Association of Outdoor Recreation and Education • High Mountain Institute
The Mazamas • The Mountaineers • The Wilderness Society

April 2, 2014

The Honorable Rob Bishop, Chairman
House Subcommittee on Public Lands and Environmental Regulation
1324 Longworth House Office Building
Washington, DC 20515

The Honorable Raul Grijalva, Ranking Member
House Subcommittee on Public Lands and Environmental Regulation
1324 Longworth House Building
Washington, DC 20515

Dear Chairman Bishop, Ranking Member Grijalva, and Members of the Subcommittee:

The above-listed organizations provide and advocate for outdoor recreation and education opportunities on America's public lands. Through programs offered to both young people and adults, we develop connections between people and America's natural heritage. By providing rewarding outdoor experiences on public lands, we help people grow personally and professionally, enrich their lives and improve their health.

We write to express our views on the reauthorization of the Federal Lands Recreation Enhancement Act, 16 USC 6801 *et seq*., 118 Stat. 3377 (Dec. 8, 2004) ("FLREA"), scheduled to be the subject of a Subcommittee hearing on April 4, 2014. We are interested in the development of this legislation because we believe America's public lands should be readily accessible for recreation by individuals and guided groups, subject to statutory limitations. In our experience, the indiscriminate imposition of fees can have the effect of limiting access. At the same time, we recognize that fees are appropriate in some circumstances, and provide valuable resources to agencies in carrying out their land management responsibilities.

We offer a number of recommendations below that we believe strike an appropriate balance between these two considerations. We respectfully request that this letter be included in the hearing record for the subcommittee.

I. Introduction

FLREA authorizes federal land management agencies to charge fees for recreational use of federal lands, and also authorizes them to retain the revenue generated from those fees for the agency's use without further appropriation. It also authorizes the U.S. Forest Service and Bureau of Land Management to issue special recreation permits, including "outfitter-guide permits," and to charge special recreation permit fees for use of federal lands. FLREA is scheduled to sunset on December 8, 2015.

By accident or design, FLREA has become an important source of revenue for federal land management agencies. Because of recent reductions in agency funding, the agencies are increasingly dependent on FLREA revenue to offset the costs of maintenance on federal lands. If the federal land management agencies were adequately funded, the imposition of recreation fees might be unnecessary.

For that reason, we urge Congress to restore the cuts to agency funding that have occurred since 2010. Although full funding levels are likely much higher, a return to the funding levels of FY2010 would be a reasonable intermediate step towards adequately funding the agencies. Funding the agencies at FY2010 levels is an essential investment in America's $646 billion recreation industry, which supports 6.5 million jobs nationwide. Providing additional funding would reduce the incentives for agencies to charge recreation fees in more areas.

In the absence of increased agency funding, some form of fee collection authority is necessary if the agencies are going to have any chance of addressing their maintenance backlogs. Thus, reauthorization of FLREA is needed. At the same time, FLREA as originally enacted has significant flaws that should be corrected before the law is reauthorized. We discuss these flaws and the resulting controversies below. We also analyze the discussion draft released by the subcommittee and make recommendations for improvement. Our recommendations would allow agencies to charge appropriate fees, but place limitations on that authority to ensure that fees do not become a barrier to the use of public lands.

II. Analysis and Recommendations

A. Cost Recovery for Outfitter-Guide Permits

Section 6802(h) of Title 16, U.S. Code and section 807(a) of the discussion draft authorize the U.S. Forest Service and Bureau of Land Management to issue special recreation permits, which are sometimes referred to as "special use" permits, and include the permits issued to outfitters and guides. Outfitter-guide permits are an important tool for getting people out on America's public lands. Small business owners use these permits to take people rafting, horse-packing and climbing on National Forests and BLM lands. Likewise, nonprofit organizations and universities use these permits to get young people outdoors, provide environmental education opportunities, and fight the obesity epidemic. Together, these organizations play an important role in encouraging and assisting the public in enjoying their public lands, including America's Wilderness areas.

In setting fees for special recreation permits, section 807(b) of the discussion draft authorizes agencies to consider "the costs associated with the activities authorized under 807(a), including—

(1) trail and facility construction;
(2) maintenance;

(3) natural and cultural resource monitoring;
(4) restoration;
(5) emergency response and law enforcement;
(6) signage and user education;
(7) permit administration."

