Park Reservation System (Apr. 11, 2023), https://zinke.house.gov/media/press-releases/zinke-calls-investigation-recreationgov-contract-glacier-national-park (calling for a full investigation of the Booz Allen contract dating back to the original contract and subsequent renewals); Kurt Repanshek, *Senators Still Waiting on Answers Regarding Recreation.gov*, Nat'l Parks Traveler (Oct. 1, 2023), https://www.nationalparkstraveler.org/2023/10/senators-still-waiting-answers-regarding-recreationgov.
133. *See* Tyler McIntosh, Center for Western Priorities, The Camping Crunch: Camping's Rise in Popularity on America's Public Lands 4-5 (2021), https://westernpriorities.org/wp-content/uploads/2022/01/CampingCrunch.pdf. Reservable peak season campsite occupancy increased 39% nationally and 47% in the West between 2014 and 2020.
134. *Id.* at 7; *see, e.g.*, Mostafa Shartaj et al., *Summer Crowds: An Analysis of USFS Campground Reservations During the COVID-19 Pandemic*, 17 PLoS ONE e0261833 (2022), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0261833.
135. *See, e.g.*, Jason Blevins, *Record Traffic in South Platte Forest District Spurs First-Ever Designated Camping Plan*, Colo. Sun (Oct. 7, 2020), https://coloradosun.com/2020/10/07/south-platte-rampart-range-traffic-spurs-designated-campsites/.
136. *See, e.g.*, Recreation.gov, *Stanislaus National Forest Christmas Tree Permit*, https://www.recreation.gov/tree-permits/TP2648 (last visited Dec. 10, 2023).
137. *See, e.g.*, Recreation.gov, *Fort Dupont Park Picnic Areas*, https://www.recreation.gov/camping/campgrounds/250017 (last visited Dec. 10, 2023).
138. *See* Hannah Downey, Property & Environment Research Center, Prepared Statement to the U.S. House Natural Resources Subcommittee on Oversight and Investigations Hearing on "Lessons From the Field: Overcrowding in National Parks" (2022), https://www.congress.gov/117/meeting/house/115216/witnesses/HHRG-117-II15-Wstate-DowneyH-20221206-SD003.pdf.
139. *See, e.g.*, Sarah Kuta, *Does the National Park Service's Reservation System Shut Out Non-White, Low-Income Campers?*, Smithsonian Mag. (Apr. 19, 2022), https://www.smithsonianmag.com/smart-news/national-park-reservation-system-shut-out-non-white-low-income-campers-180979937/; *but see* Michael Childers, *Overcrowded US National Parks Need a Reservation System*, Conversation (June 1, 2021), https://theconversation.com/overcrowded-us-national-parks-need-a-reservation-system-158864.
140. Technically, day-use reservations allow visitors to arrive at any time on the day of their reservation, while timed-entry reservations grant visitors access

Monument in 2018, timed-entry and similar reservation systems are intended to manage both crowding and resource impacts.[141] Some sites implementing such systems require reservations for all visits, while others only require them for visits during traditionally high-use times of the year, days of the week, or times of day.[142]

And while timed-entry systems began on NPS lands, they have increasingly been implemented on USFS and BLM lands, as well as in various state parks.[143] Notably, Yosemite National Park, which had implemented a timed-entry system for the several previous years, did not require reservations in 2023, which led to four-hour park entry lines.[144] Yosemite is currently in the planning process for a new visitor access management plan,[145] which seems likely to include at least some timed-entry reservations. Beyond Yosemite, the undeniable trend is a move toward mandatory reservation systems at high-use recreation sites across the public land system.[146]

C. *The Legal Framework Governing Today's Recreation Fees*

Congress has given the agencies relatively little direction regarding public land recreation policy relative to its importance to both the economy and national identity.[147] FLREA is the primary statute governing recreation fees,[148] and is relatively brief compared to the body of statutes controlling other significant uses of the public lands.[149] This section begins with a review of FLREA's key provisions, then moves to a discussion of case law interpreting these provisions. It concludes with a brief discussion of the role of agency policy in this legal framework.

1. FLREA

FLREA's key provisions relevant to this Article establish both substantive and procedural requirements for when and where the agencies can charge recreation fees.[150] Unfortunately, some of FLREA's procedural requirements do not map to its substantive criteria in a straightforward manner. This mismatch is a shortcoming of the existing legal framework, and is a significant contributor to concerns noted by agency land managers, the public, and the courts.[151] Despite efforts led by Representative Bishop,[152] FLREA has not seen a comprehensive update since its enactment in 2004.

☐ *FLREA's substantive recreation fee provisions*. Key to the legal framework Congress envisioned in FLREA are several categories of recreation fees, each with their own rules: "entrance fees," "standard amenity recreation fees," "expanded amenity recreation fees," and "special recreation permit fees." Entrance fees may only be charged by NPS and FWS, regardless of which amenities are provided—presumably a result of these agencies' explicit recreation and conservation mandates. BLM and USFS, on the other hand, are generally prohibited from charging entrance fees for *sites* they manage.

However, Congress authorized BLM and USFS to charge standard amenity recreation fees for general access to certain *fee areas*. Specifically, those areas include national conservation areas and others that provide basic amenities like restrooms, trash cans, interpretive signs, and so on (FLREA amenities). Understanding the legal difference between *sites* and *areas* is important because BLM and USFS can charge entrance fees at *areas*, but not at *sites*. This distinction is a source of confusion on the part of both

only during a specific time window on the day of their reservation. Thus, true timed-entry reservations are the stricter management tool, but also allow land managers to better distribute use throughout the day, which can therefore allow greater total daily visitation.

141. *See* Examining the Future of Recreation.gov, *supra* note 96.

142. *See* Local Adventurer, *Now These US National Parks Require Reservations (2023)*, https://localadventurer.com/which-national-parks-require-reservations/ (last visited Dec. 10, 2023).

143. *See* Margaret Fleming, *Welcome to Colorado. Do You Have a Reservation?*, Colo. Sun (May 27, 2022), https://coloradosun.com/2022/05/27/public-lands-reservation-national-park-forest/. *See also* News Release, USFS, Reservation System Will Open Soon for Mount Evans and Brainard Lake (May 2, 2022), https://www.fs.usda.gov/detail/arp/news-events/?cid=FSEPRD1017989.

144. NPS, *Yosemite National Park: Entrance Reservations*, https://www.nps.gov/yose/planyourvisit/reservations.htm (last updated Nov. 27, 2023); Ashley Harrell, *"Never Seen Anything Like This": Yosemite Visitors Are Waiting 4 Hours to Enter a Packed Park*, SFGate (June 29, 2023), https://www.sfgate.com/california-parks/article/yosemite-crowds-descend-with-no-reservation-system-18175130.php.

145. NPS, *Yosemite National Park: Visitor Access Management Plan*, https://www.nps.gov/yose/getinvolved/ visitoraccessmanagement.htm (last updated Oct. 30, 2023).

146. For example, Rocky Mountain National Park is currently finalizing a permanent timed-entry reservation system. *See* NPS, *Rocky Mountain National Park: Day Use Visitor Access Strategy*, https://www.nps.gov/romo/getinvolved/day-use-visitor-access-strategy.htm (last updated Dec. 6, 2023). Acadia National Park also now requires timed-entry reservations to drive its Cadillac Summit Road. These vehicle reservations are exclusively available through Recreation.gov and cost $6 on top of the park entrance fee. NPS, *Acadia National Park: Cadillac Summit Road Vehicle Reservations*, https://www.nps.gov/acad/planyourvisit/vehicle_reservations.htm (last updated Oct. 10, 2023); *see also* Williamson Interview, *supra* note 132.

147. *See* Keiter, *supra* note 56, at 92.

148. Carol Hardy Vincent, Congressional Research Service, IF10151, Federal Lands Recreation Enhancement Act: Overview and Issues 1 (2022), https://crsreports.congress.gov/product/pdf/IF/IF10151/13.

149. *See* 16 U.S.C. ch. 87 et seq.; *cf.* 30 U.S.C. ch. 3A et seq. The outdoor industry's economic impact is greater than that of other major industries, yet the law governing recreation is nowhere near as well developed. *See* Outdoor Recreation Roundtable, *supra* note 122.

150. 16 U.S.C. §6802.

151. *See infra* Part III.

152. Representative Bishop led efforts to update FLREA after its initial 10-year authorization lapsed in 2014. These efforts included an informative hearing before the House Subcommittee on Public Lands and Environmental Regulation that touched on many of the concerns presented in this Article. *See H.R. ___, "Federal Lands Recreation Enhancement Act"; H.R. 2743, "Veterans Eagle Parks Pass Act," and H.R. 3976, "Wounded Veterans Recreation Act": Hearing Before the H. Subcomm. on Public Lands and Environmental Regulation of the Comm. on Natural Resources*, *supra* note 21, at 113-68.

