A STRATEGY FOR RESTORING AMERICA'S NATIONAL PARKS

BY HOLLY LIPPKE FRETWELL* AND MICHAEL J. PODOLSKY**

A change is taking place across the American landscape. Hikers, climbers, and picnickers are finding a way to promote better care of our resources; they are paying to play. Until recently, Americans paid almost nothing for recreational access to federal lands. Yet "free" recreation has often meant starving parks of resources to improve eroding roads, fix leaking sewer systems, and provide visitor services. Americans are beginning to realize that if resources are not managed correctly, the opportunities for outdoor recreation and the quality of outdoor experiences decline severely.

A great deal of federally owned land is used for recreation. Although the National Park Service, which controls 83 million acres, is the organization most people identify with federally provided outdoor recreation areas, the Forest Service and the Bureau of Land Management have more acreage and receive more recreational visitors. These lands cover 455 million acres and, according to governmental estimates, host about 1 billion visitors each year, compared to 290 million visits in our national parks.

The Federal government, one of the largest providers of recreational services, has begun to explore alternative methods of funding. Under the experimental Fee Demonstration Program, Congress allows agencies to charge higher fees and to keep most of these fees where they are collected rather than sending them to the national treasury. Four agencies—the National Park Service, the Bureau of Land Management, the Fish and Wildlife Service, and the Forest Service—are trying new entrance and user fees on some of

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their units, and each park or area is allowed to keep at least 80 percent of the fee receipts.

This article argues that allowing public land managers to retain user fees to cover expenses will encourage better fiscal and environmental responsibility. Fiscal autonomy solves important problems for land managers. By leaving at least eighty percent of the fees in the park or area that collected the funds, park managers become directly accountable for the quality of stewardship and services. Fiscal autonomy also reverses the distorted incentives that the political annual appropriations process fosters. Moreover, charging those who consume the services for the cost of producing them provides potentially critical financial resources for park managers. In addition to explaining the problems with the current funding system and the benefits that fiscal autonomy provides, the article will assess the Fee Demonstration Program and identify ways to improve it.

Part I provides a brief overview of the history of the national park system. Part II describes the current state of the parks and their role in recreation, and discusses the reasons why the current method of congressional funding distorts incentives for park managers to provide proper stewardship of our parks and their resources. Part III demonstrates the means for getting the incentives right while taking into account the competing concerns of efficiency and equity. Furthermore, it shows how the Fee Demonstration Program implemented through a congressional statute is a first step in accomplishing this goal and discusses the legal constraints that the Fee Demonstration Program must satisfy to meet constitutional requirements for the imposition of a fee as compared to a general tax. Part IV addresses the current status of user fees in state parks. Finally, Part V provides the conclusion and recommendations for the future.

I. HISTORY OF THE NATIONAL PARK SYSTEM

Ironically, at their inception, the national parks were intended to be self-supporting with managers directly accountable for expenditures. Under the initial model of park system operations, congressional appropriations were to be limited to initial investments in roads and visitor facilities. Ferdinand Hayden, one of the early explorers of Yellowstone National Park, the country's first national park, assured Congress that the park would require no appropriated funds.[1] In fact, when Yellowstone National Park was created in 1872, no money was appropriated for its operation. All involved believed that income from leases would be sufficient to "operate the necessary highways and providing a proper police force."[2] Indeed, even as late as 1916, at least five parks proved that their income earning capabilities were sufficient to cover operating expenses.[3] The receipts from these fees were held in a special account, accessible to the Park Service without congressional appropriation, which could be used for road maintenance, park development, and administration.

Although the Yellowstone leases never met expectations nor was the revenue derived adequate to build the necessary infrastructure to service the park,[4] Congress did not appropriate *any* funds for Yellowstone until 1878.[5] Park revenues were sufficient to cover *operating expenses*, but the lack of funding to cover boundary enforcement and the initial development of park resources hampered management of Yellowstone National Park from the beginning.[6] In fact, early on, Yellowstone was dependent upon the army for law enforcement and management.[7]

By the early 1900s, the initial model of direct accountability was being replaced by the current model of congressionally controlled parks. Political and financial influences encouraged the progression toward congressionally controlled parks and away from local accountability. For example, Crater Lake National Park established in 1902, Mesa Verde created in 1906, Rocky Mountain and Lassen Volcano national parks established in 1915 and 1916, respectively, were not authorized by statute to retain revenues for administrative or other uses: Revenues generated in these parks reverted to the General Treasury.[8] In 1916, as part of the progression of the congressionally controlled parks model, Congress passed a bill that

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1. R. Andrew McDaniel, The National Parks on a Business Basis: Stephen Mather and the National Park Service 2 (1996) (unpublished manuscript, on file with The Political Economy Research Center).

