

January 2014

Can't See the Forest for the Fees: An Examination of Recreation Fee and Concession Policies on the National Forests

Steven J. Kirschner

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>

Recommended Citation

Kirschner, Steven J. (2014) "Can't See the Forest for the Fees: An Examination of Recreation Fee and Concession Policies on the National Forests," *Wyoming Law Review*. Vol. 14 : No. 2 , Article 6.
Available at: <https://scholarship.law.uwyo.edu/wlr/vol14/iss2/6>

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

WYOMING LAW REVIEW

VOLUME 14

2014

NUMBER 2

CAN'T SEE THE FOREST FOR THE FEES: AN EXAMINATION OF RECREATION FEE AND CONCESSION POLICIES ON THE NATIONAL FORESTS

*Steven J. Kirschner**

ABSTRACT

The United States Forest Service is governed by a strict legal framework determining when and how it can charge recreation fees. Current law precludes the Forest Service from charging entrance or parking fees. A system of recreation passes provides public access to all federal lands. Yet, when traveling to thousands of national forest campgrounds and trailheads, visitors must pay an entrance and parking fee, even if they have a federal recreation pass. Delegating authority from the agency to concessionaires—third party land managers—creates a situation in which federal passes do not grant access to the lands they cover. The rise of concessionaires led to concerns over recreation fees touching issues integral to public lands themselves. Additionally, the Forest Service itself circumvents statutes requiring the presence of certain amenities in order to charge recreation fees. These workarounds are the subject of recent and ongoing legal challenges. These activities frustrate the public's trust in land management agencies and leads to instability and confusion for recreational visitors. The legal framework should be modified to create a level playing field for recreation fees, and the concession system itself should be reexamined with an eye towards removing profit-motivated third parties from public land operation.

TABLE OF CONTENTS

I.	INTRODUCTION	514
II.	HISTORY	515
III.	CONCESSION PERMITTING	520

* Juris Doctor, University of Florida Fredric G. Levin College of Law, 2006; Master of Laws, University of Colorado School of Law, 2012.

IV.	THE FEDERAL LANDS RECREATION ENHANCEMENT ACT.....	523
V.	HIGH IMPACT RECREATION AREAS—TESTING THE BOUNDARIES OF THE FEE REQUIREMENT.....	526
A.	Smith v. U.S. Forest Service	527
B.	Adams v. U.S. Forest Service	529
VI.	RECREATION PASSES, PUBLIC COMMENT, AND THE POISON PILL	531
VII.	BRAINARD LAKE CASE STUDY	533
VIII.	WHO SHOULD MANAGE RECREATION INFRASTRUCTURE ON PUBLIC LANDS?	535
IX.	THE FLREA POST-2015.....	544
X.	CONCLUSION	550

I. INTRODUCTION

Deschutes National Forest in Oregon has no campgrounds operated by the United States Forest Service. There are plenty of campgrounds; more than eighty, in fact. But these campgrounds are managed and operated by private entities.¹ Privately operated recreation facilities are not limited to Deschutes. Today, private entities manage more than 2,000 national forest recreation sites.² Drive, hike, ride, or bike into a national forest campground and you are more likely to see an employee of private third parties accepting fees than a Forest Service employee.

The extensive presence of third parties operating recreation facilities on federal lands raises a twinge of discomfort in many recreation users, evincing a sense that something is not quite right. This sense is amplified when recreation users arriving at campgrounds and trailheads find a private company employee asking for entrance and access fees. The Forest Service's stated mission³ and those of third party operators managing recreation sites in the national forests may not stem from the same values and goals. National forests are one of our most precious resources. Is anything lost by entrusting the care and operation of these sites to profit-motivated third parties? If not, do we lose anything essential when third parties become the face of the Forest Service to millions of recreational users enjoying the national forests each year?

This dilemma stems from the regulatory structures governing the agency's ability to administer fees. The Forest Service's statutory framework for

¹ See Terry Richard, *Deschutes Forest Adds Reservable Campgrounds*, THE OREGONIAN (Nov. 16, 2009, 12:55 PM), http://blog.oregonlive.com/terryrichard/2009/03/deschutes_forest_adds_reservab.html.

² See COGGINS, GEORGE ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 961 (2007).

³ "The mission of the USDA Forest Service is to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations." Privacy Act of 1974; New System of Records, 77 Fed. Reg. 24,929, 24,930 (Apr. 26, 2012). A list of vision statements and guiding principles can be found at http://www.fs.fed.us/about_us/mission.html (last visited Aug. 17, 2013).

administering recreation fees prohibits charging national forest visitors an entrance fee.⁴ Additionally, the Forest Service cannot charge a fee for parking at or hiking from a trailhead. Forest Service policy, however, does not require third party operators—concessionaires—to honor certain recreation passes which allow passholders access to all Forest Service lands without paying additional access fees.⁵ And yet, travelling to Brainard Lake National Recreation Area in Roosevelt National Forest in Colorado, requires an entrance fee—whether you are using the facilities or just leaving your car to hike into the surrounding wilderness area. A framework in which concessionaires are allowed to charge entrance fees while the agency itself would not be allowed to do so is made possible by a unique regulatory loophole for third parties.⁶

This article examines the unique relationship between the Forest Service and concessionaires. It begins with a discussion of the Forest Service's history, with a specific eye towards the rise of recreation and concessionaires.⁷ It then examines the Federal Lands Recreation Enhancement Act (FLREA) and the methods by which the agency bends the requirements embodied therein.⁸ Finally, this article discusses the foundational concerns with giving concessionaires control over such a valuable public asset and resources, and proposes a new framework for recreation management.⁹

II. HISTORY

The United States government began setting aside land as “forest reserves” from public domain lands in 1891 with the passage of the Forest Reserve Act.¹⁰ The Reserve Act tasked the Department of the Interior with administering these forest reserves.¹¹ Soon after, Congress passed the 1897 Sundry Civil Appropriations Act, commonly known as the Organic Act of 1897 (Organic Act).¹² The Organic Act created the Division of Geography and Forestry—later known as the Forest Service—within the United States Geological Survey in the Department of Agriculture.¹³ The Organic Act provided a kind of mission statement guiding the new agency and established binding Presidential authority to create forest

⁴ Federal Lands Recreation Enhancement Act (FLREA), 16 U.S.C. §§ 6801–6814 (2013). The FLREA applies to federal recreational lands and waters administered by the Forest Service, the Bureau of Land Management (BLM), and the Bureau of Reclamation. *Id.* § 6801(d)(1).

⁵ See 16 U.S.C. § 6813(d) (2014).

⁶ See *infra* Part IV.

⁷ See *infra* Part II.

⁸ See *infra* Part IV.

⁹ See *infra* Part IX.

¹⁰ COGGINS, *supra* note 2, at 21.

¹¹ *Id.*

¹² See *id.*

¹³ See *id.*

reserves.¹⁴ Under the Organic Act, Presidents shall create national forests only “to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”¹⁵ The Organic Act remained the Forest Service charter for almost a century.¹⁶

Soon after passage of the Organic Act, forester Gifford Pinchot became Chief of the Division of Forestry.¹⁷ Pinchot’s philosophy on forest management emphasized efficiency; he sought to use forest resources as efficiently as practicable.¹⁸ This stance often placed him at odds with advocates not only of extractive resource development, timber companies, and miners, but also the nascent preservationist movement.¹⁹ This philosophy left no room for a recreation interest; indeed, there is no indication that recreation was even the remotest consideration for Pinchot. This philosophy generated a starting point for considering agency evolution on recreation issues.²⁰

Before this evolution could begin, the Division of Forestry needed forests. As the head of the Division of Forestry, later the Bureau of Forestry, within the Department of Agriculture, Pinchot was a forester without forests; as laid out by the Reserve Act, the nation’s forest reserves remained under the purview of the Department of the Interior.²¹ In 1905, after seven years of lobbying from Pinchot, Congress transferred the nation’s 6.3 million acres of forest reserves from the Department of Interior to the Department of Agriculture, creating the national forest system in its current form.²²

The national forest system focused primarily on timber production.²³ This followed the ethos Pinchot laid out in a letter written the day Congress transferred the national forests to the Department of Agriculture. In the letter, Pinchot stated, “the water, wood and forage of the reserves are [to be] conserved and wisely used for the benefit of the home builder first of all”²⁴ The first Forest Service

¹⁴ 16 U.S.C. § 475 (2012).

¹⁵ *Id.*

¹⁶ The Organic Act remained the agency’s charter until passage of the National Forest Management Act of 1976. 16 U.S.C. §§ 1600–1614 (2012).

¹⁷ See COGGINS, *supra* note 2, at 21.

¹⁸ *Id.*

¹⁹ See WILKINSON, CHARLES, CROSSING THE NEXT MERIDIAN 130 (1992).

²⁰ See *infra* notes 29–65 and accompanying text.

²¹ See 16 U.S.C. § 471 (1891), *repealed by* Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1782.

²² See WILKINSON, *supra* note 19, at 126.

²³ See COGGINS, *supra* note 2, at 21.

²⁴ See WILKINSON, *supra* note 19, at 128.

manual, the "Use Book," directed that "timber, water, pasture, mineral and other resources are for the use of the people. They may be obtained under reasonable conditions, without delay. *Legitimate improvements and business enterprises will be encouraged.*"²⁵ Interpreted broadly, this is the first mention of encouraging development of enterprises, including recreation facilities, for profit in national forests.²⁶ Still, the idea of recreation as an important or primary use of national forest resources had not yet taken hold.²⁷

As noted above, the Forest Service was created with a mission statement discussing water and timber, not recreation.²⁸ Finding a specific point at which recreation became an active agency issue is difficult, but the 1915 Occupancy Permit Act (Permit Act) is one possible springboard.²⁹ The Permit Act authorized the Forest Service to issue permits for home sites, resort sites, and similar recreation-oriented permits.³⁰ The agency did not generate a great deal of revenue, and nascent recreation interest carried with it potential to bring much-needed funds to the Forest Service.³¹ The Forest Service, recognizing revenue potential in this growing interest, had pushed for the Act in part as a response to the pressure to "make the agency pay."³² District foresters therefore began inventorying the national forests for sites suitable for recreation development.³³

To accommodate the new recreation interest, the Forest Service had to evolve. From its inception, the Forest Service was, not unsurprisingly, an organization of foresters: men trained in silviculture and similar vocations.³⁴ It lacked voices trained in the disciplines necessary to create a recreation infrastructure: designers of recreation sites, trail builders, and planners, for instance.³⁵ The agency needed to hire personnel trained and prepared to establish this new infrastructure. Faced with budget shortfalls, however, it was unable to do so.³⁶

The increase in recreation for which the Forest Service was preparing occurred quickly as technology and infrastructure advanced. With the advent of the

²⁵ *Id.* (emphasis added).

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See supra* notes 24–27 and accompanying text.

²⁹ HAYS, SAMUEL P., *THE AMERICAN PEOPLE & THE NATIONAL FORESTS* 69 (2007). The Term Permit Act of 1915 is codified at 16 U.S.C. § 407 (2014).

³⁰ HAYS, *supra* note 29, at 69.

³¹ *See id.*

³² *Id.*

³³ *Id.* Author Aldo Leopold served as a district forester for District 3 in the Southwest during this time. *Id.*

³⁴ *See id.* at 70.