The efforts to update FLREA culminated in a draft bill, H.R. 5204, the "Federal Lands Recreation Enhancement Modernization Act of 2014." H.R. 5204 would have significantly changed agency fee authority, including by eliminating most of the "FLREA amenity" requirements, while also requiring increased agency accountability regarding fee revenues, and authorizing FLREA through 2020. H.R. 5204 was introduced in the House, but never received a vote. *See* Federal Lands Recreation Enhancement Modernization Act of 2014, H.R. 5204, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/house-bill/5204.

land managers and the public. It has also led to significant litigation, including an apparent circuit split on the issue of what constitutes a "fee area."[153]

Some of FLREA's most significant provisions spell out the site/area distinction, and thus dictate where the agencies may collect standard amenity fees. Under §6802(f)(4) of FLREA, BLM and USFS may only charge these general access fees at a national conservation area, a fully featured visitor center, or an area (fee area)

> (A) that provides significant opportunities for outdoor recreation;
>
> (B) that has substantial Federal investments;
>
> (C) where fees can be efficiently collected; and
>
> (D) that contains all of the following amenities [FLREA amenities]
>
> (i) Designated developed parking.
>
> (ii) A permanent toilet facility.
>
> (iii) A permanent trash receptacle.
>
> (iv) Interpretive sign, exhibit, or kiosk.
>
> (v) Picnic tables.
>
> (vi) Security services.[154]

But the agencies' authority to charge standard amenity recreation fees is limited by FLREA's §6802(d)(1), which states that:

> The Secretary shall not charge any standard amenity recreation fee or expanded amenity recreation fee for Federal recreational lands and waters administered by the [BLM], the [USFS], or the Bureau of Reclamation under this chapter for any of the following:
>
> (A) Solely for parking, undesignated parking, or picnicking along roads or trailsides.
>
> (B) For general access unless specifically authorized under this section.
>
> (C) For dispersed areas with low or no investment unless specifically authorized under this section.
>
> (D) For persons who are driving through, walking through, boating through, horseback riding through, or hiking through Federal recreational lands and waters without using the facilities and services.
>
> (E) For camping at undeveloped sites that do not provide a minimum number of facilities and services as described in subsection (g)(2)(A).
>
> (F) For use of overlooks or scenic pullouts.[155]

Thus, §6802(f)(4) "allows fees at locations with all six statutory amenities present, except where §6802(d) applies."[156] Where permitted, FLREA requires that all recreation fees be "commensurate with the benefits and services provided to the visitor," and lays out criteria that land managers must consider prior to setting fee rates.[157] In summary, for USFS and BLM—agencies that generally manage lands dedicated to multiple uses—entrance or general access fees are allowed only on lands that are either dedicated to conservation or offer all six FLREA amenities to the public.

Next among the types of fees authorized by FLREA, expanded amenity recreation fees are supplementary fees that the agencies may charge for use of specific amenities like campgrounds or reservation services. And finally, special recreation permit fees are fees for specific activities that require permits.[158] This category of fees encompasses permits for everything from backcountry camping, to commercial access for outfitters,[159] to public events like races and private events like weddings.

☐ *FLREA's procedural safeguards*. Whenever land managers seek to either establish a new fee area, implement a new fee, or change an existing fee, they must first seek approval through the Recreation Resource Advisory Committee (RRAC) process, which FLREA describes in detail.[160] FLREA dictates that RRACs must include "balanced representation" from recreational users and interest groups, as well as state, local, and tribal officials.[161] Though the RRAC process is mandatory, the resulting decisions are advisory, and thus all fee changes approved by RRACs are subject to approval by the applicable agency secretary.[162]

To provide opportunities for public input, the agencies must publish notice of all proposed new fee areas in the *Federal Register* six months prior to establishment.[163] Smaller changes, such as new fees or changes to existing fees, do not require *Federal Register* notice, but must be published in local media outlets.[164] Thus, under FLREA, land managers must provide opportunities for the public to participate in the development or changing of all recreation fees.[165]

Some of FLREA's other key provisions authorize the agencies to issue interagency passes, enforce payment of fees, and enter contracts with third parties to provide recreation-related services. Finally, FLREA sets forth requirements ensuring that a vast majority of recreation fee

153. *See infra* Part III.
154. 16 U.S.C. §6802(f).
155. *Id.* §6802(d)(1).
156. Alpern v. Ferebee, 949 F.3d 546, 549 (10th Cir. 2020).
157. 16 U.S.C. §6802(b).
158. *See id.*
159. While FLREA contains significant provisions related to commercial users of the public lands like outfitters and guides, the Article focuses on the legal framework as it relates to noncommercial recreational users. Agency permittees, such as outfitters and guides, have made significant progress lobbying Congress to update the portions of FLREA most relevant to their operations. *See infra* Section IV.A.
160. 16 U.S.C. §6803(d).
161. *Id.*
162. *Id.*
163. *Id.* §6803(a)-(b).
164. *Id.*
165. *Id.* §6803(a)-(c).

revenues are returned to their site of collection.[166] FLREA has been amended several times, for example to add new forms of agency passes, but these amendments have always been wrapped into other initiatives.[167] FLREA was originally authorized for 10 years, and after its expiration in 2014, Congress has continued to reauthorize it on an annual basis.[168] Congress will have its next opportunity to reauthorize FLREA in October 2024.[169]

2. Case Law

Most suits concerning FLREA are as-applied challenges brought under the Administrative Procedure Act (APA), alleging that an agency's imposition of a fee, or citation for nonpayment of that fee, was arbitrary and capricious. The crux question is often whether a BLM or USFS designation of land as a "fee area" violated the arbitrary and capricious standard by failing to provide the required FLREA amenities. A line of cases out of the U.S. Courts of Appeals for the Ninth and Tenth Circuits indicates that while there is consensus on some common "area" questions, the circuits are split on others.

Several of these cases address the question of whether BLM or USFS can delineate a "fee area" in such broad terms as to encompass FLREA amenities, even when those amenities are far removed from certain visitors. In the first of these cases, *United States v. Wallace*, the court held that USFS could combine lands that did not feature all the FLREA amenities with others that did to create a valid "fee area."[170] But two subsequent cases, *United States v. Smith* and *Adams v. U.S. Forest Service*, seemingly pushed the weight of authority to the alternate conclusion—at least in the Ninth Circuit.[171]

In *Smith*, an Arizona federal district court noted that USFS had inappropriately interpreted §6802(f) as allowing it "to combine multiple 'areas' with or without amenities if, cumulatively, all required amenities [could] be found in the area, notwithstanding the size of the area or how far a visitor might have to travel to avail themselves of the amenity. This is not persuasive logic."[172] However, in *Sherer v. U.S. Forest Service*, the Tenth Circuit seemingly split from the Ninth by holding that a fee area "is not defined by any term of mileage or any other quantitative measurement," but only by the presence of the FLREA amenities within its geographic area.[173]

On a related issue, the Ninth Circuit held in *Adams* that FLREA "provides simply and unambiguously that the Forest Service cannot collect a standard amenity fee from someone who picnics on a road or trailside, even if that picnic occurs within an 'area' that has amenities."[174] It added:

> [It] is equally clear that [FLREA] prohibits the Forest Service from charging standard amenity recreation fees for each of several activities in which plaintiffs participate after they park: hiking without using facilities and services, picnicking on a road or trailside, or camping at a site that does not have a majority of the . . . [FLREA amenities].[175]

Next, in *Wiechers v. Moore*, a California federal district court interpreted *Adams* as allowing land managers to charge for parking at facilities that featured all the FLREA amenities, regardless of whether visitors actively used amenities other than parking.[176] The *Wiechers* court convincingly argued that holding otherwise "would require the Forest Service 'to patrol each fee area, ask for proof of payment, and personally cite each violator.'"[177] The Tenth Circuit came to essentially the same holding in *Alpern v. Ferebee*, adding that "fees are typically allowed where federal investment has occurred but not where nature is the sole attraction."[178] While questions remain, the clearest takeaway from these cases seems to be that the agencies may impose fees "solely for parking" in developed parking areas that feature all six FLREA amenities.