Section 807(b) appears to allow an agency to shift any cost "associated" with the recreational activities authorized under a section 807(a) permit onto an outfitter-guide permit holder. Without more of a limiting principle, this would allow agencies to shift a significantly larger amount of agency costs onto outfitter-guide permit holders than is authorized under current law.

For example, existing Forest Service cost recovery regulations allow the agency to require permit applicants and permit holders to pay "processing fees" and "monitoring fees." 36 CFR 251.58. Processing fees are "based on the costs that the Forest Service incurs in reviewing the application . . . and shall be based only on the costs necessary for processing that application." Section 251.58(c)(1). "'Necessary for' means that but for the application, the costs would not have been incurred." *Id.* Monitoring fees are "based on the estimated time needed for Forest Service monitoring to ensure compliance with" a permit. Section 251.58(d)(1).

Section 807(b) goes well beyond current Forest Service regulations. It would allow agencies to require a guide to pay for the costs of maintaining a trail used by the guide as part of its operations, along with the costs of restoration and law enforcement along that trail, since all of these costs could be "associated" with the guide's permit. An agency could shift these costs onto a permit holder even though they do not satisfy the "but for" test in current law, since agencies are generally required to provide trail maintenance and law enforcement services in places where no permits have been issued. If agencies use their authority in this way, the cost of permits will increase dramatically. This will impact both for-profit and nonprofit outfitter-guide operations, and could make it very difficult for these organizations and businesses to take people out on public lands.

It is worth noting that, under the existing cost recovery authority in 36 CFR 251.58, outfitters and guides already find it challenging to pay for the permits needed to get people outdoors. Section 251.58 requires outfitter-guide applicants to pay significant up-front costs in some circumstances in order to apply for permits. Paying these up-front costs is a substantial burden for many companies and organizations, particularly since doing so does not guarantee that they will receive a special recreation permit. *See* Section 251.58(c)(5).

We recognize the need to charge reasonable recreation fees to offset the costs of permit administration, and to pay for monitoring to ensure compliance with permit terms. However, the open-ended cost recovery authority provided by draft section 807(b) would allow agencies to charge fees for expenses the agency would incur even in the absence of a permit. The resulting increase in fees would make it more difficult for outfitter-guides to provide opportunities for people to get out on public lands.

We urge the committee to reject this open-ended approach, and limit the agency's cost recovery authority to that conferred under existing Forest Service regulations.

B. Public Notification For Outfitter-Guide Permits

Although FLREA authorizes the agencies to issue outfitter-guide permits, many organizations that would like to offer outdoor experiences and environmental education on the national forests have been unable to do so because some National Forests refuse to issue permits. Among the organizations affected are nonprofit outdoor experiential education programs, public schools, university outing programs and nonprofit recreation clubs.

The U.S. Forest Service does not currently have any sort of nationwide listing of where permits are available within the National Forest system. The agency's on-line permit resources are quite limited, even though the agency's web page would be an ideal way to inform the public of permit availability. Consequently, organizations that would like to obtain a permit must contact each individual national forest ranger district to determine if permits are available.

To address these issues, a reauthorized FLREA should establish public notification requirements for outfitter-guide permits. The Forest Service and BLM should be required to develop and operate the following systems:

1. An on-line lookup of permit availability that enables organizations interested in outfitter-guide permits to search by activity, Forest Service ranger district or BLM field office, and state.
2. A web page on the website of every ranger district or field office listing:
    a. Locations within the ranger district or field office where outfitter-guide permits are available.
    b. Locations within the ranger district or field office where outfitter-guide permits are not available, and for each such location, the reason why permits are not available.
3. A list serve or similar mechanism in which interested organizations may enroll to receive email notification of availability of outfitter-guide permits on forests throughout the National Forest or BLM System.

Providing this information to the public in a more systematic way will enable businesses and nonprofit organizations to know where permits may be obtained that will allow them to get more people out on America's public lands.

C. Standard Amenity Recreation Fees and Day Use Fees

The version of FLREA in existing law contains an inherent ambiguity that has generated significant litigation.[1] It authorizes collection of a standard amenity recreation fee for use of an "area" that provides significant recreation opportunities and has all of six listed amenities (parking, toilet, trashcan, interpretive signage, picnic tables, security). However, it prohibits the collection of fees for general access, parking, and traveling through lands and waters without using facilities and services, and also prohibits USFS, BLM and BOR from charging entrance fees. Thus, existing law is internally inconsistent about whether agencies can collect fees from a hiker using a trail within an area that has the six listed amenities if the hiker does not specifically use those amenities.