³⁵ *See id.*

³⁶ *Id.*

automobile and increased road-building in the national forests, outdoor recreation soon became accessible to all socioeconomic strata.³⁷ Outdoor recreation, with its roots in the late 1910s, accelerated every year—even through the Great Depression—with only a small slowdown during World War II.³⁸ Faced with ever-increasing crowds of car campers, personnel shortage issues rapidly became a problem for the Forest Service.³⁹ Forest Service officials argued ceaselessly for increased funding to accommodate the increasing recreation demand, which soon began to loom inexorably above foresters' heads.⁴⁰

Coping with the recreation demand was an ongoing source of puzzlement and concern for agency officials. “There is no point in trying to explain this recreational urge of our people,” stated befuddled Rocky Mountain region forester John Spencer in 1947.⁴¹ “Its existence and its imperious demands are demonstrated facts which we cannot ignore.”⁴² Indeed, campers became somewhat of a nuisance for a Forest Service thoroughly unprepared for their numbers and persistence.⁴³ Doubly vexing was the fact recreationalists provided little to no income to the agency.⁴⁴

As recreation demand grew, it became apparent the agency had to find a way to either monetize the rapidly growing recreation interest or increase its funding base.⁴⁵ In 1957, the Forest Service unveiled “Operation Outdoors,” a five-year program for national forest recreation development.⁴⁶ The Eisenhower administration strongly supported the plan, and Congress listened; in 1958, Forest Service funding grew from \$4 million to \$9 million annually.⁴⁷ For the first time in its history, the Forest Service could hire a full-time recreation staff, easing pressure on long-suffering foresters.⁴⁸

³⁷ *See id.*

³⁸ *Id.*

³⁹ Recreation visits in the national forests rose from 18 million in 1946 to 52.5 million ten years later. LEWIS, JAMES G., *THE FOREST SERVICE AND THE GREATEST GOOD: A CENTENNIAL HISTORY* 126 (2005). In 2002, the Forest Service hosted 214 million outdoor recreationists. *See* COGGINS, *supra* note 2, at 908.

⁴⁰ HAYS, *supra* note 29, at 71.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *See id.* In some cases, recreationalists cost the Forest Service money and resources by carelessly starting forest fires. *Id.* Indeed, Smokey the Bear made his debut only three years before Spencer's lamenting the inexplicable camping hordes. *Id.*

⁴⁵ *See* LEWIS, *supra* note 39, at 126.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Amidst this increase in recreation, construction demands brought on by World War II and the postwar construction boom led to exponential growth in the annual timber cut.⁴⁹ By 1966, timber cut grew to six times its prewar level.⁵⁰ Mounting pressure on the Forest Service and a realization of the finite nature of the timber resource led to passage of the 1960 Multiple-Use, Sustained-Yield Act (MUSY).⁵¹ The Congressional declaration of purpose opening MUSY reads: "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."⁵² MUSY departed from the Organic Act by explicitly including outdoor recreation as a purpose for establishing national forests.

Recreation demand continually increased following passage of MUSY,⁵³ while federal appropriations for recreation operation and maintenance flat-lined or decreased.⁵⁴ As a result, the agency turned to third parties to help alleviate the financial burden the national forests were becoming.⁵⁵

Agency guidance directed the Forest Service to install "simple, moderate-rate resorts . . . Where public funds are not available for this purpose, *such installations will be permitted by private enterprise, but under permit requirements which retain government control of the type of development and the quality and cost of services rendered.*"⁵⁶ Over the past thirty years, as recreation visits increased, the Forest Service drastically increased reliance on private third parties—concessionaires.⁵⁷ The increase in recreation visits and popularity also led to increased concession management of other profitable recreation facilities, such as heavily visited picnic areas, boat launches, and trailheads.⁵⁸ The end result of this increase is striking. More than half of all Forest Service camping sites—eighty-two percent of camping sites available for reservation through the National Recreation Reservation Service—are managed by concessionaires.⁵⁹ Indeed, many national forests no longer contain any Forest Service-managed recreation sites.⁶⁰ Across the Forest

⁴⁹ See COGGINS, *supra* note 2, at 21.

⁵⁰ See *id.*

⁵¹ See *id.* The Multiple-Use, Sustained-Yield Act is codified at 16 U.S.C. §§ 528–531 (2012).

⁵² 16 U.S.C. § 528 (2012).

⁵³ Tom Quinn, *Public Lands and Private Recreation Enterprise*, USDA FOREST SERVICE 14 (2002), available at <http://www.fs.fed.us/pnw/pubs/gtr556.pdf>.

⁵⁴ *Id.* at 15.

⁵⁵ See *id.*

⁵⁶ *Id.* at 14 (emphasis added).

⁵⁷ See *infra* notes 58–63 and accompanying text.

⁵⁸ Quinn, *supra* note 53, at 23.

⁵⁹ Proposed Directives for Forest Service Concession Campground Special Use Permits, 74 Fed. Reg. 62,736 (Dec. 1, 2009).

⁶⁰ See Richard, *supra* note 1.

Service's Rocky Mountain Region, including lands in Kansas, Nebraska, South Dakota, Wyoming, and Colorado, about sixty percent of all campgrounds are managed by concessionaires.⁶¹ In Colorado, seven national forests covering 14.5 million acres contain 1,268 non-fee sites and 540 fee areas, with 469 recreation sites managed by concessionaires.⁶² Recreation is big business: today, spending by recreation visitors in areas surrounding national forests amounts to nearly \$13 billion per year,⁶³ resulting in a contribution of more than \$14 billion to the United States gross domestic product.⁶⁴

The Forest Service's relationship with third party concessionaires is an indelible aspect of national forest recreation. This relationship developed as a response to an unexpected boom in recreation. This article explores the caveats of concessionaires managing land or facilities. To do this fully, however, first requires discussing the nature of the concessionaire's relationship with the agency and the source of rights or privileges granted under a concession permit.⁶⁵

III. CONCESSION PERMITTING

MUSY, together with the Organic Act, the 1915 Occupancy Permit Act, and the 1976 National Forest Management Act (NFMA),⁶⁶ form the foundation for Forest Service recreation permitting. Under the Organic Act, the Forest Service may regulate "occupancy and use" of the national forests.⁶⁷ Courts interpret this to mean that permits are generally required for conducting recreational activities for profit on national forest land.⁶⁸ Permits to operate government-owned campgrounds and related concessions require additional, specific authority.⁶⁹

With regards to actual on-the-ground management of recreation sites, the Forest Service Manual⁷⁰ and the Forest Service Concession Desk Guide⁷¹ give some insight into agency decision making regarding concession permits. First, the

⁶¹ Proposed Directions for Forest Service Concession Campground Special Use Permits, 74 Fed. Reg. 62,736, 62,737 (Dec. 1, 2009).

⁶² *Id.*

⁶³ U.S.D.A. FOREST SERVICE, FISCAL YEAR 2012 BUDGET OVERVIEW 12 (2012), available at <http://www.fs.fed.us/aboutus/budget/2012/justification/FY2012-USDA-Forest-Service-overview.pdf>.

⁶⁴ *Id.*

⁶⁵ See *infra* Part III.

⁶⁶ 16 U.S.C. § 1600 (2012).

⁶⁷ See 16 U.S.C. § 551 (2012).

⁶⁸ See *United States v. Brown*, 200 F.3d 710 (10th Cir. 1999); see also *United States v. Hells Canyon Guide Service, Inc.*, 600 F.2d 735 (9th Cir. 1981).

⁶⁹ This authority comes from § 7 of the Granger-Thye Act, 16 U.S.C. § 580(d) (2012).

⁷⁰ FOREST SERVICE, FOREST SERVICE MANUAL, FSM 2300—RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT, CHAPTER 2340—PRIVATELY PROVIDED RECREATION OPPORTUNITIES (2006).

⁷¹ FOREST SERVICE, CAMPGROUND CONCESSION DESK GUIDE (1998).

agency can choose to manage a site itself.⁷² Under Forest Service management, operation and maintenance costs are paid from Forest Service funds, and use fees are paid directly to the Treasury.⁷³ The agency can choose to manage the site remotely through the use of a periodically checked fee station.⁷⁴ If on-site presence is required, it can be provided through volunteer hosts or other agency programs. The Forest Service cites two objectives for managing sites in this manner. Forest Service management “benefits the agency by providing a service to the public, and it benefits [the volunteer or host] by offering an opportunity to engage in recreational activities on the National Forests, while contributing to the agency’s recreation program.”⁷⁵ The agency generally utilizes Forest Service management for popular sites without the economy of scale to support a concessionaire-managed site.⁷⁶

Second, the agency can award a permit to a concessionaire to manage facilities.⁷⁷ The agency’s stated objective in awarding permits is to “provide a diversity of recreation activities that emphasizes the forest setting and rustic, natural resource-based recreation opportunities.”⁷⁸ Where a concession involves private operation of government-owned recreation facilities, the government establishes a Granger-Thye concession.⁷⁹ Under Granger-Thye, the agency issues permits for the operation and maintenance of existing government-owned recreation facilities.⁸⁰ Permit holders may make capital improvement additions or changes to government-owned improvements or sites with Forest Service appropriated funds.⁸¹ They may also make improvements to a site contingent on an agreement that improvements and their value accrue to the ownership and benefit of the federal government.⁸² To be successful, Granger-Thye concessions require use and efficiency of operation that ultimately allow recovery of operation and maintenance costs.⁸³

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ FOREST SERVICE MANUAL, *supra* note 70, at 15.

⁷⁹ *Id.* at 22; *see also supra* note 71 and accompanying text.

⁸⁰ FOREST SERVICE MANUAL, *supra* note 70, at 15.

⁸¹ *Id.*

⁸² *Id.*

⁸³ FOREST SERVICE CONCESSION DESK GUIDE, *supra* note 71. This leads to an obvious question: if a Granger-Thye concession requires high enough levels of use to cover operation and maintenance costs, what is the advantage to the public? In discussing recovery of costs and revenue generally, the distinction between government-owned and privately-owned improvements is paramount. The Forest Service “does not have the authority to retain land use fees for concession permits involving privately owned improvements, including the part of the fees attributable to advertising and

When the Forest Service issues a permit to manage land, regardless of type, the legal nature of the right granted is unclear. In general, concession permits do not create vested, protectable property interests.⁸⁴ Instead, the grant is a special use permit; the Forest Service retains significant authority over concessionaires' activities and decisions.⁸⁵

Though the legal nature of the right granted is somewhat unclear, these permits give exclusivity that protects concessionaires from competition with other entities. The relationship between the agency and the concessionaire is analogous to the government's relationship with public utilities. The idea that when private property is "affected with a public interest," it is subject to government regulation and control is a cornerstone of public policy law.⁸⁶ There are many theories as to when the government should regulate private entities in the name of the public interest. The most appropriate theory providing an analogy to the concession relationship is the government function theory, which suggests that regulation is warranted when a business is performing a public or governmental function as an agent of the state.⁸⁷ In such situations, the company is "the substitute for the State" in performing that function.⁸⁸

As applied to recreation enterprises operating on public lands, third-party campground and trailhead operators clearly serve as a "substitute for the State" in their operations. Concessionaires perform a governmental function in managing and overseeing significant portions of federal lands. It is therefore reasonable to conclude that recreation enterprises operating on the public lands—similar to private property used in providing public utility service—are "affected with a public interest."⁸⁹ Thus, the Forest Service, as the agency providing permits and

sponsorship revenues." Advertising and Sponsorship in Connection With Concessions Involving Privately Owned Improvements on National Forest System Lands, 78 Fed. Reg. 27,941, 27,944 (May 13, 2013). Rather, these fees are deposited into the U.S. Treasury. *Id.*

⁸⁴ See *Paulina Lake Historic Cabin Owners Ass'n v. U.S. Dep't of Agriculture Forest Service*, 577 F. Supp. 1188, 1193 n.2 (D. Or. 1983). Therein, the court stated that the law is settled that "special use permits create no vested property rights." The court then analogized special use permits to grazing permits.