One other question that appears to have been answered is that FLREA's procedural requirements do not apply to third-party contractors who provide recreation services on behalf of the agencies. In an issue of first impression, the court in *Bark v. U.S. Forest Service* explained that under the Granger-Thye Act of 1950, "third-party concessioners are able to charge visitors for access to designated recreation areas within our National Forests."[179] It further noted that FLREA allows third parties to "charge a fee for providing a good or service . . . in accordance with any other applicable law or regulation."[180]

The *Bark* court held that because FLREA authorizes third parties to charge for "*a good or service*," whereas it limits the agencies to charging fees only at areas where *all* FLREA amenities are present, third parties were not subject to FLREA's limitations associated with the fees charged by the agencies.[181] Specifically, it held that fees imposed at recreation areas managed by contractors did not need to fulfill FLREA's public notice and RRAC approval require-

166. *See id.* §6803.
167. *Id.* Specific amendment language can be found at 16 U.S.C. ch. 87, https://uscode.house.gov/view.xhtml?path=/prelim@title16/chapter87&edition=prelim.
168. Vincent, *supra* note 148, at 1.
169. Vincent, *supra* note 54, at 1.
170. *See* 476 F. Supp. 2d 1129 (D. Ariz. 2007).
171. *See* United States v. Smith, 740 F. Supp. 2d 1111 (D. Ariz. 2010); Adams v. U.S. Forest Serv., 671 F.3d 1138 (9th Cir. 2012).
172. *Smith*, 740 F. Supp. 2d at 1126.
173. 727 F. Supp. 2d 1080 (D. Colo. 2010), *aff'd*, 653 F.3d 1241 (10th Cir. 2011).
174. *Adams*, 671 F.3d at 1145. Christine Wallace, the defendant who lost in *Wallace*, won on her FLREA claims as a plaintiff in *Adams*. Both *Wallace* and *Adams* addressed USFS recreation fees at Mount Lemmon, Arizona.
175. *Id.*
176. No. 1:13-CV-00223-LJO, 2014 WL 1922237 (E.D. Cal. May 14, 2014). In doing so, the *Wiechers* court declined to follow the reasoning of the court in *Fragosa v. Moore*, 17 F. Supp. 3d 985 (C.D. Cal. 2014), which held that USFS could not charge for merely entering a fee area without use of developed facilities and services, even when the area was small, well-delineated, and featured all FLREA amenities.
177. *Wiechers*, 2014 WL 1922237, at *4.
178. 949 F.3d 546, 551 (10th Cir. 2020).
179. Bark v. United States Forest Serv., 37 F. Supp. 3d 41, 46, 44 ELR 20073 (D.D.C. 2014).
180. *Id.* at 49.
181. *Id.* at 57-58.

ments.[182] But *Bark* did not address Recreation.gov fees, nor whether new reservation systems trigger agency analysis under the National Environmental Policy Act (NEPA).[183]

The first case to do so was *Kotab v. Bureau of Land Management*, where the court held that Recreation.gov's "processing fees" were in fact recreation fees subject to FLREA.[184] In *Kotab*, an avid hiker challenged the Nevada BLM's implementation of a timed-entry system at Red Rock Canyon National Conservation Area under the APA.[185] The new timed-entry system required a $2 reservation fee on top of the standard recreation fee, and could only be purchased through Recreation.gov. The court noted that while FLREA "permits agencies to contract with third parties to provide visitor-reservation services, and it allows third parties to collect a commission for those services, it does not authorize an agency to pass off that commission to the public as a separate, non-recreation fee."[186] It added that the Ninth Circuit had "long proscribed agency interpretations of [FLREA] that give the agency complete discretion to dictate a fee's so-called purpose, thus allowing it to entirely evade the prohibition on certain fees by simply declaring that its fees are 'for' something else."[187]

Thus, the *Kotab* court found that Recreation.gov's "processing fees" were recreation fees subject to FLREA's fee requirements.[188] And because there had traditionally been a recreation fee in place to access Red Rock, the additional recreation fee announced by the *Kotab* court merely meant that BLM was required to publish notice of the change in local media.[189] However, the full implications of the *Kotab* ruling on both other recreation fee cases and the Recreation.gov status quo are yet to be seen.

But while the *Kotab* plaintiff ultimately won on his FLREA claim under the APA, he had originally brought a claim under NEPA as well, and the court's ruling on the NEPA issue raised more questions than it answered.[190] The *Kotab* plaintiff had argued that because BLM had implemented the Red Rock timed-entry system without soliciting public input, it had violated NEPA's public participation requirements. The *Kotab* court noted the Ninth Circuit rule that "when an agency, responding to changing conditions, makes a decision to operate a completed facility within the range originally available to it, the action is not major."[191] While noting that the fee affected thousands of visitors, the court nonetheless found that the $2 fees had a de minimis impact, and were therefore within the range originally available to BLM.[192]

Because no other courts have addressed the issue, it is unclear whether this ruling in *Kotab* stands for the broad proposition that new timed-entry reservation systems do not trigger NEPA, or if this principle narrowly applies only when adding small amounts to preexisting recreation fees. But exempting new reservation systems from environmental analysis under NEPA seems counterintuitive. After all, the land management agencies are turning to reservation systems in hopes that they will limit the environmental, behavioral, and experiential effects resulting from increased visitation. Clearly, then, land managers intend for these systems to have significant effects on the "quality of the human environment," which should trigger NEPA.[193] And rather than simply eliminating or reducing visitor use, reservation systems often merely shift visitor use patterns and their associated impacts elsewhere instead, further supporting NEPA analysis.[194]

3. Agency Policy

The agencies' enabling acts make only general references to how recreation should be managed on the public lands.[195] Thus, aside from FLREA's general guideposts, recreation fee policy is largely left to the agencies, with each agency issuing its own internal guidance on the subject.[196] The depth and specificity of this guidance varies greatly. For example, BLM dedicates only a few lines in its recreation handbook to setting fees,[197] along with a regulation explaining that it

> sets recreation use fees and adjusts them from time to time to reflect changes in costs and the market, using the following types of data . . . . [t]he direct and indirect cost to the government; [t]he types of services or facilities provided; and [t]he comparable recreation fees charged by other Federal agencies, non-Federal public agencies, and the private sector located within the service area.[198]

182. *Id.*
183. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
184. 595 F. Supp. 3d 947 (D. Nev. 2022), *appeal dismissed*, No. 22-15810, 2022 WL 17261849 (9th Cir. Aug. 3, 2022) (internal quotation marks omitted).
185. *Id.* at 949-51.
186. *Id.* at 952-53.
187. *Id.* at 954.
188. *Id.* at 955-56.
189. *Id.* at 956.
190. Order Granting in Part Defendants' Motion to Dismiss and Lifting Stay on Summary-Judgment Briefing at 8, Kotab v. Bureau of Land Mgmt., No. 2:20-cv-01957-JAD-EJY (D. Nev. June 29, 2021).
191. *Id.* at 10-11 (citing Idaho Conservation League v. Bonneville Power Admin., 826 F.3d 1173, 1175 (9th Cir. 2016)).
192. *Id.* at 11.
193. 42 U.S.C. §4332(C).
194. *See infra* Section III.A.2.
195. *See* Keiter, *supra* note 56, at 92.
196. *See id.*
197. *See* BLM, BLM Manual 8320—Planning for Recreation and Visitor Services (Public) (2011), https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual8320.pdf.
198. 43 C.F.R. §2933.22. However, in August 2023, BLM released its "Blueprint for 21st Century Outdoor Recreation," which describes recreation as "central" to its mission and calls for a "transformational shift" in how BLM manages recreation. As part of this shift, the Blueprint discusses recreation fees, and contemplates action to improve equity and access for underserved communities, update fee collection technology, and ensure that fees are set appropriately. BLM, The Bureau of Land Management's Blueprint for 21st Century Outdoor Recreation (2023), https://www.blm.gov/sites/default/files/docs/2023-08/Blueprint%20for%2021st%20Century%20Outdoor%20Recreation508.pdf. While the Blueprint is certainly a step in the right direction, it is yet to be seen whether its recommendations will translate into meaningful updates to BLM recreation fee policy.

NPS, on the other hand, devotes two entire reference manuals to recreation fee policy pursuant to its Director's Order No. 22.[199]

III. Shortcomings of the Current Recreation Fee Regime

While the legal framework surrounding recreation fees provides basic guardrails, and is in some ways highly prescriptive, it has nonetheless failed to provide clarity around when, where, how, and upon whom land managers may assess recreation fees. This has led to significant legal and policy concerns around administrability, transparency, accountability, equity, and the quality of services the agencies provide to public land users. This part begins by examining legal concerns relating to this framework, then proceeds to discuss policy concerns associated with FLREA, reservation systems, and Recreation.gov.

A. Legal Concerns

FLREA, reservation systems, and Recreation.gov present unique legal concerns—especially where they intersect. These structures also interact with statutes like NEPA and the APA, as well as various executive orders, to present new legal questions. This section first addresses legal concerns related to FLREA, then moves to those related to reservation systems.