The discussion draft released by the subcommittee wisely abandons the use of "special amenity recreation fees" in favor of a simplified "day use" fee structure. It also revises the list of prohibitions on day use fees in a way that appears to resolve the inherent ambiguity described above.

Unfortunately, the discussion draft would allow agencies to charge fees in locations where we believe fees are inappropriate. We also think that agencies should be required to provide more documentation when they decide to establish a fee site.

1. Day Use Fees in the Discussion Draft

a. National Volcanic Monuments and National Conservation Areas

Existing FLREA and the discussion draft broadly authorize fees at all National Conservation Areas (NCA) and National Volcanic Monuments (NVM). Some of these sites have little or no amenities. In those instances, charging a fee is not warranted.

In the past, the agencies' authority to charge fees at NCAs and NVMs has been cited as a reason why areas eligible for these designations should not be so designated. When that happens, fees that are intended to assist agencies in their efforts to conserve and maintain these places have the perverse effect of preventing them from being protected.

In managing monuments and conservation areas, agencies should be authorized to charge fees only in those areas that have developed amenities. The discussion draft's definition of "sites of concentrated public use" and "areas of concentrated public use" could be used as the basis for charging fees in these areas, subject to the modifications we recommend below. This would allow agencies to charge fees in monuments and conservation areas that have developed amenities, but would eliminate fees in other areas where fees are not justified.

[1] *Sherer v. U.S. Forest Service*, 727 F. Supp. 2d 1080 (D. Colo. 2010), *U.S. v. Smith*, 740 F. Supp. 2d 1111 (D. Ariz. 2010), *Adams v. U.S. Forest Service*, 671 F.3d 1138 (9th Cir. 2012).

b. Sites of concentrated public use

Although the discussion draft addresses some of the ambiguities that exist in current law, the draft's definition of "sites of concentrated public use" is loose enough to allow the agencies to charge fees at locations that have minimal facilities, and for which there may be little or no public demand. In effect, an agency could charge a hiker a fee at a trailhead with a portable toilet, a trash can, and an interpretive sign.[2] We believe this would encourage agencies to charge fees nearly everywhere on public lands, which undermines the goal of making America's public lands open and accessible to everyone.

We recommend two modifications to the definition of "sites of concentrated public use" to limit the number of locations where fees are charged.

i. There should be a public demand for additional facilities and amenities at the day use fee location. The agency should be required to demonstrate that there is demand for the facilities in order to impose the fee. See our discussion of a fee area plan in Section 2 below.
ii. Fees should be limited to areas that have a permanently installed toilet facility rather than a temporary one. Agencies should not be authorized to drop a portable toilet at a trailhead and begin charging a fee.

2. Public Notice And Comment Opportunities

Under existing law, agency consultations with the public on when and where fees will be imposed and the amount of fees to be charged have not been effective. The Recreation Resource Advisory Committee review process prescribed by existing law does not provide consistent public oversight of the fee system.

The public participation provisions in the discussion draft are a significant improvement. However, we believe the public notice and comment requirements for establishing day use fees should be more robust. In addition to the requirements in the discussion draft, we recommend that FLREA require agencies to produce a short fee area plan when they want to impose a new day use fee, and provide the public with an opportunity to comment on it. This fee area plan should include the following information:

a. A demonstration of public demand for additional facilities and amenities at the day use fee location;
b. An inventory of the amenities in the area;
c. A description of the funding and maintenance needs of the area; and
d. A brief explanation of how the fee revenue will be used.

[2] The Forest Service claims that there is "routine presence of agency law enforcement" everywhere on a National Forest. See Section 804(a)(2)(D). Thus, the requirement that a site of concentrated public use have routine law enforcement is always satisfied, and therefore has no practical effect.

Requiring the agencies to produce these plans will establish a useful baseline and reference point for each agency decision to impose a fee, and provide the public with a basis for providing effective input on whether the fee should be imposed. We urge the committee to include this requirement in reauthorizing FLREA.