⁸⁵ See *Mount Evans Co. v. Madigan*, 14 F.3d 1444 (10th Cir. 1994). The "Crest House" atop Mount Evans in Colorado, a facility constructed by a private company under a special use permit, burned down. The Forest Service decided not to rebuild the house, and the company sued. The court held that the decision not to rebuild was not made in an arbitrary or capricious manner, that the agency retained the authority to prevent the company from rebuilding, and that the decision was supported by the Forest Service's use of significant data in making the decision.

⁸⁶ *Munn v. Illinois*, 94 U.S. 113, 128–29 (1877).

⁸⁷ Tom Quinn, *A Public Utility Model for Managing Public Land Recreation Enterprises*, GEN. TECH. REP. PNW-GTR-543, 14 (2002) (citing *Missouri ex rel. Sw. Bell Tel. Co. v. Public Service Comm'n*, 262 U.S. 276 (1922)).

⁸⁸ *Missouri*, 262 U.S. at 291.

⁸⁹ See Quinn, *supra* note 87, at 22.

authority to operate on the public lands, is well within its power as the regulating entity to regulate prices charged by concessionaires.

IV. THE FEDERAL LANDS RECREATION ENHANCEMENT ACT

Since the increase in recreation demand on national forests, the agency has been searching for ways to “make the agency pay.”⁹⁰ Specifically, the Forest Service needed authority and mechanisms to generate revenue. The Land and Water Conservation Fund Act⁹¹ traditionally governed the authority of the Forest Service to charge fees for recreational access to national forests. In 1996, Congress adopted a three-year recreation fee demonstration program to meet the increased recreation demand without additional appropriations.⁹² The program allowed federal agencies to retain all recreation fees generated on agency land.⁹³ Eighty percent of those fees were to be spent at the unit—in the case of the Forest Service, the national forest—where they were collected.⁹⁴

In 2004, Congress declined reauthorization of the fee demonstration program.⁹⁵ Its replacement, the FLREA,⁹⁶ built upon the basic framework of the fee demonstration program, retained the principle that fees collected should be used locally.⁹⁷ The agency still retains all fees, with sixty to eighty percent used at the unit where they are collected.⁹⁸ The remaining revenue may be used anywhere within the agency.⁹⁹

⁹⁰ See *supra* notes 30–31 and accompanying text.

⁹¹ 16 U.S.C. § 460 (2012). The Land and Water Conservation Fund, which still exists, provides funds for federal, state, and local governments to purchase land, water, and wetlands. Lands purchased through the fund are used to provide recreational opportunities. Revenue for the fund comes largely from fees paid by offshore oil and gas operators. See U.S. FOREST SERVICE, LWCF PURCHASES (2014), available at <http://www.fs.fed.us/land/staff/LWCF/index.shtml>.

⁹² Pub. L. 104-134, § 315 (1996).

⁹³ See *id.*

⁹⁴ *Id.*

⁹⁵ Congress' denial for reauthorization came after numerous complaints and Congressional extensions concerning the fee demonstration program. Common complaints with the program included: (1) fees erect barriers keeping lower-income citizens from enjoying the public lands; (2) charging entrance fees to public lands represents double taxation, charging fees for entrance to lands maintained and set apart by federal tax dollars; and more foundationally, (3) such fees represent a commercialization of public lands anathema to the reasons why the lands were originally set aside. The program, though unpopular, was extended several times for lack of a better solution.

⁹⁶ 16 U.S.C. §§ 6801–6814 (2012).

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

After the widely derided fee demonstration program, trust in the federal land management agencies fee decisions was low.¹⁰⁰ The fees charged under the fee demo program had no overarching structure. While all people are theoretically entitled to enter national forests without paying,¹⁰¹ fee requirements under the fee demo program were not consistent across the federal land management agencies. In a House of Representatives committee report, Representative Richard Pombo stated that the FLREA's specific, prescriptive fee requirements were intended to

alleviate concerns of those who no longer trust certain federal land management agencies with the recreation fee authority. For example, the amendment made clear that the USFS and the BLM will not be permitted to charge solely for parking, scenic pullouts and other non-developed areas while the NPS and the FWS may continue to charge an entrance fee.¹⁰²

Pursuant to these concerns, the FLREA specifically provides that the Forest Service shall not charge an entrance fee for federal recreational lands managed by the agency.¹⁰³ However, the Forest Service may charge for access to specific amenities.¹⁰⁴ Specifically, the FLREA states that “[e]xcept as limited by subsection (d), the Secretary may charge a standard amenity recreation fee for Federal recreational lands and waters under the jurisdiction of the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service.”¹⁰⁵ The Act only allows charges at: (1) national conservation areas; (2) national volcanic monuments; (3) destination visitor or interpretive centers providing a broad range of interpretive services, programs and media; or (4) an area that provides significant outdoor recreation opportunities, substantial Federal investments, where fees can be efficiently collected, and which “contains all of the following amenities: designated developed parking, a permanent toilet facility, a permanent trash receptacle, interpretive sign, exhibit, or kiosk, picnic tables[,] and security services.”¹⁰⁶

The FLREA also contains a list of specific limitations on amenity recreation fees.¹⁰⁷ The Forest Service may not charge any standard amenity recreation fee or expanded amenity recreation fee for federal recreational lands and waters they administer for any of the following:

¹⁰⁰ *See id.*

¹⁰¹ *See* 16 U.S.C. § 6802(e)(2) (2012).

¹⁰² H.R. REP. NO. 108-790(I), at 14 (2004), reprinted in 2004 WL 2920863, at *18.

¹⁰³ *See id.*

¹⁰⁴ 16 U.S.C. §§ 6801–6814 (2012).

¹⁰⁵ 16 U.S.C. § 6802(f) (2012).

¹⁰⁶ *Id.*

¹⁰⁷ 16 U.S.C. § 6802(d) (2012).

- (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.
- (G) For travel by private, noncommercial vehicle over any national parkway or any road or highway established as a part of the Federal-aid System, as defined in section 101 of title 23, United States Code, which is commonly used by the public as a means of travel between two places either or both of which are outside any unit or area at which recreation fees are charged under this Act [16 USCS §§ 6801–6814].
- (H) For travel by private, noncommercial vehicle, boat, or aircraft over any road or highway, waterway, or airway to any land in which such person has any property right if such land is within any unit or area at which recreation fees are charged under this Act [16 USCS §§ 6801–6814].
- (I) For any person who has a right of access for hunting or fishing privileges under a specific provision of law or treaty.
- (J) For any person who is engaged in the conduct of official Federal, State, Tribal, or local government business.
- (K) For special attention or extra services necessary to meet the needs of the disabled.¹⁰⁸

¹⁰⁸ *Id.*

The FLREA is an extremely lucrative fee program for the Forest Service. The agency collects approximately \$65 million annually from recreation fees.¹⁰⁹ One could say the FLREA and the concession system has been the ultimate way to “make the agency pay.”¹¹⁰

V. HIGH IMPACT RECREATION AREAS—TESTING THE BOUNDARIES OF THE FEE REQUIREMENT

Despite seemingly strict amenity requirements, the Forest Service developed methods to circumvent the strict legal fee requirements. A recent line of recreation fee cases indicates courts’ willingness to hold the Forest Service to the FLREA fee requirements despite the agency’s efforts to find ways around the requirement that certain amenities exist at a site before a fee can be charged for use of that site.¹¹¹ After the FLREA’s 2004 enactment, the Forest Service issued interim implementation guidelines for new fee requirements allowing the agency to avoid the FLREA’s amenity requirements.¹¹² The agency authorized itself to create “High Impact Recreation Areas” (HIRA) by consolidating many smaller areas into one larger area.¹¹³ The interim guidelines described a HIRA as:

A clearly delineated, contiguous area with specific, tightly defined boundaries and clearly defined access points (such that visitors can easily identify the fee area boundaries on the ground or on a map/sign; that supports or sustains concentrated recreation use; and that provides opportunities for outdoor recreation that are directly associated with a natural or cultural feature, place, or activity (i.e., waterway, canyon, travel corridor, geographic attraction, the recreation attraction).¹¹⁴

The interim guidelines provided for charging standard amenity recreation fees at HIRAs meeting FLREA requirements.¹¹⁵ The guidelines required that a HIRA provide the six required amenities specified in the FLREA and that those

¹⁰⁹ FOREST SERVICE, 2013 BUDGET JUSTIFICATION, 12–8 (2013), <http://www.fs.fed.us/aboutus/budget/2013/fy2013-justification.pdf>.

¹¹⁰ See *supra* note 32 and accompanying text.

¹¹¹ See *Adams v. U.S. Forest Serv.*, 671 F.3d 1138 (9th Cir. 2012); *Smith v. U.S. Forest Serv.*, 740 F. Supp. 2d 1111, 1118 (D. Ariz. 2010).

¹¹² *Smith*, 740 F. Supp. 2d at 1118. The guidelines can be found in: FOREST SERVICE, *Federal Lands Recreation Enhancement Act—Forest Service Interim Implementation Guidelines* (Apr. 22, 2005), <http://www.fs.fed.us/passespermits/docs/final-guidelines.pdf>.

¹¹³ See *Smith*, 740 F. Supp. 2d at 1118.

¹¹⁴ See *id.* (citation omitted); FOREST SERVICE, *supra* note 109, at 9. It is important to note that the HIRA is a creature entirely of the Forest Service’s making. The HIRA classification was not authorized by the FLREA, and seems to have been created in order to aggregate amenities to charge *de facto* entrance fees at access points at which fees would not be warranted under the FLREA.

¹¹⁵ See FOREST SERVICE, *supra* note 109.

amenities be integrated into and accessible in the area in order to reasonably accommodate visitors.¹¹⁶ The guidelines also stated that though a HIRA could not include an entire administrative unit, such as an entire national forest, a “collection” of recreation sites could be aggregated to create a HIRA.¹¹⁷

In promulgating these guidelines, the Forest Service triggered public comment requirements, including the agency’s own internal regulatory requirement mandated by the FLREA public notice and comment provisions, mandating public notice and comment.¹¹⁸ Despite this, however, the Forest Service did not provide the public with an opportunity for notice and comment.¹¹⁹

In addition to these issues, the substance of the interim implementation guidelines themselves has been the subject of litigation. Two specific cases discuss the guidelines and the use of HIRAs to circumvent the fee requirements: *Smith v. U.S. Forest Service* and *Adams v. U.S. Forest Service*.

A. *Smith v. U.S. Forest Service*

In *Smith*,¹²⁰ the U.S. District Court for the District of Arizona examined an attempt by the Forest Service to maneuver around the FLREA’s amenity requirement by designating a particular recreation area as a HIRA.¹²¹ In 2009, Smith parked his car at the Vultee Arch Trailhead in Arizona’s Coconino National Forest to hike the Dry Creek Trail, intending to backpack overnight and return to his car later without using any amenities.¹²² Upon return, he found a Forest Service citation on his vehicle for failure to pay a recreation fee.¹²³ The citation was issued pursuant to 36 C.F.R. § 261.17 (2010), providing that “[f]ailure to pay any recreation fee is prohibited.” The FLREA provides that failure to pay a recreation fee is a Class A or B misdemeanor,¹²⁴ and the term “recreation fee” includes a standard amenity recreation fee.¹²⁵

¹¹⁶ See *Smith*, 740 F. Supp. 2d at 1119.