1. Concerns Related to FLREA's Recreation Fee Provisions

FLREA's primary legal shortcomings are that it lacks clarity, enforcement mechanisms, and equity considerations. First, ambiguity in the legal framework surrounding recreation fees, especially on USFS and BLM lands, leaves land managers unsure when and how to implement new fees, and results in a lack of uniform fees across the public land system. For example, FLREA prohibits BLM and USFS from charging for general access to "fee sites," unless they meet certain requirements for "fee areas."[200] A related requirement is that land managers must publish notice in the *Federal Register* six months prior to designating new fee areas, but are not required to do so for new fee sites.[201] Thus, because FLREA fails to define either "fee site" or "fee area,"[202] a broad interpretation of the term "fee area" could largely make FLREA's amenity requirements meaningless.[203]

The ambiguity of FLREA's standard amenity fee provisions also leaves significant questions regarding whether fees may be assessed on many lands managed by BLM and USFS. As evinced by the case law discussed above, FLREA fails to explain how far away from amenities USFS and BLM land managers may impose standard or expanded amenity fees.[204] The split between the Ninth Circuit, which has held that land managers cannot combine areas to encompass the necessary FLREA amenities,[205] and the Tenth Circuit, which has held that geographic scope is irrelevant to the "fee area" determination,[206] is the result of FLREA's ambiguity.

Similar questions arise about visitors' use of parking and other amenities (or lack thereof) within a fee area. For example, while *Wiechers* and *Adams* make clear that USFS and BLM may charge "solely for parking" in lots that feature FLREA amenities,[207] it remains unclear whether these agencies can charge for "undeveloped" parking within a broader "fee area." Likewise, if a visitor parks on the side of the road on BLM land and hikes into a "fee area" to camp or hike, may the agencies charge a fee?

FLREA also fails to explain when notice and comment is required prior to implementation of new BLM or USFS fees. The RRAC fee approval process, which is intended to provide public input on the front end, is different than the type of public involvement guaranteed by the notice-and-comment process[208] and does nothing to address improper fees once they are in place. Further, FLREA fails to offer a mechanism for administrative appeals. It provides for enforcement of its user payment requirements, but provides no analogous measures by which the public may hold land managers accountable for imposing fees that violate FLREA.[209] Thus, FLREA leaves little recourse for individuals to challenge agency fee decisions except in the courts—after being cited for nonpayment.[210] These concerns matter all the more because together USFS and BLM manage more than 430 million acres of public land—roughly 17% of the United States—and recreation on all of those lands is subject to FLREA.[211]

Additionally, unlike its predecessor, the LWCF, FLREA contains no equity provisions.[212] Thus, the agencies are free to impose recreation fees with no formal consideration of how they might disproportionately impact marginalized populations. In addition to policy concerns, this may

199. NPS, Director's Order No. 22: Recreation Fees (May 14, 2010), https://www.nps.gov/subjects/policy/upload/DO_22_5-14-2010.pdf.
200. *See* 16 U.S.C. §6802.
201. *Id.*
202. *See id.*
203. *See supra* Section II.C.2.
204. *See id.*
205. *See* United States v. Smith, 740 F. Supp. 2d 1111, 1126-29 (D. Ariz. 2010); Adams v. U.S. Forest Serv., 671 F.3d 1138, 1143-46 (9th Cir. 2012).
206. *See* Sherer v. U.S. Forest Serv., 727 F. Supp. 2d 1080, 1093 (D. Colo. 2010).
207. *See supra* Section II.C.2.
208. Unlike BLM and USFS, NPS requires:
> Park managers who consider establishing or changing a fee that results in increased financial impact to the visitor must engage the public and seek input from Congressional delegations, appropriate Federal, State and local officials, the local Chamber of Commerce, commercial tour operators, and the general public and other stakeholders before a new or changed fee is proposed.

NPS Director's Order No. 22, *supra* note 199, at 16.
209. 16 U.S.C. §6811.
210. *See Smith*, 740 F. Supp. 2d at 1114, 1129; *see also Adams*, 671 F.3d at 1146. For a thorough review of these cases and the issues they consider, see Steven J. Kirschner, *Can't See the Forest for the Fees: An Examination of Recreation Fees and Concession Policies on the National Forests*, 14 Wyo. L. Rev. 514, 527-29 (2014), *available at* https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1327&context=wlr.
211. Vincent et al., *supra* note 102, at i.
212. *See* 16 U.S.C. §§6801 et seq.

run afoul of the directives of Executive Order Nos. 12898 and 13985.[213] First, President William Clinton's Order No. 12898 requires the federal agencies to consider environmental justice in their decisionmaking.[214] Next, President Joseph Biden's Order No. 13985, issued in 2021, directs the agencies to "assess whether, and to what extent, [their] programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups" and work to "redress inequities in their policies and programs."[215]

2. Concerns Related to FLREA's Lack of Guidance Around Reservation Systems and Reservation Fees

Reservation systems, especially timed-entry systems, present legal challenges under both FLREA and NEPA, as well as equity concerns. While FLREA makes clear that reservation systems are permissible, it is entirely silent on when, where, and how such systems should be implemented.[216] Where agencies do require reservations, FLREA stipulates that expanded amenity fees are appropriate to cover the cost of the reservation system. But FLREA leaves the decision of whether to implement a reservation system entirely in the hands of land managers, and provides no guardrails for its implementation.[217] As a result, there is a significant lack of uniformity in both the process for implementing new reservation systems, and in the ultimate user experience with reservations across the public land system.[218]

Due to FLREA's minimal direction regarding reservation systems, it is unclear which requirements are triggered when land managers consider implementing new reservations—especially timed-entry systems. The courts have begun answering this question and indicate that at a minimum, such new systems require publication of notice in local news outlets.[219] Thus, one of the key legal questions posed by timed-entry systems is whether land managers must perform NEPA analysis prior to their implementation.

Where NEPA applies, federal decisionmakers must provide a detailed statement of the proposed action's direct, indirect, and cumulative impacts, as well as a review of alternatives to the proposed action.[220] Thus far, even though timed-entry systems can have significant behavioral, experiential, and environmental impacts, land managers have failed to consistently perform NEPA analysis for new timed-entry systems.[221] Even where the agencies have undergone careful decisionmaking before implementing new timed-entry systems, there is little evidence that they have considered these systems' probable impacts on nearby areas that do not require reservations.[222]

While much is made of new campground or timed-entry reservations' promise of reducing environmental impacts, little has been mentioned about their adverse indirect effects on surrounding areas. When reservation systems are implemented in an area, recreationists who would have previously gone to that area are often diverted to other areas in the vicinity.[223] Indeed, land managers sometimes state that this spreading of use is one of the objectives of implementing a reservation system in the first place.[224]

But often, these alternative areas have significantly less infrastructure than do the areas where reservation systems are implemented. Because infrastructure such as restrooms, trash cans, established trail systems, and the like is critical to limiting environmental impacts, this means that these alternative areas are often disproportionately harmed as compared to more developed sites. Further supporting this idea is a well-established body of evidence showing that

213. *See* 3 U.S.C. §12898; 3 U.S.C. §13985.
214. *Id.* §12898.
215. *Id.* §13985.
216. *See* 16 U.S.C. §§6801 et seq.
217. *See id.*
218. *See* Vincent, *supra* note 54, at 2.
219. *See* Kotab v. Bureau of Land Mgmt., 595 F. Supp. 3d 947, 955-56 (D. Nev. 2022).
220. *Id.*; 40 C.F.R. §1508.1(g).
221. For example, Muir Woods National Monument conducted an environmental assessment (EA) under NEPA in 2015 prior to implementing its reservation system. NPS Planning, Environment, and Public Comment, *Muir Woods Reservation System Finding of No Significant Impact (FONSI) and Errata*, https://parkplanning.nps.gov/document.cfm?parkID=303&projectID=48272&documentID=70152 (last visited Dec. 10, 2023). Rocky Mountain National Park, which has used a timed-entry system since 2020, recently issued an EA for its new Day Use Visitor Access Strategy. NPS Planning, Environment, and Public Comment, *Rocky Mountain NP Day Use Visitor Access Plan and Environmental Assessment*, https://parkplanning.nps.gov/document.cfm?parkID=94&projectID=100042&documentID=132674 (last visited Dec. 10, 2023). This assessment is promising, noting:

> Under any action alternative, indicators and thresholds would be established. This iterative practice of monitoring, implementing management strategies, and then continuing to monitor to gauge the effectiveness of those actions would allow park managers to maximize the benefits for visitors while achieving and maintaining desired conditions for resources and visitor experiences in a dynamic setting. These indicators, along with other recurring and ongoing monitoring at the park, will inform if and when reservation system adaptations are needed.