2. HIRAM MARTIN CHITTENDEN, THE YELLOWSTONE NATIONAL PARK 110 (Richard A.Bartlett ed., 1964).

3. GENERAL ACCOUNTING OFFICE, 2 INCREASING ENTRANCE FEES – NATIONAL PARK SERVICE (1982).

4. *See* CHITTENDEN, *supra* note 2, at 110.

5. *See id.*

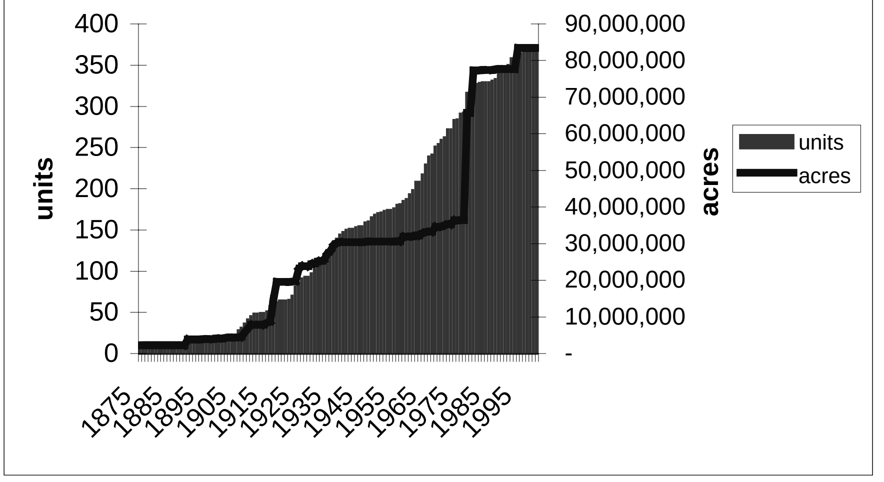
6. *See id.* at 110-11 (describing how the shortage of funds hindered operations at Yellowstone at the time of its inception).

7. *See* HORACE M. ALBRIGHT & MARIAN ALBRIGHT SCHENK, CREATING THE NATIONAL PARK SERVICE: THE MISSING YEARS 225-26 (1999).

8. *See* McDaniel, *supra* note 1 at 7.

created the national park system and President Wilson signed it into law.[9] Stephen Mather, the first director of the National Park Service, tried unsuccessfully to persuade Congress that all park revenues should be retained for park use.[10] By 1918, however, Congress began to require that all park fees revert to the federal treasury.[11]

Figure 1 - National Park Service Units and Acres



Source: *NPS 2002 Budget Justifications, NPS 206*

The park system has expanded substantially. Figure 1 demonstrates that preservation of wilderness and natural areas continued to progress beyond Yellowstone National Park and has continued at an ever-increasing rate. The increase was especially rapid in the late 1970s and early 1980s.[12] The parks' increasing dependency on annual appropriations to pay for operating expenditures has forced managers to respond to political wishes and

9. *See* ALBRIGHT & SCHENK, *supra* note 7, at 146-48.

10. *See* McDaniel, *supra* note 1, at 7 (outlining Mather's view that direct control over park visitor fees was "instrumental for their [the parks] proper management"). *See also* BARRY MACKINTOSH, U.S. DEP'T OF INTERIOR, A LEGISLATIVE AND ADMINISTRATIVE HISTORY 1-3 (1983) (describing Mather and other park proponents belief that retention of park revenues was essential to acquiring complete managerial control over national parks).

11. *See* MACKINTOSH, *supra* note 10, at 3. Mackintosh explains that based on his belief that Mather and other officials of the Departments of Interior and War had exceeded their authority in arranging for all park fees to be set aside in an account that could be used without congressional approval, John. J. Fitzgerald, Chairman of the House Interior Appropriations Sub-Committee, introduced legislation requiring all receipts to be remitted to the Treasury.