¹¹⁷ *Id.*

¹¹⁸ See *id.*; see also 68 U.S.C. § 6802(b)(5) (2014) (requiring the Forest Service to obtain input from Recreation Advisory Committees (RACs) as provided in 68 U.S.C. § 6803).

¹¹⁹ See *Smith*, 740 F. Supp. 2d at 1119. The Forest Service argued that because the pass program used in the area was in existence prior to the enactment of the FLREA, it was therefore exempt from the public notice and comment requirements of the FLREA. See *id.* “A cursory examination of the FLREA,” stated the court, “contradicts this contention.” *Id.* Pursuant to an interagency agreement between the BLM and the Forest Service, the BLM’s RACs had offered to review the Red Rock HIRA. The Forest Service refused.

¹²⁰ *Id.* at 1111.

¹²¹ See *id.*

¹²² *Id.* at 1114.

¹²³ *Id.*

¹²⁴ See 16 U.S.C. § 6811(d) (2014).

¹²⁵ See 16 U.S.C. § 6801(8) (2014).

The defendant challenged the citation, claiming the fee requirement for parking at an undeveloped trailhead to hike and camp in undeveloped locations is void because it is *ultra vires*, or beyond the Forest Service's Congressionally delegated authority under the FLREA.¹²⁶ The defendant argued that the site where he parked did not contain the FLREA required amenities for "areas" where an amenity fee may be charged, and that the fee requirement at the Vultee Arch Trailhead was therefore not authorized by the FLREA.¹²⁷ The defendant next asserted that no reasonable person could be on notice that parking at the trailhead would require paying a fee based on FLREA fee provisions requiring amenities not plainly available at that trailhead.¹²⁸ The Forest Service countered, claiming their interpretation of the FLREA allowed them to create HIRA "areas" where fees could be charged by combining sites without the required amenities with areas that did contain the required amenities.¹²⁹

The court addressed two main issues.¹³⁰ First, the court reviewed the Forest Service's creation and history to determine the agency's authority to impose fees.¹³¹ Second, it considered whether the trailhead was in fact part of the Red Rock HIRA.¹³² Regarding the first issue, the court noted the only existing authority for charging the defendant a fee for use of a National Forest is the FLREA.¹³³ Accordingly, if the fee at issue was beyond FLREA authority, the fee was *ultra vires*, and the citation lacked authorization.¹³⁴ The court ultimately held the fee beyond FLREA authority because the defendant's use of the National Forest was limited to driving to and from a parking area and parking overnight at an undeveloped parking area that contained none of the FLREA-required amenities.¹³⁵ The court reviewed the listed amenities, ultimately concluding that for this reason, the Vultee Arch Trailhead was not an "area" where a fee could be charged.¹³⁶ The FLREA therefore did not authorize the Forest Service to charge the defendant the fee at issue.¹³⁷

¹²⁶ See *Smith*, 740 F. Supp. 2d at 1114.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.* at 1115.

¹³⁰ See *id.* at 1121 (citing *United States v. Mandel*, 914 F.2d 1215, 1220–21 (9th Cir. 1990)).

¹³¹ See *id.* at 1121.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.* at 1124.

¹³⁵ *Id.* at 1121.

¹³⁶ *Id.* at 1124.

¹³⁷ See *id.*

The court then reviewed the Forest Service's argument that the fee was authorized due to the trailhead's inclusion in the Red Rock HIRA.¹³⁸ The Red Rock HIRA encompassed more than 160,000 acres, nearly five times the size of other HIRAs.¹³⁹ It was not a clearly delineated, contiguous area with specific, tightly defined boundaries.¹⁴⁰ It contained portions of three different wilderness areas and ranged through steep canyons with ill-defined boundaries.¹⁴¹ These conditions ran contrary to the requirement that visitors be easily able to identify the fee area boundaries on the ground or on a map.¹⁴² The court ultimately held the Red Rock HIRA beyond the scope of a HIRA as contemplated by the interim guidelines.¹⁴³ The court held that charging an amenity fee anywhere within the Red Rock HIRA was contrary to the clear statutory language of the FLREA.¹⁴⁴ The court therefore dismissed the citation as inconsistent with the FLREA.¹⁴⁵

B. *Adams v. U.S. Forest Service*

In *Adams v. U.S. Forest Service*, the Ninth Circuit confronted a similar issue to those examined in *Smith*: the FLREA's amenity requirement.¹⁴⁶ The case concerned the Mt. Lemmon HIRA in Arizona's Coronado National Forest.¹⁴⁷ The Forest Service collected fees from all drivers parking vehicles along a stretch of the 28-mile Catalina Highway—the only paved road leading to the summit of Mt. Lemmon.¹⁴⁸ Following enactment of the FLREA, the Forest Service designated that stretch of the Catalina Highway an HIRA.¹⁴⁹ This HIRA did contain the FLREA required amenities.¹⁵⁰ The agency therefore maintained fee requirements at the Mt. Lemmon HIRA, with one exception: visitors who drive through the area without stopping are not charged a fee.¹⁵¹ Visitors who drove into the HIRA, parked their cars and hiked or camped in undeveloped areas accessible from the highway were charged a fee regardless of whether or not they used the amenities.¹⁵² Four recreational visitors sued the Forest Service seeking a declaration that the

¹³⁸ *Id.* at 1125.

¹³⁹ *See id.* at 1126–27.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1128.

¹⁴² *See id.*

¹⁴³ *See id.* at 1127.

¹⁴⁴ *See id.* at 1128.

¹⁴⁵ *Id.*

¹⁴⁶ 671 F.3d 1138 (9th Cir. 2012).

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 1139–40.

¹⁴⁹ *See id.* at 1141–42.

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 1142.

¹⁵² *Id.*

Forest Service exceeded the scope of its fee-charging authority under the FLREA by charging fees to those who drove to Mount Lemmon, parked, and accessed undeveloped areas without using the amenities.¹⁵³ The Forest Service moved to dismiss the case, and the motion was granted. The plaintiffs appealed to the Ninth Circuit.¹⁵⁴ The issue on appeal was whether the Forest Service violated the FLREA by collecting a standard amenity recreation fee for solely parking and accessing undeveloped areas in the Mt. Lemmon HIRA.¹⁵⁵

On appeal, the Ninth Circuit recognized that the FLREA permits the Forest Service to charge a standard amenity recreation fee in an area with amenities and characteristics described in the Act, even though those stated amenities were not accessible along the exact stretch of the highway where the plaintiffs parked.¹⁵⁶ The court further noted, however, that the FLREA specifically prohibits the Forest Service from charging a fee—even in a place where a § 6802(f) would permit it—for “certain activities or services.”¹⁵⁷ Section 6802(f) provides that even in locations where all listed amenities are present, the Forest Service still cannot charge a fee solely for parking, passing through, picnicking, or camping where parties are not actually taking advantage of any listed amenities.¹⁵⁸ As noted above, the FLREA also prohibits fees, among other things: “[f]or 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;” and “[f]or camping at undeveloped sites that do not provide a minimum number of facilities and services as described under 16 U.S.C. § 6802(g)(2)(A).”¹⁵⁹

The Forest Service argued that the fee at issue was not “solely for parking” because the HIRA included the listed amenities, whether or not visitors used those amenities.¹⁶⁰ If the agency could charge fees for parking in a HIRA containing the listed amenities, however, this would run contrary to the FLREA’s prohibition on fees charged solely for parking. This interpretation would weaken the fee prohibition and defy the legislative intent behind that prohibition.¹⁶¹ According to the court, the FLREA contemplates individuals entering areas offering the listed

¹⁵³ *Id.* at 1140.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* This is the essential quality of the Forest Service’s HIRA program. The listed amenities are present in the HIRA, though they may not be present at the exact point at which a visitor parks or accesses the area.

¹⁵⁷ 16 U.S.C. § 6802(d)(1) (2012).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See Adams*, 671 F.3d at 1144.

¹⁶¹ *Id.*

amenities without taking advantage of those amenities.¹⁶² Allowing the Forest Service to operate under its advocated interpretation ignores and negates the statutory fee charging requirements.¹⁶³ The Ninth Circuit, citing the freestanding prohibition on fees for the listed activities or services, ultimately held the FLREA unambiguously prohibited the Mount Lemmon fee structure.¹⁶⁴

These cases show the agency's attempts to circumvent the FLREA fee requirements. They also demonstrate the growing backlash against attempts to monetize access to federal lands. In addressing the issue of paying to access federal lands, the FLREA put into practice a powerful incentive for the Forest Service to continue increasing use of third party management in national forests.

VI. RECREATION PASSES, PUBLIC COMMENT, AND THE POISON PILL

The Forest Service's HIRA program is not the only way the agency avoids the amenity fee requirements. The FLREA itself contains a brief but incredibly powerful clause allowing the agency, in cooperation with concessionaires, to circumvent the fee and amenity requirements of the Act altogether. To understand the impact of this clause, one must explore the additional programs the FLREA established, specifically the recreation pass program and public comment process.

The FLREA does more than just delineate circumstances under which the Forest Service can charge fees; it also creates a system of recreation passes granting access to federal lands.¹⁶⁵ For example, the America the Beautiful pass, also known as the interagency pass, covers entrance and standard amenity recreation fees for all federal recreational lands and waters for which a standard amenity recreation fee is charged.¹⁶⁶ The FLREA makes the America the Beautiful pass, normally \$80, \$10 for senior citizens and free to disabled persons.¹⁶⁷ The FLREA provides for establishing other site-specific and regional passes covering entrance and standard amenity fees for particular federal lands and waters.¹⁶⁸

In addition to the recreation pass program, the FLREA also establishes a process for public notice and comment on recreation fees. To foster public participation in fee decisions, the FLREA states that prior to establishing a new fee area, the agency must promulgate guidelines for public involvement and agency

¹⁶² *Id.* at 1144–45. The court cited § 6802(d)(1)(D) (2012), specifically prohibiting fees for those driving, walking, riding or boating through an area without using facilities or services.

¹⁶³ *Id.* at 1145.

¹⁶⁴ *Id.* at 1143.

¹⁶⁵ *See* 16 U.S.C. § 6804 (2012).

¹⁶⁶ *Id.* at (a)(1).

¹⁶⁷ *Id.* at (b).

¹⁶⁸ *Id.*

procedures for informing the public about fee revenues.¹⁶⁹ These guidelines must be published in the *Federal Register*.¹⁷⁰ Furthermore, the FLREA requires the agency provide the public with “opportunities to participate in the development of or changing of a recreation fee.”¹⁷¹ The FLREA requires the agency publish notice in the *Federal Register* regarding establishment of a new recreation fee area six months prior to the fee taking effect.¹⁷² Notice regarding changes to existing FLREA fees must be published in local newspapers and publications near the site of the proposed change.¹⁷³ The FLREA further establishes Recreation Resource Advisory Committees (RRACs).¹⁷⁴ RRACs make recommendations to the Secretary of Agriculture regarding standard amenity recreation fees and expanded amenity recreation fees whenever these recommendations relate to public concerns—broad concerns which include implementation or elimination of fees and the expansion of fee programs.¹⁷⁵

After establishing the recreation pass and public notice and comment programs, the drafters of the FLREA also included the FLREA, containing a brief passage, a poison pill that—almost as an afterthought given the extensive presence of third-party concessionaires on the public lands—casts a great deal of doubt on these programs and the law itself. The passage provides “[n]otwithstanding any other provision of this Act, . . . 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.”¹⁷⁶ Quite simply, concessionaires are not required to honor *any* passes for standard amenity recreation fee day-use sites, nor are they required to participate in public notice and comment. As noted above, *Adams* and *Smith* arose out of controversies on federal land administered by the Forest Service.¹⁷⁷ Had the lands in question been run by a concessionaire, the outcomes could—and probably would—have been different. It seems that given the poison pill—the “notwithstanding” clause—a concessionaire can charge entrance fees for national forest visitors, thereby completely circumventing the FLREA’s amenity fee requirements.¹⁷⁸ This renders useless all of the protections, passes, and incentives provided for in the FLREA, raises obstacles to the public’s use of their lands and nullifies the law’s drafters’ attempts to subsidize and encourage outdoor recreation.