NPS, Rocky Mountain National Park Day Use Visitor Access Plan and Environmental Assessment 2-3 (2023). Rocky Mountain National Park did not conduct NEPA analysis prior to implementing its timed-entry system in 2020, perhaps due to the COVID-19 pandemic. Red Rock Canyon National Conservation Area recently conducted an EA on its new Recreation Area Management Plan for Calico Basin, which included both a new fee program and timed-entry system and found that the plan would have no significant impact, despite failing to examine any indirect impacts these provisions might have on the human environment. *See* BLM Red Rock Canyon Sloan Field Office, Calico Basin Recreation Area Management Plan and Final Environmental Assessment ch. 4 (2022), https://eplanning.blm.gov/public_projects/2016281/200499801/20060502/250066684/Final%20EA%20-%20DOI-BLM-NV-S020-2022-0001-EA__RRCNCA%20Calico%20Basin%20RAMP.pdf. Following an appeal to the Interior Board of Land Appeals, BLM has agreed to supplement its original EA with an analysis of the indirect impacts of the proposed reservation system at Calico Basin. Bennett Slavsky, *Reservations and Fees in the Calico Basin? Not if Access Fund Can Help It*, Climbing (Feb. 10, 2023), https://www.climbing.com/news/reservations-for-calico-basin/.
222. *See generally supra* note 221.
223. For would-be visitors without reservations, reservation requirements are effectively closures. As such, impacts to surrounding areas should be expected much as if the area were simply closed—as many were during the COVID-19 pandemic. *See How COVID-19 Is Crushing Our Climbing Areas*, *supra* note 107; *see, e.g.*, Glenna Hartman et al., Institute for Tourism and Recreation Research, Projected Impact of Visitor Limitations in Glacier National Park 17-18 (2021), https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1427&context=itrr_pubs.
224. Ratcliffe Interview, *supra* note 117; Williamson Interview, *supra* note 132.

unimpacted areas are harmed more by their initial use than are already-used areas that see increases in use.[225]

In addition to environmental impacts, reservation systems have behavioral and experiential impacts as well. Indeed, often one of the main reasons why land managers choose to implement reservation systems—especially timed-entry systems—is to change the behavior and experiences of would-be visitors to public lands.[226] Rationale for these systems varies, but generally they serve to deter would-be visitors from coming to the site in question unless they have a reservation. This in turn affects the experiences of visitors with reservations, who one hopes would enjoy a better visit due to less crowding, as well as those without reservations, who may either visit an unrestricted site nearby, go elsewhere entirely, or stay home. Clearly, reservation systems change the subjective experiences of both those who do and do not have reservations.

Thus, contrary to the *Kotab* court's ruling, because reservation systems have significant environmental, behavioral, and experiential impacts, they significantly affect the quality of the human environment and should be subject to the NEPA process.[227] Recall that in *Kotab*, the court held that because Red Rock Canyon National Conservation Area historically had a recreation fee in place, the additional $2 fee for its new reservation system had only a de minimis impact, and was thus not a major action requiring NEPA analysis.[228] But agencies must conduct NEPA analysis for all "major federal actions significantly affecting the quality of the human environment."[229] And under the Council on Environmental Quality's NEPA implementation regulations, "major actions" include all "new and continuing activities" with "effects that may be major."[230]

And as described above, timed-entry systems can have impacts far beyond the marginal economic harm of charging visitors an additional $2. Indeed, land managers implement timed-entry reservation requirements for the specific purpose of altering visitor use patterns and their associated impacts, as well as visitors' subjective experiences. Thus, despite *Kotab*, questions remain regarding when new reservation systems trigger NEPA analysis.

Reservation systems implemented under FLREA introduce legally significant equity concerns as well. Often, public land reservations are unavailable at the unit itself. Instead, users typically must obtain reservations through Recreation.gov, which requires Internet connectivity, competency navigating the online reservation system, and the ability to pay by credit card—all of which can prove to be barriers for lower-income individuals. Substantiating these concerns, a recent study found that requiring visitors to access national park campground reservations via Recreation.gov may exclude lower-income and non-white campers.[231] Specifically, the study found that campers in reservation-required campgrounds came from wealthier and whiter communities than did campers at first-come, first-served campgrounds.[232] As with recreation fees under FLREA, agencies' failure to address the inequitable impacts of reservation systems may violate Executive Order Nos. 12898 and 13985.

Finally, FLREA leaves questions open about how much the agencies can charge for reservation fees, how contractors like Booz Allen might influence these fees during bidding, or whether reservation fees should be standardized across the public land system. FLREA also fails to explain whether its requirement that agencies return a high percentage of all recreation revenue to its site of origin applies not only to recreation fees themselves, but also to reservation fees collected through Recreation.gov.[233] If the *Kotab* court's holding that the Red Rock reservation fee was a "recreation fee" under FLREA proves influential, it would follow that FLREA's fee-return requirement should also apply to reservation fees. And if that were the case, then much of the Recreation.gov contract would be legally questionable, since it is unclear whether any portion of the reservation fee revenues collected through Recreation.gov are remitted to the agencies, much less to their sites of origin.

A recent class action suit, *Wilson v. Booz Allen Hamilton, Inc.*, pushed further on these questions. First, the complaint relied heavily on *Kotab* to allege that Recreation.gov's processing, reservation, lottery, and other similar fees were "junk fees" that (1) failed to comply with FLREA's procedural requirements; (2) violated FLREA's directive to avoid duplicative fees; and (3) were not a reasonable commission under FLREA's third-party contracting provision.[234] It further alleged that Recreation.gov's imposition of fees on active military, veterans, Gold Star families, and

225. *See* Christopher Monz, Recreation Ecology Lab, Outdoor Recreation and Ecological Disturbance: A Review of Research and Implications for Management of the Colorado Plateau Province 7-8 (2021), https://suwa.org/wp-content/uploads/RecreationReport_Sept2021.pdf; *see also* Jeffrey L. Marion, *A Review and Synthesis of Recreation Ecology Research Supporting Carrying Capacity and Visitor Use Management Decisionmaking*, 114 J. Forestry 339 (2016), *available at* https://academic.oup.com/jof/article/114/3/339/4599819.

226. *See, e.g.*, NPS, *Glacier National Park: Vehicle Reservations*, https://www.nps.gov/glac/planyourvisit/vehicle-reservations.htm (last updated Dec. 4, 2023). Explaining:

> Resource impacts like vegetation loss and braiding trail systems are common in areas of high use. Visitor experience quality is also being affected as sustained, high levels of use become common. Visitor access to the park, parking areas, and trailheads has been unpredictable and frustrating for visitors as the park implements unplanned closures to address these issues. Visitor safety becomes an issue when emergency vehicles are not able to respond efficiently due to congestion. The pilot vehicle reservation system spreads visitation throughout the day during peak hours and provides a measure of certainty and safety to visitors.

For the month of July 2023, all of Glacier's available vehicle reservations sold out within 30 minutes of being posted.

227. 42 U.S.C. §4332(C).

228. *See* Kotab v. Bureau of Land Mgmt., 595 F. Supp. 3d 947 (D. Nev. 2022).

229. 42 U.S.C. §4332(C).

230. The Council on Environmental Quality regulations also explain that "[m]ajor reinforces but does not have a meaning independent of significantly." 40 C.F.R. §1508.18.

231. William L. Rice et al., *Exclusionary Effects of Campsite Allocation Through Reservations in U.S. National Parks: Evidence From Mobile Device Location Data*, 40 J. Park & Recreation Admin. 45 (2022), *available at* https://js.sagamorepub.com/jpra/article/view/11392.

232. *Id.*

233. *See* 16 U.S.C. §6802.

234. Complaint, Wilson v. Booz Allen Hamilton, Inc., No. 1:23-cv-00043 (E.D. Va. filed Jan. 1, 2023), https://www.nationalparkstraveler.org/sites/default/files/attachments/recreation.gov_-_as_filed_complaint_0.pdf.

people with disabilities violated FLREA's mandate that these populations receive free lifetime or annual park passes.[235] After several months of litigation, the *Wilson* plaintiffs voluntarily dismissed the case, and it is unclear if this suit will have any effect on Recreation.gov's operations.[236] Still, *Wilson* raised the profile of these issues, even leading two senators and a former Secretary of the Interior to submit letters to DOI, NPS, and USFS requesting details about the Recreation.gov contract with Booz Allen.[237]

B. Policy Concerns

The interplay between FLREA, reservation systems, and Recreation.gov presents significant policy questions for both land managers and the public. For land managers, FLREA creates frustrating impediments to routine fee updates, makes future funding uncertain, and leaves them facing ambiguous procedural requirements. For the public, fees, reservation systems, and the Recreation.gov platform combine to present equity, transparency, functionality, and principle-based concerns.