12. The Alaska National Interest Conservation Act contributed more than 40 million acres to the National Park System as of 1980.

short-term planning rather than careful resource and environmental stewardship. As Horace Albright, one of the primary driving forces behind the creation of the national park system stated:

> With fear and trepidation, I appeared before the House and Senate committees to ask for additional appropriations. My point was that Congress created the National Park Service but gave us no money to operate our Washington office. I was up at the Capitol, hat in hand, begging for some appropriations to see us through until money could be allocated in the spring for the full fiscal year of 1918.[13]

Appropriations to cover the Washington office operations were eventually appropriated, but as Albright described in order to obtain the funds, "'I had crawled on my knees in sack cloth and ashes begging for the money."[14] The situation did not get easier as the years passed. Albright referred to the annual appropriations process as the agonizing "rite of spring."[15] The message was clear that to receive funding park system managers and staff must cater to political desires of Congress.

Unfortunately, the import of his message remains true today. The early politicization of the national park system continues to obstruct resource management and stewardship. Because they are dependent on the politicized annual appropriation process, the Park Service and other federal land managers are subject to the demands of politicians whose directives must be followed, even when not in the best interest of resource stewardship and visitor benefits.

The appropriations process reduces federal land managers' accountability and provides perverse incentives for them. The incentives are to satisfy the appropriator rather than the visitor or the needs of the natural environment. As the next sections demonstrate, this combination of diminished accountability and perverse incentives continues today. By providing an independent source of funds, the Fee Demonstration Program corrects some of these distorted incentives and produces significant improvements in land and resource management where it has been implemented. In fact, the creation of a self-sustaining source of funds for federal areas would fulfill the original vision for the operation of the nation's parks, forests, and other recreational lands. Unfortunately, the scope of the program is limited and needs to be expanded.

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13. *See* ALBRIGHT & SCHENK, *supra* note 7, at 148.
14. *Id.* at 205.
15. *Id.* at 278.

II. THE CURRENT STATE OF U.S. NATIONAL PARKS AND DISTORTING INCENTIVES

A. Current State

The current system of park financing is based on funding from the federal treasury as allocated by the political process through annual congressional appropriations. This system's consequences include poor maintenance, a crumbling infrastructure, excessive spending on unnecessary or inappropriate projects, over-expansion of the park system, neglect of natural resources, underfunding of studies to improve their current state and a crowding out of the private provision of recreation. While some argue that the severity of the situation is the result of a lack of funding,[16] the state of national parks is more the result of perverse incentives for local park managers to satisfy political needs.

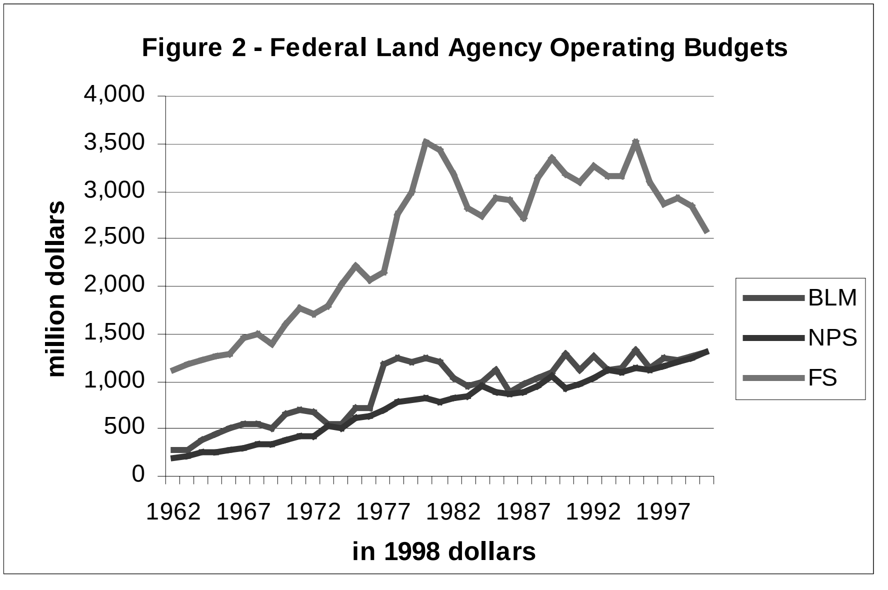

Figure 2 shows that operating budgets for the National Park Service, the Forest Service and the Bureau of Land Management