¹⁶⁹ *Id.* at (c).

¹⁷⁰ *Id.*

¹⁷¹ 16 U.S.C. § 6803 (2012).

¹⁷² *Id.* at (b).

¹⁷³ *Id.*

¹⁷⁴ *See id.* at (d).

¹⁷⁵ *Id.*

¹⁷⁶ 16 U.S.C. § 6813(e) (2012).

¹⁷⁷ *See supra* notes 109–63 and accompanying text.

¹⁷⁸ *See* Bobby Magill, *USFS will no Longer make Passholders pay at Brainard, Bellaire, Chambers Lake Fee Areas*, THE FORT COLLINS COLORADOAN, May 24, 2013.

VII. BRAINARD LAKE CASE STUDY

As an illustration of the on-the-ground consequences of concessionaire exemptions from the FLREA's requirements, consider Brainard Lake National Recreation Area near Ward, Colorado. Brainard Lake is a glacial lake surrounded by a subalpine forest in a spectacular, glacially carved valley.¹⁷⁹ The recreation area includes several campgrounds, hiking trails, developed trailheads with bathroom facilities, and parking.¹⁸⁰ Brainard Lake is run by concessionaire American Land and Leisure.¹⁸¹

Brainard Lake serves as an access point to many trails within the Indian Peaks Wilderness Area.¹⁸² Like the areas previously discussed, visitors must pay for access to Brainard Lake regardless of whether or not they use any of the provided amenities.¹⁸³ Hikers and backpackers entering the wilderness must park at Brainard Lake and pay an entrance fee.¹⁸⁴ No consideration is given to whether visitors are coming to spend the day at Brainard Lake and use facilities located therein or arriving simply to leave a vehicle at the trailhead for a hiking or backpacking trip. Furthermore, until a 2013 agreement with the Forest Service, American Land and Leisure planned to refuse to honor the America the Beautiful pass.¹⁸⁵ This agreement notwithstanding, the concessionaire could have chosen to not honor the pass.¹⁸⁶ All of this is made possible by the "notwithstanding" clause—the poison pill of the FLREA.¹⁸⁷ It is difficult to believe this consequence was unforeseen or even unintended. The Forest Service could easily remedy this situation. Nothing written in the FLREA ("Notwithstanding any other provision *of this Act . . .*")¹⁸⁸ prohibits the Forest Service from enacting its own regulatory provisions imposing all of the FLREA's amenity requirements in permits issued to concessionaires who wished to charge fees. Indeed, the agency's internal rulemaking process to enact such a provision would not even require congressional approval.

The "notwithstanding" clause, unlike the amenity fee issues described above, has not been challenged. While plaintiffs challenge the entrance/amenity fee issue in court, the "notwithstanding" clause and Forest Service policy have made it difficult if not impossible to challenge concessionaires' ability to completely

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ FOREST SERVICE, BRAINARD LAKE RECREATION AREA, www.fs.usda.gov/goto/arp/brainard (last visited Apr. 30, 2014).

¹⁸² *Id.*

¹⁸³ *See supra* notes 124–68 and accompanying text.

¹⁸⁴ *See supra* notes 124–68 and accompanying text.

¹⁸⁵ Magill, *supra* note 178; *see supra* Part VI.

¹⁸⁶ *See* 16 U.S.C. § 6813(e) (2012).

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* (emphasis added).

ignore recreation passes. The agency recognized the problems inherent in allowing concessionaires to ignore the America the Beautiful pass, which covers entrance fees for all recreational lands and waters where those fees are charged.¹⁸⁹ In a series of proposed directives issued in 2009, the agency stated:

A converse problem has emerged with [Special Amenity Recreation Fee (SARF)] day use sites that are operated as concessions. After enactment of (sic) REA, the Forest Service took the position that concessioners should not be required to provide free use at SARF sites to any Interagency Pass holders. There were several reasons for this policy, including the need to (1) Maintain eligibility for the regulatory exemption from the Service Contract Act at 29 CFR 4.133(b) by not requiring concessioners to provide extensive free services; (2) honor the terms under which these concessions were offered; and (3) maintain the economic viability of concessions.

However, not requiring concessioners to honor Interagency Passes at SARF day use sites has resulted in misunderstanding by some Interagency Pass holders, who expect to have their passes honored at all SARF day use sites. The problem has created a dilemma for the Forest Service. The Agency believes that all pass holders should understand how their passes will be honored at concessions. Additionally, the Agency believes that holders of the Interagency Pass have a reasonable expectation that their passes will be honored at all SARF day use sites.

However, it would not be economically viable to require concessioners to provide free use to all Interagency Pass holders. Not only were these costs not anticipated when the applications for these concessions were submitted, but these requirements, in addition to the camping fee discount, would be detrimental to the economics of the concessions and could render many of them nonviable. Furthermore, although camping fees are the primary source of revenue for most concessions, for some, the primary source of revenue is day use sites. Concessioners are concerned that the Agency will remove these sites from concessions to satisfy the expectations of Interagency Pass holders and thus eliminate viable business opportunities.¹⁹⁰

¹⁸⁹ Proposed Directives for Forest Service Concession Campground Special Use Permits, 74 Fed. Reg. 62,736, 62,737 (Dec. 1, 2009); *see also* 15 U.S.C. § 6804 (2012); *Smith*, 740 F. Supp. 2d at 1117.

¹⁹⁰ Proposed Directives for Forest Service Concession Campground Special Use Permits, 74 Fed. Reg. at 62,738.

The increasing concentration of concessionaire-operated sites in the national forests combined with the FLREA's "notwithstanding" clause perverts the purposes for which the America the Beautiful pass was created by not allowing universal use. While the FLREA takes strong steps to open federal lands to senior citizens and persons with disabilities by offering discounted or free passes and steps to foster public involvement in fee decisions,¹⁹¹ the practical application of the "notwithstanding" clause completely eradicates those goals. Additionally, the concessionaire exemption contradicts the FLREA goals. As noted above, the FLREA was intended to restore public trust in the land management agencies and establish a stable framework for administering recreation fees.¹⁹² Permitting concessionaires to skirt fee requirements, ignore recreation passes, and avoid public participation requirements engenders mistrust in the federal land management agencies' ability to wield fee authority in an equitable manner. Brainard Lake serves as an example where concessionaires seeking to ignore the fee system established in the FLREA, use the poison pill to do so. The disconnect between provisions intended to ensure universal access to federal lands and third parties' ability to skirt fee requirements raises the question—who is the proper steward of recreation infrastructure in the national forests?

VIII. WHO SHOULD MANAGE RECREATION INFRASTRUCTURE ON PUBLIC LANDS?

Given that concessionaires can freely ignore fee requirements, it seems proper to ask whether concessionaires are indeed the proper parties to manage recreation infrastructure. Why are profit-motivated third parties given free rein and a friendly regulatory environment under which to operate on federal lands? If enough money is available to permit extensive development on recreational lands and permit concessionaires to make a profit, it would be simpler (and cheaper) for the agency itself to handle these responsibilities. However, the agency may argue that allowing concessionaires to run things is the only sustainable way to accommodate the ever-increasing public demand for outdoor recreation on public lands, given declining agency resources and current federal budget cuts.

Internal agency documents certainly seem to support using concessionaires in light of the agency's current situation.¹⁹³ The agency's 1988 National Recreation Strategy expressed a desire to attract new sources of financing for recreation investments.¹⁹⁴ The agency wanted investors to seek out new funding sources as an opportunity to provide "quality service while realizing a reasonable return."¹⁹⁵ Shortly afterwards, in 1992, an interagency document stated that the "mission of

¹⁹¹ See *supra* notes 177–83 and accompanying text.

¹⁹² See H.R. REP. NO. 108-790(I), *supra* note 102, at *18; see also *supra* notes 106–09 and accompanying text.

¹⁹³ See Quinn, *supra* note 87.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

the Forest Service is to provide for recreation by attracting private capital.”¹⁹⁶ How this focus can be squared with the agency’s other mission statements, such as those asserted in the Organic Act, MUSY, and NFMA is unclear.

The steady increase in concession management represents gradual acceptance by unit-level managers that concessionaires offer the only alternative to closing facilities in the face of slowing agency funding. In 1997, a letter from agency chief Mike Dombeck provided a glimpse into the struggle between increasing the presence of profit-motivated third parties on the national forests and maintaining the agency’s mission.¹⁹⁷ Referring to the regions’ participation in the fee demonstration program, Dombeck wrote:

Another strategy is to encourage an expanding role for the private sector in delivering services in national forest settings. Use of concessions is a key tool for providing benefits and services to our customers, concessions also directly contribute to ecosystem protection and enhancements while promoting economic strength and stability in the communities we serve.¹⁹⁸

Dombeck refers to recreational users of national forests not as guests, users, or recreationists, but explicitly as “customers.”¹⁹⁹ This distinction highlights the Forest Service’s view of recreation users as a revenue stream. In its 2012 fiscal year overview, the agency stated that it “works to efficiently maximize limited resources and create a high return on investment for the American taxpayer.”²⁰⁰ The agency does not elaborate on the methods used—such as the increased partnership with concessionaires—to “create a high return on investment” and serve its “customers.”

A growing coalition of public lands users, nonprofits, and local organizations—the very “customers” referred to in the letter quoted above—are rallying against what they see as the industrialization and commercialization of the public lands.²⁰¹ This outlook is seen in comments to the proposed Forest Service direc-

¹⁹⁶ *Id.* (citing U.S. DEP’T OF THE INTERIOR, *Report of the Concessions Management Task Force Regarding Commercial Recreation Activities on Federal Lands* (1992)).

¹⁹⁷ Letter from Mike Dombeck, Chief, USDA Forest Service, to Regional Foresters (Feb. 25, 1997) (on file with author).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ U.S.D.A. FOREST SERVICE, *supra* note 63, at 2.