1. FLREA Presents the Agencies With Significant Implementation Challenges

To begin, FLREA's lack of specificity can make implementing recreation fees challenging for land managers.[238] Because FLREA does not provide specific guidelines for how land managers should implement new fees, and not all agencies have well-developed procedures governing recreation fees, personnel at individual units are sometimes left with little guidance on how, when, and where to assess fees. This means that fee implementation procedures, and the fees themselves, can be inconsistent across not only the public land system, but also within individual agencies.[239] As a result, the public may be required to pay recreation fees in one location, while a nearly identical area elsewhere would not require fees, based entirely on which land management unit the area happens to fall in.

Another policy challenge is that FLREA is only authorized on an annual basis.[240] This means that land managers must operate in an uncertain legal and policy environment, never knowing when their fee authority may change.[241] And because FLREA fees are largely retained at the site of collection, this means that land managers cannot rely on consistent revenues for certain sites. Perhaps unsurprisingly, agency officials have requested that Congress permanently authorize FLREA.[242] For the past several years, a bill doing so via an amendment to FLREA has been making its way through Congress, thus far unsuccessfully.[243]

FLREA also seems to invite land managers to work around its provisions by outsourcing services to third-party concessioners. FLREA provides that despite its normal restrictions, "a third party may charge a fee for providing a good or service to a visitor of a unit or area of the Federal land management agencies in accordance with any other applicable law or regulation."[244] This means that USFS and BLM can contract with third parties to operate recreation sites or areas and collect fees, such as entrance fees, that would otherwise be barred by FLREA's substantive provisions.[245] For example, in *Bark*, the court upheld fees charged by concessioners at sites across six different national forests, even though the fees did not comply with FLREA.[246] But this loophole seems to frustrate FLREA's dual objectives of ensuring that recreation fees are only imposed at fee areas that meet its amenity requirements and that fee revenues are returned to their sites of origin.[247]

Finally, land managers also face seemingly unnecessary barriers to making routine fee increases.[248] For example, when BLM and USFS seek to marginally raise fees to keep up with inflation, they must satisfy FLREA's involved RRAC requirements.[249] In part due to the specificity of these requirements, RRACs often have difficulty finding enough members,[250] which further frustrates the process and has resulted in a backlog of fee proposals in several states.[251] As a result of these implementation challenges, land managers are incentivized to delay needed fee increases, outsource to third parties, or otherwise avoid the fee approval process.

235. *Id.*
236. *See supra* note 18.
237. Press Release, *supra* note 132; Repanshek, *supra* note 132.
238. Ratcliffe Interview, *supra* note 117.
239. *See* Phil Taylor, *Panel Takes Ideas on Reauthorizing Recreation Fees*, E&E News (Apr. 4, 2014), https://democrats-naturalresources.house.gov/media/in-the-news/panel-takes-ideas-on-reauthorizing-recreation-fees.
240. Vincent, *supra* note 148, at 1.
241. Ratcliffe Interview, *supra* note 117; Williamson Interview, *supra* note 132.
242. *See The Federal Lands Recreation Enhancement Modernization Act, Hearing on H.R. ___, Before the Subcomm. on Federal Lands, House Natural Resources Comm.*, 114th Cong. (2015) (statement of Olivia B. Ferriter, Deputy Assistant Secretary for Budget, Finance, Performance, and Acquisition, DOI), https://www.doi.gov/ocl/flrea-draft-bill [hereinafter Statement of Olivia B. Ferriter].
243. The proposed America's Outdoor Recreation Act of 2023 was a bipartisan package encompassing many recreation-related proposals. Among them are select updates to FLREA. Most notably for the purposes of this Article, this bill would permanently authorize FLREA. It would also make significant changes to how FLREA treats commercial outfitter and guide permits. S. Rep. No. 118-79 (2023), *available at* https://www.govinfo.gov/content/pkg/CRPT-118srpt79/html/CRPT-118srpt79.htm.
244. 16 U.S.C. §6813(e).
245. *See supra* Section II.C.2. For a thorough discussion of these issues, see generally Kirschner, *supra* note 210.
246. Bark v. U.S. Forest Serv., 37 F. Supp. 3d 41, 46 (D.D.C. 2014).
247. *See supra* Section I.B.
248. Ratcliffe Interview, *supra* note 117.
249. *See supra* Section II.C.1.
250. Ratcliffe Interview, *supra* note 117; *see, e.g.*, *Forest Service Seeking Committee Members to Advise on Recreation Site Fees*, KBHR News (July 5, 2019), https://kbhr933.com/big-bear-news-kbhr-93-3-102-5/forest-service-seeking-committee-members-to-advise-on-recreation-site-fees/; *see also* Ebbets Pass Scenic Byway Association, *Forest Service Seeking Members for Regional Recreation Resource Committee*, https://scenic4.org/forest-service-seeking-members-for-regional-recreation-resource-committee/ (last visited Dec. 10, 2023).
251. FLREA Report, *supra* note 103, at 31-32.

2. FLREA's Authorization of Recreation Fees Raises Historic Concerns Regarding the User-Pays Model

Numerous stakeholders, including members of Congress, state and local governments, interest groups, and individuals, have opposed both FLREA and its predecessor, Fee Demo, on principled grounds.[252] The user-pays model is at the center of their objections, albeit for a variety of reasons.[253] Some critics see these programs as "the first step in a broad public-private partnership that would lead to increased commercialization of the country's public lands."[254] Echoing historic objections to recreation fees, other stakeholders see FLREA as authorizing double taxation, being a regressive tax, or violating the idea that "public lands belong to the American people and are places where everyone is granted access and is welcome."[255] Finally, as discussed above, FLREA's failure to either consider the socioeconomic impact of recreation fees, or to provide exceptions from its user-pays model for low-income individuals, raises significant equity concerns.

3. Reservation Systems and Recreation.gov Raise Transparency, Functionality, and Equity Concerns

The combination of reservation systems and Recreation.gov raises transparency, functionality, and equity concerns that stack upon the policy concerns raised by FLREA fees themselves. First, Recreation.gov's confidential contract with a third-party concessioner has led to transparency concerns by making it unclear where its fees go, how they are determined, and whether this arrangement benefits the public. This lack of transparency means that public perceptions may or may not be in line with the reality of the arrangement between the land management agencies and Booz Allen, which has contributed to public dissatisfaction.[256]

For example, multiple publications have decried the Recreation.gov contract with Booz Allen as funding the "world's most profitable spy organization."[257] *Wilson*, the recent class action lawsuit, is further evidence of these concerns in action,[258] as are the recent letters sent by members of Congress to agency officials expressing transparency concerns with the Recreation.gov contract.[259] And because studies have shown that transparency and trust are key factors affecting the public's willingness to pay recreation fees,[260] this lack of transparency regarding Recreation.gov almost certainly contributes to public concerns with both the arrangement and the agencies themselves.

Next, Recreation.gov users also face significant practical challenges—both with the system and with availability of reservations more generally. For example, different booking rules across the system have led to so much confusion[261] that a coalition of nearly 400 hotels and international travel organizations sent a letter to DOI complaining that "short booking windows and inconsistent procedures are not workable for international travelers and international tour operators."[262] Users who are savvy with these systems, on the other hand, often set calendar reminders to ensure they are logged in and ready to click "add to cart" six months or a year (to the minute) before their intended visit, to capitalize on booking windows that fill up in seconds. Additionally, because reservation fees are generally quite low, some users make more and longer reservations than they plan to use, thereby securing the flexibility to either use a given reservation or "no-show" as they see fit.[263]

While this strategy works well for those recreationists savvy and wealthy enough to implement it, it also means that many reservations go unused—reservations that could have been available for other visitors. Exacerbating the lack of available reservations, technically skilled actors have developed both personal and commercial "bot" services to "nab" sites before their human competitors can get to them.[264] Unsurprisingly, these barriers to accessing reser-