D. Fees Charged By Concessionaires

Both existing law and the discussion draft authorize agencies to enter into fee management agreements with nongovernmental entities to facilitate fee collection and processing. However they do not explain how this authorization applies to concessionaires. There is ongoing litigation challenging the Forest Service's policy of entering into concession contracts that allow private companies to charge members of the public to use public lands.[3] In the leading case, the plaintiffs assert that concessionaires are charging fees solely for the availability of amenities and services, and not limiting the fees to situations where those amenities are actually used, thereby subverting the intent of FLREA.[4]

In revising FLREA, the source of concessionaires' authority to charge fees should be clarified, and concessionaires should be subject to the same fee limitations as the agencies themselves. Likewise, the draft bill should require agencies and concessionaires to provide public participation opportunities when concessionaires plan to impose new fees.

E. Expenditures of Fee Revenues

FLREA is ambiguous as to whether Standard Amenity Recreation Fee revenue can be used for trail maintenance, or instead must be used only to maintain the amenities (parking, toilet, trashcan, interpretive signage, picnic tables, security) for which the fees are collected. If limited to the amenities, FLREA revenue provides no relief for the significant trail maintenance backlog on the National Forests, a backlog that was recently documented by the Government Accountability Office.[5] There is also concern that too much of the revenue is used for overhead and administrative costs, rather than for actual maintenance.

The list of permissible expenditures in the discussion draft is essentially unchanged from existing law. Consequently, the ambiguity about the use of FLREA revenue for trail maintenance remains. We urge the committee to revise section 812(a)(3) to specifically authorize the use of FLREA revenue for trail maintenance costs anywhere on the unit in which the fees are collected. This will empower the agencies to use FLREA revenue to help address the trail maintenance backlog and make it easier for people to enjoy our public lands.

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[3] *BARK v. U.S. Forest Service*, Case No. 1:12-CV-01505 (D.D.C. 2012).
[4] *Id.*
[5] Forest Service Trails; Long- and Short-Term Improvements Could Reduce Maintenance Backlog and Enhance System Sustainability, GAO-13-618.

Regarding overhead, the discussion draft limits overhead and administrative costs to five percent of total revenues. However, it then authorizes the use of up to twenty percent of total revenue for "direct fee collection costs." When combined, this means that 25% of total revenue can be used for the costs of administering the fee collection system. This is a significant increase over the 15% authorized under existing law. The law should be written to encourage the agencies to keep administrative costs down and devote as much of the revenue as possible to maintenance and improvement of recreation facilities and trails. We urge the committee to preserve the 15% limit.

F. Stewardship Credits

Section 807(d) would establish a pilot program for providing stewardship credits that would offset the fees owed by a special recreation permit holder when the permit holder agrees to provide maintenance and resource protection work on public lands. We support the development of a pilot program to test this idea.

In some locations, special recreation permit holders provide important services on public lands that make these lands more accessible for average Americans. Currently, they provide this work on a voluntary basis, putting a strain on their small business operations. The pilot program would test the idea of giving these permit holders an additional incentive to undertake trail maintenance and other work on public lands. If the program includes appropriate safeguards, this could benefit the public by improving access.

Section 807(d) builds in some safeguards to ensure that work is done by qualified personnel and in cooperation with local land managers. However, we believe these safeguards should be enhanced to ensure that the agencies see significant benefits from the fee credit system. We urge the following modifications.

1. Section 807(d) should more explicitly state that credits will only be given for work that addresses the agency's priorities, and then only when the work is done to minimum agency standards.
2. Because agencies will receive less revenue under the pilot program, Congress should require the agencies to include in the report required by section 807(d)(2) an evaluation of whether the pilot program has resulted in a net gain for trails and facilities maintenance.
3. As currently written, the pilot program would continue even if it is not producing net benefits. FLREA should authorize agency managers to discontinue the pilot program if it is not producing a net gain in trails and facilities maintenance.

With these modifications, we urge the committee to include this pilot program in the reauthorization of FLREA.

G. Reporting

The reporting provisions in section 813 are a significant improvement over existing law, and we support them. In particular, we support the requirement that agencies produce annual reports on the use of fee revenue and make them available on their websites.

H. Sunsetting

Section 820 would sunset the law after five years. We believe a duration of ten years would be more appropriate and urge the subcommittee to revise the draft accordingly.

III. Conclusion

We thank the Subcommittee for the opportunity to share our views on the reauthorization of the Federal Lands Recreation Enhancement Act.

Sincerely,

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