²⁰¹ See WESTERN SLOPE NO-FEE COALITION, “WHOSE FORESTS ARE THEY, ANYWAY?:” AN ANALYSIS PUBLIC RESPONSE TO PROPOSED CHANGES IN INTERAGENCY PASS POLICY AT CONCESSIONAIRE-MANAGED FOREST SERVICE RECREATION SITES (2010), *available at* http://www.westernslopenofee.org/pdfuploads/Concessionaire_Issues_White_Paper.pdf.

tives discussed above.²⁰² The proposed directives sought to change the discount terms at concessionaire-managed Forest Service campgrounds for holders of senior and disabled passes as well as the interagency pass.²⁰³ If enacted, the directives would change agency policy so that instead of being required to offer holders of senior and disabled passes a fifty percent discount, they would only be required to offer a ten percent discount.²⁰⁴ Public comments were diverse, but overarching themes included a desire to keep the national forests free from commercialization, as well as a fierce opposition to the increasing presence of private entities as land managers.²⁰⁵ A sampling of the comments includes: “I believe the awarding of contracts to administer campgrounds and other public services should be reversed and returned to supervision by forest service [sic] employees . . . No commercialization of campgrounds, now or ever;”²⁰⁶ “Our national public land system should not be managed by third party concessionaires. That job was given to the specific agency to provide the best management possible for the land and for the people. Please, do your job;”²⁰⁷ and

I am dismayed by the general movement toward privatization which has inundated our government over the years. I fondly remember the days when Forest Service employees, not private contractors, greeted campers such as myself. Those employees loved the woods and were instrumental in instilling that love and appreciation into millions of visitors to our country's outdoor spaces. Concessionaires fulfill no such role;²⁰⁸

Concessionaire operated sites typically reflect a higher fee structure than those operated by in-house Forest Service employees. Their profit motive seems to be the modus operandi. In addition, the concessionaire operated sites tend to isolate the Forest Service from the day to day management of the area and limits their ability to respond to recreational issues;²⁰⁹

The concessionaires make plenty of money and I, personally, have been disappointed in the manner some of them are keeping our campgrounds My suggestion would be to get rid of

²⁰² See *supra* Part VII.

²⁰³ The interagency pass, also known as the “America the Beautiful” pass, was created by the FLREA. See 16 U.S.C. §§ 6801–6814 (2012).

²⁰⁴ Proposed Directives for Forest Service Concession Campground Special Use Permits, 74 Fed. Reg. 62,736, 62,739 (Dec. 1, 2009).

²⁰⁵ See WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

²⁰⁶ WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5–6.

²⁰⁷ WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

²⁰⁸ WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

²⁰⁹ WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

cessionaires and turn the campgrounds back to the Forest Service and let us have the campground receipts to maintain and improve campgrounds.²¹⁰

Of the 117 comments received via email, 116 opposed the changes.²¹¹ Of the 151 comments received via regular mail, 150 opposed the changes.²¹² Even the concessionaire firm Cradle of Forestry submitted a comment opposing the proposed directives; they feared the policy change would anger its customers and create problems for their employees.²¹³ After the comment period closed, the Forest Service withdrew the proposed directives citing public opposition.²¹⁴ This shows that the agency considers citizen and interest group perspectives in its decision-making process regarding concessionaires. It further evidences a potential slowing of the shift of authority to concessionaires.

Still, change is slow for the Forest Service. Programmatic review of recreation fees and concession programs is lacking even after cases like *Adams* and *Smith*. In response to each successful challenge, the Forest Service changed policies at the unit level. The agency, however, has been slow to take broad action.

In 2013, the Forest Service issued new directives regarding concession recreation services.²¹⁵ These directives are unlikely to assuage the fears of those who believe that agency policy has skewed too far towards privatization and commercialism. The directives expand the rights of concession permit holders to advertise in certain buildings, winter sports facilities, and other recreation

²¹⁰ WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5. This comment is especially telling, as it was written by a Forest Service employee.

²¹¹ WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

²¹² WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5. The vast majority of comments—3,833 in total—were submitted through an online comment system at the regulations.gov website. Of these, the Western Slope No-Fee Coalition reviewed every hundredth comment, 38 in total. Of these 38 comments, only one was supportive of the proposed directives. This comment came from Steve Werner, the vice president of American Land and Leisure, the concessionaire that operates Brainard Lake. In support of the proposal, Mr. Werner argued that concessionaires provide a significant savings to the agency by absorbing operational and payroll costs. To the point that concessionaires are not required to honor passes, Mr. Werner argued that concessionaires do not see any revenue from pass sales. As a concession to senior and disabled passholders, Mr. Werner proposed that concessionaires offer a 10 percent discount to these passholders at standard amenity recreation fee day use sites. WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 29. After a brief search, the Western Slope No-Fee Coalition found at least ten online comments containing identical wording to Mr. Werner's letter, all of which were submitted by individuals affiliated with concessionaires. WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 4.

²¹³ WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

²¹⁴ WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

²¹⁵ Advertising and Sponsorship in Connection with Concessions Involving Privately Owned Improvement on National Forest System Lands, 78 Fed. Reg. 27,941, 27,941 (May 13, 2013).

facilities such as marinas.²¹⁶ The new directives run contrary to former Forest Service directives prohibiting all outdoor advertising except posting of available services and accommodations.²¹⁷

In the notice of the new directives published in the *Federal Register*, the agency again acknowledged that the majority of the comments weighed against increased commercialization.²¹⁸ “Most respondents stated that [the Forest Service] and other Federal lands should be a refuge from the constant commercialism in their daily lives and that advertising detracts from the natural environment they seek when visiting the [national forests].”²¹⁹ In the notice, the agency responded to the public comments opposing the directives specifically acknowledging that general outdoor advertising was inappropriate in the national forests, but argued that limited advertising pursuant to the new directives provided “a useful public service that would not otherwise be available.”²²⁰ More fundamentally, the agency stated that it “sees a public need to promote public interest and participation in management of [Forest Service] lands.”²²¹ The Forest Service stated this need could be met by increased advertising pursuant to the directives and “sponsorship of events, projects, and programs that provide for evaluation of solutions to specific natural resource management problems, increase conservation awareness, or promote public safety.”²²² The agency did not expand upon this statement, but it went on to provide a glimpse into its priorities by stating that “[w]ithout sponsorship opportunities, these endeavors might not provide a return on investment for concessioners and therefore most likely would not be undertaken.”²²³ The text left unclear exactly what kind of endeavors are contemplated as appropriate. In any event, these new directives show that despite overwhelming public opinion against such action, the agency is moving towards increased entanglement with concessionaires.

The debate over concessions and the direction the Forest Service takes moving forward hints at the broader issue: what is and what should be the role of private enterprise on public lands? Professor Joseph Sax argues that the debate is one over whether questions of recreation demand should be met from either an entrepreneurial perspective or from a public policy perspective.²²⁴ This entrepreneurial perspective centers on the idea that privatization—the process by

²¹⁶ *Id.*

²¹⁷ *Id.* at 27,942.

²¹⁸ *Id.*

²¹⁹ *Id.* at 27,943.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ JOSEPH A. SAX, MOUNTAINS WITHOUT HANDRAILS 70 (Univ. of Mich. Press 2011) (1980).

which certain public services and functions are transferred from the government to private-sector providers—is a tool capable of controlling costs and improving performance.²²⁵ Proponents of privatization argue that shifting government services to the private sector allows businesses to harness market competition, thereby providing better service at lower costs.²²⁶

Specifically, proponents of privatization see federal ownership of public lands as wasteful.²²⁷ They argue that the federal government losing billions in the course of managing federal land assets is unacceptable.²²⁸ Furthermore, they argue that government management has actually been deleterious to the ecological health of public lands.²²⁹ Proponents point to the General Service Administration's competitive contracting system as justifying the increased presence of private entities on the public lands.²³⁰ After adopting a competitive contracting program in the 1980s providing maintenance services to various agencies, those agencies realized savings of between forty and fifty percent over the cost of custodial work with their own staff.²³¹ Contracting, could therefore lead to similar land management agency savings. Indeed, through contracting out routine services, the Forest Service has found more time, money, and staff to devote to duties higher on the agency's priority list.²³² Those in favor of increasing concessionaire presence further argue that because contracting saves the agency money, the agency can do more with ever-decreasing budget allocations.²³³ Whether the concession system is actually saving money, and whether concessions are the most efficient way to use the agency's money in the first place is at best unclear. Data that would answer this question are difficult to come by, and the government has not conducted a programmatic study comparing agency management with concession management.

²²⁵ Ronald D. Utt, *Transferring Functions to the Private Sector*, in HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP IV: TURNING IDEAS INTO ACTIONS (Stuart M. Butler & Kim R. Holmes, eds., Heritage Found. ed. 1997).

²²⁶ See WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

²²⁷ See Terry L. Anderson et al., *How and Why to Privatize Federal Lands*, 363 POLICY ANALYSIS 1, 2 (1999), available at <http://www.cato.org/pubs/pas/pa363.pdf>.

²²⁸ *Id.*

²²⁹ *Id.* The justifications for this argument are curious. The CATO paper cited cites a Montana study that the state of Montana—not a private entity by any means—did a better job protecting watersheds from logging than did the Forest Service. Not mentioned is the idea that it would be difficult to convince a private, profit-motivated land manager to manage a forest for watershed protection—certainly not a profitable end—in the first place.

²³⁰ See Utt, *supra* note 225.

²³¹ *Id.*

²³² *Id.* No figures are given to support this conclusion.

²³³ The agency's budget between FY2011 and FY2012 has declined approximately four percent. See U.S.D.A. FOREST SERVICE, *supra* note 200, at 2.

Disregarding the question of efficiency, concessionaires are a significant and growing presence on federal lands. It is reasonable to assume that when given the opportunity to increase its presence on these lands, a concessionaire with at least some profit motive will usually choose the path leading to increased revenue. However, the mere existence of a profit motive does not necessarily mean the management philosophy of concessionaires excludes the health of the land and the mission of the Forest Service. In managing land, what is best for the land and for the public often intersect. A concessionaire might not advocate recklessly building additional facilities on land if it is clear those additional facilities will take away from the intrinsic attraction and value of the land. This course of action could reduce the number of recreational visitors to that land and ultimately lower the concessionaire's bottom line.

It is not necessarily true that additional facilities take away from the attractiveness and intrinsic value of a recreation site though. Recreation is big business. Spending by recreation visitors in areas surrounding national forests amounts to nearly \$13 billion per year.²³⁴ Given that this correlates with the increase in concession operations, there does not appear to be much motive to reduce the scale of concession management. The Forest Service estimates that "a small campground concession with one to three developed recreation sites might produce revenue ranging from \$50,000 to \$105,000, while a large campground concession with ten to twelve developed recreation sites might generate revenue in excess of \$1,000,000."²³⁵

In addition to revenue generation, other on-the-ground justifications exist for private entities to manage public land. An independent entity in charge of managing an area, due to that entity's independence from bureaucratic hurdles typically involved in government decisionmaking, can likely respond more quickly to increases in recreation demand or changing conditions on the ground. Private entities can respond to changing conditions whether or not a portion of fees remain on site, presuming the concessionaire has available capital. Thus, a private land manager removed from the land management agency likely provides a more direct pathway between on-the-ground problems and potential solutions.

As opposed to advocacy for private entities to manage federal land, Professor Joseph Sax refers to what he calls the public policy perspective, arguing that privatization is not the best path forward for public lands when considering all economic and noneconomic factors.²³⁶ Indeed, in internal material discussing the agency's budget priorities and justifying its allocation of resources, the agency does not discuss recreation, let alone any intangible, noneconomic benefit to the

²³⁴ U.S.D.A. FOREST SERVICE, *supra* note 63, at 12.

²³⁵ Proposed Directives for Forest Service Concession Campground Special Use Permits, 74 Fed. Reg. 62,736, 62,737 (Dec. 1, 2009).

²³⁶ See SAX, *supra* note 224, at 70.

public.²³⁷ In its 2012 fiscal year overview, the agency stated that it “works to efficiently maximize limited resources and create a high return on investment for the American taxpayer.”²³⁸ The agency makes this statement in a section headed “Forest Service Value,” situated in a passage justifying government expenditures for national forests.²³⁹ The agency justifies its actions based on restoring and improving forest health, conducting research, and providing financial and technical assistance to its partners.²⁴⁰ These justifications make no mention of recreation or benefit to the public. This language places the agency in the same arena as proponents of privatization, justifying continued funding for national forests through monetary and tangible gain rather than focusing on the public as per the agency’s mission statement.