252. *See, e.g.*, Western Slope No-Fee Coalition, *supra* note 54; *see generally* Kirschner, *supra* note 210.
253. Vincent, *supra* note 54, at 2.
254. *See, e.g.*, Berkeley, California, City Council, Resolution Supporting Sierra Club Efforts to Urge Congress to Restore Needed Public Funding to the Forest Service and Other Federal Public Lands Agencies for Their Recreation Programs (Jan. 12, 1999), https://www.westernslopenofee.org/wp-content/uploads/2015/10/City_of_Berkeley_California.pdf.
255. *See, e.g.*, State of Colorado, Senate Joint Resolution 05-015 (2005), https://www.westernslopenofee.org/wp-content/uploads/2015/10/Colorado_State_Legislature2.pdf.
256. *See, e.g.*, DeFrates, *supra* note 125; *see also* Sonken & Repanshek, *supra* note 128 (comments following the article are further evidence of public dissatisfaction with Recreation.gov and the Booz Allen contract).
257. Drake Bennett & Michael Riley, *Booz Allen, the World's Most Profitable Spy Organization*, Bloomberg (June 21, 2013), https://www.bloomberg.com/news/articles/2013-06-20/booz-allen-the-worlds-most-profitable-spy-organization (reporting that Booz Allen is a multi-industry government contracting conglomerate); *see also* Matthew Rosenberg, *At Booz Allen, a Vast U.S. Spy Operation, Run for Private Profit*, N.Y. Times (Oct. 6, 2016), https://www.nytimes.com/2016/10/07/us/booz-allen-hamilton-nsa.html (reporting that Booz Allen has made billions off its intelligence contracts with the federal government, and noting that "[i]ts clients include every branch of the military and a long list of intelligence organizations, from the [National Security Agency] to lesser-known outfits, such as the National Geospatial-Intelligence Agency, which is essentially a high-tech mapping operation. Overseas, Booz Allen has helped the United Arab Emirates build its own high-tech spy agency.").
258. *See* Complaint, Wilson v. Booz Allen Hamilton, Inc., No. 1:23-cv-00043 (E.D. Va. filed Jan. 1, 2023), https://www.nationalparkstraveler.org/sites/default/files/attachments/recreation.gov_-_as_filed_complaint_0.pdf.
259. Press Release, *supra* note 132; Repanshek, *supra* note 132.
260. *See* Gyan Nyaupane et al., *The Role of Equity, Trust, and Information on User Fee Acceptance in Protected Areas and Other Public Lands: A Structural Model*, 17 J. Sustainable Tourism 501 (2009), *available at* https://www.tandfonline.com/doi/abs/10.1080/09669580802651699.
261. Lauren Sloss, *National Park Booking App Leaves Users Feeling Lost in the Woods*, N.Y. Times (Aug. 1, 2022), https://www.nytimes.com/2022/07/29/travel/nps-recreation-gov.html.
262. Letter from U.S. Travel Association to Deb Haaland, Secretary, DOI, and Chuck Sams III, Director, NPS (July 11, 2022), https://www.ustravel.org/sites/default/files/2022-07/junenationalparks-ustravel_signon-7.7.22.pdf.
263. *See* Robyne Stevenson, *Empty Campground? The One Reason You Still Can't Snag a Spot*, Travel Awaits (Nov. 18, 2021), https://www.travelawaits.com/2709105/why-you-cant-get-a-spot-empty-campground/.
264. *See, e.g.*, Campnab, *Home Page*, https://campnab.com/ (last visited Dec. 10, 2023); *see also* Kurt Repanshek, *Rush to the Outdoors Has Challenged Recreation.gov*, Nat'l Parks Traveler (Mar. 3, 2021), https://www.nationalparkstraveler.org/2021/03/rush-outdoors-has-challenged-recreationgov.

vations disproportionately impact low-income groups and people who are less familiar with outdoor spaces.[265]

Reservation systems also disproportionately impact frequent users of public lands—namely residents of gateway communities. Many of these "locals" choose to live in gateway communities specifically because their recreational interests or occupations are related to nearby public land units. For these individuals, reservation systems present challenges. As noted above, reservations are often simply unavailable, preventing the everyday use locals rely on. Even when timed-entry reservations are available, reservation fees—which often cost $2 per visit—can become a significant concern for those who frequent those areas. For some locals, this means paying several hundred dollars in Recreation.gov fees annually, above and beyond the cost of their America the Beautiful pass.

Additionally, since neither FLREA nor agency policy guidance dictates how reservation systems must be implemented, land managers are empowered to choose the days and times when reservations are required. In the best cases, this allows land managers to require reservations during busy weekends or during summer peak seasons, while also allowing users to make reservation-free, spur-of-the-moment visits so long as they arrive before or after peak hours. In extreme cases, however, land managers are free to require reservations even at times when the land management unit is essentially empty.

IV. A Path Forward: Suggested Legal and Policy Reforms

The upcoming expiration of FLREA's annual authorization in October 2024 gives policymakers a convenient opportunity to update the law around both recreation fees and reservation systems to meet the needs of today's public land system.[266] Land managers expect trends of increased recreational use to continue in coming years. As the chair of the House Natural Resources Committee's Oversight and Investigations Subcommittee stated at a 2022 hearing, there are two ways to address this increased demand—"you can either get more pie, or you can divvy up the pie."[267]

For some public land units, this will mean that reservations are here to stay. For others, it will mean applying a variety of management strategies to mitigate impacts while allowing increased use. For many high-use public land units, new reservation systems will likely be among these strategies. Hopefully, adding new public lands and recreational opportunities to the "pie" will also be part of the solution. In all these scenarios, select updates to FLREA, agency policy, and the Recreation.gov contract will benefit both land managers and the public. This part begins with a discussion of suggested congressional actions, then moves to suggested agency actions.

A. Suggested Congressional Actions

First, Congress should permanently authorize FLREA as proposed in the recently introduced America's Outdoor Recreation Act.[268] Permanent authorization of FLREA will allow land managers to count on their fee authority remaining unchanged, which will promote consistency in fees and reduce the need for administrative hedging.[269] Further, the recreation fees enumerated in FLREA have become normalized on many public lands and provide an important source of funding for the agencies.

Next, Congress should address agency concerns regarding their lack of needed recreation funding. In doing so, Congress should pay special attention to providing supplemental funding for less-used land management units, which are the least able to support themselves on user fees alone.[270] Additional appropriation funds could cover both the costs of maintaining the public land system and the recreational opportunities it provides.[271] Given the importance of public lands to the people of the United States, such appropriations would be money well spent.

Whether or not Congress appropriates additional funds, it should further support the agencies by standardizing the processes by which new fee increases are approved. To do so, Congress should remove FLREA's RRAC requirement and replace it with a more streamlined process applicable to BLM, USFS, and FWS.[272] One option would be to statutorily pre-approve fee increases indexed to inflation every few years. Such measures would not only ensure that the public land system is better funded, but would save valuable agency time that is currently spent navigating the fee approval process.

Congress should also update FLREA to provide a standard procedure for land managers to use when determining whether various recreation fees are appropriate.[273] This will both significantly improve the uniformity of recreation fees and ensure that users receive comparable experiences and services for their fee dollars. First, FLREA should explain the difference between fee sites and fee areas, and which requirements attach to both. In line with this standardization, Congress should also address the "fee area" issue by clarifying how far away from FLREA amenities recreation fees are acceptable, and if amenities are present, whether fees can be assessed on recreationists who do not use them.[274] Finally, in making these updates, Congress should work closely with the agencies to ensure that

265. Sloss, *supra* note 261.
266. Vincent, *supra* note 148, at 1.
267. House Natural Resources Committee, *Lessons From the Field: Overcrowding in National Parks*, YouTube, at 9:05-15 (Dec. 6, 2022), https://www.youtube.com/watch?v=v2tK7SbdpT8&t=769s.
268. S. Rep. No. 118-79, *supra* note 243.
269. *See* Statement of Olivia B. Ferriter, *supra* note 242.
270. Ratcliffe Interview, *supra* note 117. Several states have successfully requested that the Secretary of Agriculture make exceptions from FLREA's RRAC requirements for USFS lands in their states. *See also* FLREA Report, *supra* note 103, at 31.
271. S. Rep. No. 118-79, *supra* note 243.
272. Ratcliffe Interview, *supra* note 117. Also, in 2019, Executive Order No. 13875 instructed the agencies to request that Congress "terminate statutorily mandated [Federal Advisory Committee Act] committees such as Recreation RACs that were no longer deemed necessary or effective." FLREA Report, *supra* note 103, at 30-31.
273. *See supra* Section II.C.2.
274. *Id.*

FLREA's fee structure remains flexible enough that land managers can still sufficiently tailor fee options for their specific situation.[275]

Building on these reforms, Congress should consider modifying or removing FLREA's exceptions for concession holders. Doing so would ensure FLREA's objectives of providing consistent agency revenue and guaranteeing that visitors receive appropriate services for their fee dollars, regardless of whether the entity operating a fee area is the federal government or a contractor.[276] At the same time, removing these exceptions would not prevent the agencies from making agreements with third-party contractors. The agencies would be free to do so and could pay the contractors fair compensation out of any recreation or reservation fees collected. As an additional backstop to overreach, an updated FLREA should also allow the public to appeal agency decisions regarding recreation fees through the agencies' internal appeals processes.

Congress should also update FLREA to provide guidance on whether reservation systems are appropriate and, if so, provide guiderails regarding how they should be implemented. First, Congress should require land managers to apply an adaptive management approach prior to implementing reservation systems.[277] Specifically, land managers should be required to implement measures like improved infrastructure, education, and enforcement first. Only if monitoring and evaluation show that these measures are insufficient to acceptably mitigate impacts should reservation systems be considered.[278]

And if land managers do consider either a new reservation system or new fee, FLREA should require them to perform NEPA analysis, including the consideration of both appropriate alternatives and indirect impacts the new system or fee could have on surrounding areas. Adding a NEPA requirement would provide the public with an important route by which to hold land managers accountable. And because many land managers are already voluntarily choosing to undertake NEPA analysis, or at least gather public input prior to implementing new fees or reservation systems,[279] adding a NEPA requirement to FLREA would merely mandate industry best practices. Not only would this result in better-informed agency decisionmaking, but it would also guarantee public participation and increase uniformity among reservation systems across the public lands.[280] Additionally, because the agencies could create categorical exclusions for routine changes like altering the hours during which reservations are required or adjusting fees for inflation, complying with NEPA need not be overly burdensome on land managers.[281]

If land managers decide to move forward with a reservation system after the NEPA process is completed, FLREA should provide guidance on how these systems should be implemented. Specifically, reservations should only be required during periods of historically high use. And once a reservation system is in place, an adaptive management approach should be required, allowing land managers to adjust reservation requirements as appropriate. These measures will ensure that, where appropriate, reservation systems will remain the minimally invasive administrative tool necessary to achieve management objectives.[282]

Congress should also consider updating FLREA to provide for an annual pass that includes coverage not only for entrance fees, but for reservation fees as well. Such a pass would help address the concerns of locals and other frequent users of the public lands. A reservation fee pass could be implemented as an optional add-on to the America the Beautiful pass, or, as reservation systems become more common, Congress could simply provide that all annual passes also include coverage for reservation fees.[283] One potential drawback of such a pass, however, would be that it could further encourage users to make many reservations (to keep options open, capitalize on booking windows, etc.), then "no-show" to many of them. To address this issue, Congress should work with the agencies to ensure that they develop a system by which to hold "no-shows" accountable, whether it chooses to adopt a reservation fee pass or not.[284]

---

275. Williamson Interview, *supra* note 132.

276. The *Kotab* court found:

> The FLREA was enacted in response to public backlash against its predecessor, the Recreational Fee Demonstration Program, which allowed the Forest Service to charge and collect admission fees "for the use of outdoor recreation sites, facilities, visitor centers, equipment, and services." The public opposed those fees as overly broad, complaining that the Forest Service could collect them from people who wanted access to "undeveloped land, not services and amenities." So "Congress drafted the [FLREA], an 'overly prescriptive' regime designed 'to alleviate concerns of those who no longer trust certain federal land management agencies with the recreation[-]fee authority.'"

Kotab v. Bureau of Land Mgmt., 595 F. Supp. 3d 947, 953-54 (D. Nev. 2022) (citing H.R. Rep. No. 108-790(I) (2004), 2004 WL 2920863, at *18); *see also supra* Section I.B.

277. *See, e.g.*, Byron K. Williams et al., DOI Adaptive Management Working Group, Adaptive Management: The U.S. Department of the Interior Technical Guide (2009 ed.), https://www.doi.gov/sites/doi.gov/files/migrated/ppa/upload/TechGuide.pdf.

278. At a 2022 hearing, Rep. Blake Moore (R-Utah) said that "[o]ur parks should resist the temptation to simply limit the number of visitors who can enter . . . . Instead, we should pursue innovative and common sense solutions that address the challenges of overcrowding while maintaining access to our parks for the greatest number of people." Kurt Repanshek, *House Committee Hears Differing Opinions on How to Solve Park Crowding*, Nat'l Parks Traveler (Dec. 6, 2022), https://www.nationalparkstraveler.org/2022/12/house-committee-hears-differing-opinions-how-solve-park-crowding.

279. *See, e.g.*, NPS, *supra* note 199, where Director's Order 22 discusses public engagement. *See also* NPS, *supra* notes 144-45, where Yosemite and Rocky Mountain National Parks are conducting NEPA analysis for their visitor use management plans.

280. For example, the NEPA analysis could include the likely equity impacts of various alternatives and could lead land managers to implement strategies for mitigation of their adverse impacts on marginalized populations.

281. Categorical exclusions allow land managers to skip certain elements of the NEPA process for actions that previous NEPA analyses have already clearly shown to have insignificant impacts.

282. The "minimum tool" concept emerged with the Wilderness Act's "minimum requirements analysis" provisions, by which land managers are required to select the least invasive management treatment needed to achieve the desired outcomes. Since then, the "minimum tool" concept has been adopted as a best practice in recreation management more broadly.

283. This could be achieved via a supplemental "reservation pass," or through simply rolling the cost of reservations into the cost of all annual passes.

284. One could imagine a feature on Recreation.gov that blocks or cancels future reservations after a certain number of no-shows.

Regarding the Recreation.gov contract, both Congress and the agencies should take action to ensure increased transparency, functionality, equity, and public trust. These objectives could be achieved in a variety of ways. First, Congress could consider whether reservation services can be provided in-house by an agreement between the land management agencies. But while bringing Recreation.gov in-house would largely address transparency and trust issues, such a significant change would likely be a nonstarter with agency staff.[285] Even were online reservation services to move in-house, the effort would ultimately fail if site functionality declined below the status quo, which seems likely given the agencies' lack of expertise with web services.

Accordingly, assuming Recreation.gov continues to be operated via third-party contract, the agencies should ensure that reservation fees are appropriately priced and standardized across the system. Congress should also clarify whether FLREA's requirement that a large percentage of fee revenues be remitted to their site of origin applies to reservation fees. And the agencies should make the nonproprietary portions of the Recreation.gov contract, including as much of the fee structure as possible, publicly available.[286] Congress should similarly require the Recreation.gov contractor to disclose its profits from reservation fees. And finally, the agencies should put increased functionality requirements in place for future Recreation.gov contracts, including addressing the presence of bots.

In updating both FLREA and the Recreation.gov contract, Congress and the agencies should be sure to address the equity impacts of both recreation fees and reservation systems on marginalized and underserved populations. As an initial measure, Congress should update FLREA to require that the agencies consider equity when establishing recreation fees, as it did with the LWCF. Congress should also encourage underserved Americans to access the public lands by providing free or reduced-cost annual interagency passes to low-income individuals, perhaps by automatically attaching parks passes to other federal benefits to encourage low-income individuals to access the public lands.[287] Whether through Recreation.gov, FLREA, or by other means, Congress and the agencies should also take measures to ensure that some amount of on-site reservations are available for less tech-savvy individuals and those without access to a credit card. These updates would go a long way toward making the public land system a more accessible space for all Americans and visitors.

B. Suggested Agency Actions

Agencies should promulgate regulations and improve their internal policy guidance regarding both recreation fees and reservations. First, the agencies should undertake rulemaking to build on the legal structure implemented by Congress, whether it chooses to update FLREA or not. Many gaps left in Congress' legal framework could be filled by the agencies, including defining terms like "fee area" and requiring procedures like NEPA analysis, public participation, and administrative appeals. Next, agencies should put policies in place to ensure that individual land management units do not work around or stretch FLREA's amenity requirements.

Agencies should also conduct internal reviews to discover how they can make their fee and reservation programs more equitable. These measures could include adjusting booking windows, adding reservations set aside for day-prior or day-of use, or growing partnerships with local organizations that support low-income or marginalized populations. Finally, the agencies should expand their recreation management handbooks and manuals to include sections on reservation systems. Such policy guidance would provide visitors with a significantly more predictable and positive experience across the public land system.

V. Conclusion

The future of America's public lands is bright. Public lands enjoy broad support across socioeconomic and political dimensions, and interest in both outdoor recreation and stewardship continues to grow. To best prepare the public land system for this future, Congress and the agencies should make commonsense updates to the legal framework supporting recreation fees on public lands. Such updates would benefit both the public and land managers.

From the starting point of the LWCF, which sought to balance funding public lands with honoring the tradition of free access, the pendulum of U.S. recreation fee policy swung too far toward the permissive with Fee Demo. As a result of Fee Demo's shortcomings, Congress passed FLREA on a time-limited basis, and edged somewhat closer toward the center. Since its initial authorization expired, Congress has been reauthorizing FLREA on an annual basis—but without meaningful changes to its underlying issues.

Thus, Congress should revisit FLREA and update many of its provisions as suggested here. Such updates would provide balance by ensuring that the public land system remains accessible and well cared for, while also providing the agencies with more concrete substantive and procedural direction. By doing so, the public land system can simultaneously be more welcoming to all Americans and better protect the resources and values that make it a national treasure.

285. Williamson Interview, *supra* note 132.

286. Doing so would increase transparency by informing the public on what portion of its fee dollars goes to the Recreation.gov contractor as compared to the agency.

287. For example, Congress could stipulate for free entry, verified though showing a Supplemental Nutrition Assistance Program (SNAP) or Medicaid card upon entry, similarly to how gate agents currently verify active military status.