Sax stated that questions of privatization come down to a debate between an entrepreneurial and a public policy perspective.²⁴¹ The demand for recreation creates a multi-billion-dollar industry.²⁴² The existence of this demand by itself, however, does not necessarily demonstrate that agency policy should be committed to fulfilling that demand to the exclusion of all other factors.²⁴³ From a public policy perspective, owners of the public lands and citizens have a collective desire different from the sum of market demands.²⁴⁴ One may decide to forego the greatest dollar return on property in favor of an alternative use believed to provide a greater non-monetary return.²⁴⁵ The national forests are examples of this; the agency could likely produce the greatest monetary return on the lands it manages through extensive mineral leasing and timber sales, but its land management decisions are made pursuant to a stated agency mission that does not include profit.²⁴⁶

Decision-making driven by this mission furthers the idea that the Forest Service is iconic in American culture. The Forest Service manages and stewards some of the most beautiful and valuable land and water in the United States. Americans familiar with national forests know the agency’s shield and sign design as well as they know Smokey the Bear. Moreover, Americans find intrinsic value in seeing and interacting with Forest Service personnel.²⁴⁷ The public is more likely

²³⁷ See, e.g., U.S.D.A. FOREST SERVICE, *supra* note 63, at 12.

²³⁸ *Id.* at 2.

²³⁹ See *id.*

²⁴⁰ *Id.*

²⁴¹ See SAX, *supra* note 224, at 70.

²⁴² See *supra* note 56 and accompanying text.

²⁴³ See *supra* note 56 and accompanying text.

²⁴⁴ *Supra* note 56 and accompanying text.

²⁴⁵ See *supra* note 56 and accompanying text.

²⁴⁶ See *supra* notes 47–48 and accompanying text.

²⁴⁷ See WESTERN SLOPE NO-FEE COALITION, *supra* note 201, at 5.

to trust and rely on personnel employed through the Forest Service because, at least in theory, these employees are trained to subscribe to the agency's mission and goals.²⁴⁸ A concessionaire, on the other hand, is an entity dedicated to its own preservation and to revenue generation. Employees of a concessionaire have presumably made the decision to work for that entity using a different calculus than those who decide to work for the agency. This serves to highlight the differing experience of recreation users at concession sites and sheds light on some of the less-tangible losses that come from increased concession management. Essentially, privatization threatens the agency's status in the eyes of the public. It has the potential to shift the agency from an iconic steward of the public lands to a franchisor of recreation opportunities for private entities.

The Forest Service's motivation and mission raise an additional concern stemming from the increased presence of profit-motivated third parties in national forests. The Forest Service has multiple mission statements; throughout its history, the agency has been guided by the Organic Act, MUSY, and NFMA.²⁴⁹ The agency should operate pursuant to those mission statements. Concessionaires, on the other hand, have no such mission statements, or if they do, those missions are driven by strikingly different objectives.

The Forest Service recognizes this concern.²⁵⁰ The Forest Service Manual states that the agency should "[a]uthorize concession developments only where there is a demonstrated public need. . . [and] not permit concession development either solely for the purpose of establishing a profit-making commercial enterprise or where satisfactory public service is or could be provided on nearby private or other public lands."²⁵¹ Considering the amount of and rise in concessionaire-managed lands, it is difficult to believe the agency keeps these requirements in mind when choosing how to manage recreation opportunities.²⁵² It is unlikely there is a demonstrated public need for profit-motivated third parties to manage each of the more than 2,000 agency campgrounds currently run by concessionaires.²⁵³

In making decisions on the best way to manage these thousands of campgrounds, the Forest Service should be neither a franchisor nor a chain of private campgrounds. When a profit-motivated third party is allowed to sign a concession agreement and operate on the public lands, the risk of diluting something essential about the national forests and the public lands as a whole arises. Public lands have always been the nation's playground. The government

²⁴⁸ *See id.*

²⁴⁹ *See supra* Part II.

²⁵⁰ *See* U.S.D.A. FOREST SERVICE, *supra* note 70, at 15.

²⁵¹ *Id.*

²⁵² *See supra* notes 51–58 and accompanying text.

²⁵³ COGGINS, *supra* note 2, at 961.

owns and stewards the public lands for the people. The FLREA does not allow the national forests to charge an entrance fee. The public lands are not amusement parks or roadside attractions. Public lands belong to the public.

National forests serve many purposes, none of which are accomplished when the agency finds methods to skirt fee requirements.²⁵⁴ Certainly creating a class of profit-motivated land managers unanswerable to fee requirements and passes intended to give something back to the elderly and the disabled serves no grand purpose. This loss of an essential quality—the diminution of the “public” aspect of the public lands—cannot be represented on a balance sheet. This “public” aspect is no less vital, however, than any line item on an agency budget. The Forest Service is the steward of America’s national forests, land in turn valuable, beautiful, and wild. The agency provides the public access to these lands—their lands. The concession system puts up barriers to that access. It interposes profit-motivated third parties between the public and the land, and by doing so strains that essential connection.

IX. THE FLREA POST-2015

The FLREA is scheduled to sunset on December 8, 2015.²⁵⁵ Setting aside for the moment the difficulties inherent in passing any bill through the current Congress, the federal land management agencies have an opportunity to reconsider the law and modify its more controversial provisions.²⁵⁶ This can be accomplished through a process of evaluation and revision of the law itself by reassessing the priorities involved in establishing and assessing recreation fees.

To this end in 1996, the Government Accountability Office (GAO) published the results of an audit determining the rate of return to the federal government from concession operations.²⁵⁷ Of the six land management agencies—the Army Corps of Engineers, National Park Service, Bureaus of Reclamation, Bureau of Land Management, Fish and Wildlife Service, and Forest Service—the National Park Service and Forest Service concessions operations accounted for about ninety percent of gross revenues and fees paid to the government.²⁵⁸ The GAO noted that

²⁵⁴ See *supra* notes 109–76 and accompanying text.

²⁵⁵ Originally scheduled to sunset on December 8, 2014, the FLREA was reauthorized for one additional year in the continuing appropriations act that reopened the federal government following the October 2013 government shutdown. See Continuing Appropriations Act, 2014, Pub. L. No. 113-46, § 134 (2013); see also 16 U.S.C. § 6809 (2012).

²⁵⁶ See Pub. L. No. 113-46, § 134.

²⁵⁷ See GOVERNMENT ACCOUNTABILITY OFFICE, CONCESSIONS CONTRACTING: GOVERNMENTWIDE RATES OF RETURN 15 (1996), <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GGD-96-86/pdf/GAOREPORTS-GGD-96-86.pdf>.

²⁵⁸ *Id.* at 6.

Forest Service officials insisted that the primary purpose of concession programs was providing a service to the public, not maximizing the rate of return.²⁵⁹ But the audit did not ask the more fundamental question of what would happen if concessionaire operations were replaced by agency operations.²⁶⁰

As such, a more comprehensive audit and study of the Forest Service concession structure must be conducted. The Forest Service Manual states that concession development is authorized only where there is a demonstrated public need.²⁶¹ This mandate is likely not being followed given the extreme increase in concession development and management. The agency would likely have a difficult time justifying the rapid increase in concession development with a corresponding public need that could not be satisfied by agency management of recreation sites. Moreover, whether the current concession structure is financially justifiable, especially in light of the philosophical and foundational concerns raised by concessions on public lands, remains unclear. In his 1997 letter to regional foresters, then-agency Chief Dombeck stated that concessionaire management is key to providing quality services in light of declining work forces and capital resources.²⁶² Whether this is true is impossible to determine without an extensive survey of the concession program as advocated in this section.

Even if an audit determines that instead of contracting land management to concessionaires the agency should operate all these recreation sites on its own, the question remains whether agency operation of sites is feasible. This presents perhaps the biggest stumbling block for the agency in transitioning away from concession management. Concessionaires have achieved a symbiotic—perhaps even parasitic—relationship with the Forest Service. The agency considers concessionaires partners and refers to the recreation-seeking public as “customers.”²⁶³ Concessionaires are even given free rein to ignore a law designed to restore public trust in a stable recreation fee system and to ensure the public is actually getting benefits for their recreation fees.²⁶⁴ These are powerful indicators that the concession structure is here to stay, no matter the result of an audit, as the agency appears to have no desire to consider an alternative path.

Should the agency decide that recreation management on the national forests is to change, what should that change look like? If the goal is minimizing intrusion of profit-motivated third parties into public lands, then it must be

²⁵⁹ *Id.* at 16.

²⁶⁰ *Id.* at 16.

²⁶¹ FOREST SERVICE, FOREST SERVICE MANUAL, FSM 2300—RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT, CHAPTER 2343.03—CONCESSION USES INVOLVING PRIVATELY DEVELOPED FACILITIES (2006).

²⁶² See Letter from Mike Dombeck, *supra* note 197.

²⁶³ See *supra* notes 195–96 and accompanying text.

²⁶⁴ See *supra* notes 175–76 and accompanying text.

accomplished through two steps. First, the agency must reexamine the nature and value of its relationship with concessionaires. As noted above, this relationship raises fundamental questions about the nature and mission of the agency and how allowing private entities to manage public lands fits into that mission.²⁶⁵ Second, the FLREA must be redrafted to level the playing field in the national forests, reestablish public trust in the agency's decisionmaking on fee issues, and shed light on the structure of and justification for fees.

To reform the recreation structure in national forests, the Forest Service's first step should be adopting a recreation management strategy that has proven useful in many other sectors: partnerships with dedicated nonprofit organizations.²⁶⁶ The agency cites declining revenues and resources as justifications for its relationship with concessionaires.²⁶⁷ In light of this, the Forest Service has increasingly turned to profit-motivated third parties. However, it is unclear whether third parties are any more efficient than nonprofit organizations. Economist William Baumol noted that where there is some special basis for reliance on idealism, social pressure, or special enthusiasm, nonprofits may find a unique place in which to operate with noteworthy efficiency.²⁶⁸ It would seem, especially in light of the foundational issues discussed above, providing recreation services on public lands falls into each of these categories.²⁶⁹ Baumol recommends agencies foster relationships with local, grassroots nonprofits whose goal is improving local conditions and local recreation opportunities.²⁷⁰ This seems a logical step; already, hundreds if not thousands of local nonprofits exist to preserve and protect local recreational and natural areas.²⁷¹

Furthermore, nonprofits have already demonstrated success in taking over and managing recreation areas in similar contexts.²⁷² One such example is Hueco

²⁶⁵ See *supra* Part VII.

²⁶⁶ See Quinn, *supra* note 87.

²⁶⁷ See U.S.D.A. FOREST SERVICE, *supra* note 63, at 2.

²⁶⁸ *Id.* at 18 (citing WILLIAM J. BAUMOL, PUBLIC AND PRIVATE ENTERPRISE IN A MIXED ECONOMY 300 (St. Martin's Press 1980)).

²⁶⁹ As discussed repeatedly throughout this article, there is a public ownership aspect to the national forests that creates a certain idealism among recreation users. As shown in the comments to the proposed Forest Service directives, see *supra* notes 198–211 and accompanying text, recreation users are incredibly passionate about the public lands remaining public and exert significant pressure on the agency in response to any action they feel might compromise that public ownership quality.

²⁷⁰ See *supra* notes 198–211 and accompanying text.

²⁷¹ See, e.g., *Directors of Charities and Nonprofit Organizations*, GUIDESTAR, <https://www.guidestar.org/nonprofit-directory/environment-animals.aspx> (last visited May 5, 2014).

²⁷² See, e.g., Press Release, American Alpine Club, Access Fund and American Alpine Club Partner to Continue Legacy of Hueco Rock Ranch (July 13, 2012), available at http://americanalpineclub.org/p/access_fund_and_american_alpine_club_partner_to_continue_legacy_of_the_hueco_rock_ranch; Press Release, Access Fund, Southeastern Climbers Coalition Partners with the Access Fund to Acquire Hospital Boulders (Nov. 6, 2012), available at <http://www.accessfund.org/site/apps/nlnet/content2.aspx?c=tmL5KhNWLrH&b=5000943&ct=12332297>.

Tanks State Park and Historic Site, located in an area outside of El Paso, Texas.²⁷³ For many years, climbers visiting the park stayed at the Hueco Rock Ranch, a private lodging facility with access to the site.²⁷⁴ In 2011, the landowner was looking to sell the property to a climber-friendly buyer who could manage the property onsite.²⁷⁵ The owner reached out to the Access Fund, an organization dedicated to protecting and preserving land for climbing, to assist locating just such a buyer.²⁷⁶ With the help of the Access Fund, the owner connected with the American Alpine Club (AAC), a § 501(c)(3) charitable organization whose mission is providing knowledge and inspiration, conservation and advocacy, and logistical support for the climbing community.²⁷⁷ Using short-term funding from the Access Fund's Land Conservation Campaign, the Access Fund purchased Hueco Rock Ranch, assigning it to the AAC.²⁷⁸ The AAC immediately began undertaking improvements to the property's structures and tent camping facility and hired an onsite manager for the property.²⁷⁹

In similar purchases, the Access Fund also used its land trust to purchase the Hospital Boulders climbing area near Gadsden, Alabama.²⁸⁰ The climbing area will ultimately be owned and managed by the Southeastern Climbers Coalition (SCC).²⁸¹ SCC is a local nonprofit dedicated to preserving climbing areas in the southeast, owning and managing many climbing areas in the Southeastern United States.²⁸²

To be sure, a nonprofit partnership model has its own inherent challenges. The agency would have to determine which nonprofits properly align with the agency's mission and whether the nonprofit is logistically and administratively capable of managing the land. A robust screening process should alleviate or eliminate most of these concerns.

²⁷³ American Alpine Club, *supra* note 272. Hueco Tanks contains some of the most beautiful and challenging rock climbing in the United States.

²⁷⁴ American Alpine Club, *supra* note 272.

²⁷⁵ American Alpine Club, *supra* note 272.

²⁷⁶ American Alpine Club, *supra* note 272.

²⁷⁷ American Alpine Club, *supra* note 272.

²⁷⁸ American Alpine Club, *supra* note 272.

²⁷⁹ American Alpine Club, *supra* note 272.

²⁸⁰ Access Fund, *supra* note 272. As of November 25, 2013, the Southeastern Climbers Coalition has already raised more than half of the money needed to pay back the Access Fund land trust for its purchase of the land. Press Release, Southeastern Climbers Coalition, Hospital Boulders Thermometer Rising (Nov. 25, 2013), *available at* <http://www.seclimbers.org/modules.php?name=News&file=article&sid=612>.

²⁸¹ Southeastern Climbers Coalition, *supra* note 280.

²⁸² Southeastern Climbers Coalition, *supra* note 280.

A nonprofit partnership model can work to effectively manage recreation areas. However, whether this model can operate as efficiently as the concession model, and whether this model more closely preserves the unique nature of the public lands is still to be determined. Local nonprofits—though they have overhead and costs just like profit-motivated entities—have additional considerations concessionaires do not have. These nonprofits are mission agencies dedicated to protecting and preserving unique and valuable aspects of public lands, including recreation opportunities.²⁸³ This management model does not eliminate concern over the public interacting with non-agency personnel, but public trust in the employees of a dedicated mission-oriented nonprofit would nonetheless be significant as compared to trust in employees of for-profit entities. Recreation users arriving at campgrounds and trailheads would encounter personnel employed by an agency with a mission more closely aligned with that of the Forest Service. Signage could inform users that the area is managed by a nonprofit dedicated to protecting and preserving the area, not a third party organized and operated primarily to generate revenue.

With a nonprofit partnership, the agency could oversee general operations and review revenue allocations. Profits in excess of that necessary to maintain operations could be remitted to the Treasury or kept on site and put towards minimizing environmental impacts, improving facilities, or hiring additional personnel. A revenue structure allowing nonprofit managers to hold profits for use on site would permit managers to respond to time sensitive land conditions and increased recreation demand as quickly as concessionaires. Keeping the profits on site allows nonprofits to close the resource gap with private, profit-motivated third parties.

Despite its seeming advantages, this management model would not exclude profit-motivated third parties from managing land in national forests. Believing suitable nonprofits could manage every recreation area currently operated by concessionaires is unrealistic. The agency must match recreation areas and nonprofit land managers by scope and capability. For instance, a small nonprofit would likely find itself overwhelmed trying to manage a large recreation area with dozens of campsites, cabins, and other infrastructure. However, that same nonprofit might be perfect to maintain and manage a fee trailhead with fewer amenities. The nonprofit management model offers an alternative to concessionaire management conforming to and complementing the unique nature of public lands.

²⁸³ Nonprofits involved in efforts to protect and secure recreation interests on the public lands include the Access Fund, see *supra* notes 277–83 and accompanying text; the Backcountry Hunters and Anglers, see BACKCOUNTRY HUNTERS AND ANGLERS, <http://www.backcountryhunters.org/> (last visited Apr. 30, 2014); and the Outdoor Alliance, see THE OUTDOOR ALLIANCE, <http://www.outdooralliance.net/> (last visited Apr. 30, 2014).

In addition to nonprofit management, volunteer management should be considered. Many national forest campgrounds and trailheads do not require extensive infrastructure management.²⁸⁴ Many recreational facilities use guest and volunteer hosts and personnel residing on the premises.²⁸⁵ Volunteer management provides not only unique and valuable opportunities for volunteers themselves, but also significant financial advantages to the agency. Consider that in 2008, Forest Service volunteers contributed 3.4 million hours to the agency, valued at more than \$59 million.²⁸⁶ To an agency looking to concessionaires to help alleviate declining revenues, this shows vast potential as a source of labor and management outside of typical financial considerations.

The existing volunteer infrastructure is not without its problems. Like many recordkeeping and administrative functions within the Forest Service, the volunteer infrastructure is severely fragmented over different regions, districts, and forests.²⁸⁷ Existing infrastructure is inefficient; a 2007 study indicated that Forest Service staff with responsibility for volunteers allocated only fifteen percent of job time to volunteer administration and training.²⁸⁸ Additionally, volunteer programs are not free. A 2003 study indicates that costs associated with training, administration, supervision, management, and recognition of volunteers ranges from \$350–\$1,250 per volunteer annually, with a return on investment of \$2.05 to \$21.24 for every \$1.57 invested.²⁸⁹

Even considering the costs, however, a nonprofit-volunteer management structure could be an ideal solution to balance economic and foundational concerns regarding management of public lands. As discussed above, if profits were kept on site, a nonprofit could manage land as effectively as any private entity.²⁹⁰ Furthermore, volunteers and nonprofits are far more likely to subscribe to the agency's mission and goals than a private entity as volunteers and nonprofits generally remove profit motive from their decision-making process.

²⁸⁴ See FOREST SERVICE MANUAL, *supra* note 71.

²⁸⁵ See, e.g., FOREST SERVICE, BECOME A CAMPGROUND HOST, (2011), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5319610.pdf; USDA FOREST SERVICE, VOLUNTEERS IN THE NATIONAL FORESTS (2014), available at <http://www.fs.fed.us/fsjobs/forests-service/volunteers.html>.

²⁸⁶ FOREST SERVICE, *Forest Service Volunteer Program Management—Capacity Assessment 2* (Mar. 2009).

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 3.

²⁸⁹ *Id.*

²⁹⁰ See *supra* notes 263–77 and accompanying text.

The next step in reforming recreation management is removing the concessionaire exemption—the poison pill—from the FLREA.²⁹¹ The FLREA's goals were to create a stable recreation fee structure and to restore public trust in land management agencies administering recreation fees.²⁹² The concessionaire exemption runs counter to each of these goals. It is no longer certain where and for what the public will be charged a fee in the national forests. For reasons such as this, public trust in land management agencies administering recreation fees seems to be at an all time low, and creating an exit ramp for concessionaires has not helped. Indeed, the public can reasonably view the current structure together with the rise of concessionaires as a direct assault on the fundamental nature of the public lands. Removing the concessionaire exemption creates stability by giving the FLREA uniform application in recreation areas and bringing the practical affects of the law in line with its stated goals and purpose.

X. CONCLUSION

The Forest Service is an agency with a rich history and a series of mission statements highlighting the agency's benefit to the public. Throughout its history, the agency has adapted to a changing national landscape, in part by rising to meet an increasing demand for recreation on national forests.²⁹³ As a way to meet that demand, the agency formed partnerships with private entities. These partnerships have grown to the point that recreation visitors to campgrounds and trailheads in national forests are far more likely to encounter employees of a private third-party concessionaire than any agency personnel.²⁹⁴

Increased entanglement with profit-motivated third parties endangers the unique relationship between the public and the Forest Service as a steward of the public lands.²⁹⁵ Public lands belong to the public. When a private entity is interjected into this relationship, it severs the connection between the people and the agency in its role as steward of the public lands. Furthermore, the increased presence of concessionaires in national forests undermines the system of recreation and access fees established by the FLREA.²⁹⁶ Permitting concessionaires to charge fees with such discretion renders useless the pass system established by the FLREA. This, too, endangers the relationship between the public and the agency, eroding public trust in the agency to manage the land and activities on the land in a transparent manner in keeping with the agency's mission.

²⁹¹ See *supra* notes 175–76 and accompanying text.

²⁹² See H.R. REP. NO. 108-790(I), *supra* note 102, at *18.

²⁹³ See *supra* notes 11–67 and accompanying text.

²⁹⁴ See *supra* notes 60–65 and accompanying text.

²⁹⁵ See *supra* notes 212–25 and accompanying text.

²⁹⁶ See *supra* notes 187–89 and accompanying text.

Moving forward, the agency must eliminate the poison pill—concessionaires must be subject to the same amenity requirements as the agency if they are to charge fees.²⁹⁷ Charging fees merely for entrance into national forests is contrary to the FLREA's requirements, and allowing concessionaires to charge fees simply because they are a third party undermines public trust, feeding the perception of the agency as increasingly revenue motivated. Ultimately, transitioning to a system in which mission-oriented nonprofits manage land in place of concessionaires is vital for the Forest Service to maintain its integrity as steward of the public lands. This system has been successful in the private sector and could easily be adapted to work in the national forests.²⁹⁸ Whatever the solution, permitting profit-motivated third parties to control and regulate access to the public lands is untenable. As lawmakers consider reauthorization of the FLREA, they have the opportunity to right the ship and strengthen the fundamental relationship between the public and the Forest Service.

²⁹⁷ See *supra* notes 187–89 and accompanying text.

²⁹⁸ See *supra* notes 279–90 and accompanying text.