16. *See* Richard J. Ansson Jr., *Our National Parks-Over Crowded, Underfunded, and Besieged with a Myriad of Vexing Problem: How Can We Best Fund Our Imperiled National Park System*, 14 J. LAND USE & ENVTL. LAW 1, 2 (1998) (asserting that the terrible state of the national park system, including construction projects, land purchases and resource stewardship projects, is a result of an accumulated $11.1 billion shortfall).

have, on average, increased substantially over the passed four decades. Still there does not appear to be any foreseeable solution to the maintenance and infrastructure problems plaguing the parks due to the combined impact of the politization of park management and the lack of proper incentives for park managers.

1. Poor Maintenance and Crumbling Infrastructure

The National Park Service reports a $6 to $9 billion backlog of unfunded maintenance, acquisition, and resource management projects.[17] Park managers are unable to invest because they do not control the resource decisions for the parks. While operating budgets continue to rise at rates faster than inflation,[18] infrastructure is left to rot. For example, Yellowstone's outmoded sewer system spews raw sewage into native trout streams, and the sewage treatment plant at Old Faithful pollutes the groundwater.[19] Glacier National Park's popular Going-to-the-Sun Road is frequently closed due to safety concerns[20] and prehistoric dwellings in Mesa Verde National Park are disintegrating from a buildup of oils and airborne particles.[21] In addition, more than one-quarter of the National Park Service's buildings are in poor or dilapidated condition.[22]

While the news media have emphasized the Park Service's problems, the Forest Service also has serious maintenance problems. Indeed, the current level of funding has been described as merely "enough to sustain the current rate of rot."[23] This is not a new problem. With a road system of 373,000 miles, eight times the interstate highway system, the Forest Service has a road maintenance backlog in excess of $8.5 billion, with funding adequate to maintain only 40 percent of the roads to planned standards.[24] According to

17. *See* Denise M. Visconti, *Reform in the National Park System*, 23 SETON HALL LEGIS. J. 409, 409-412 n. 15 (citing statements found from the congressional record estimating the financial backlog of maintenance, repair, acquisition and resource stewardship projects).

18. *See* Donald R. Leal & Holly Lippke Fretwell, *Back to the Future to Save Our Parks*, PERC POLICY SERIES, June 1997, at 1.

19. *See* Holly Lippke Fretwell, *Paying to Play: The Fee Demonstration Program*, PERC POLICY SERIES, December 1999, at 3.

20. *Id*.

21. *Id*.

22. *Id*.

23. *See* Visconti, *supra* note 17, at 417 n.37 (citing *Improvements to the National Park System: Hearings Before the Subcommittee on National Parks, Historic Preservation, and Recreation of the Senate Committee on Energy and Natural Resources*, 105th Cong. 13 (1997) (statement of Roger Kennedy, Director of the National Park Service)).

24. USDA, *Road Management Website*, USDA Forest Service, *available at*

Dick Paterson, deputy director of recreation for the Forest Service, the agency has a backlog of $1.7 billion in unfunded recreational maintenance.[25]

When a crisis does occur due to the lack of investment in maintenance and infrastructure, Congress seizes the opportunity to save the day and reap the windfall of correcting a crisis that the politization of the park system has itself created. Former comptroller of Yellowstone National Park, Don Striker has stated: "a sewage spill makes the perfect example of deferred maintenance" and providing funds to repair this kinds of environmental hazard has big political rewards.[26] As Striker notes: "Nothing gets attention quicker than two, if not three ruptures in the antiquated sewer system. Those spills moved us up three notches in the priority system."

2. Extravagant Spending

In spite of the backlog of maintenance projects described above, public agencies often spend money unwisely and even extravagantly. At Delaware Water Gap National Recreation Area, for example, one famous outhouse cost $333,000.[27] It has a gabled slate roof, cottage-style porches, and a tapered cobblestone masonry foundation in the fashion of Frank Lloyd Wright.[28] But the doors are locked in the winter because the self-composting toilet will not work in Pennsylvania's freezing temperatures.[29] And do not expect any running water; there is none.[30] In 1997 in Yosemite National Park the average cost of new employee housing was $580,000 per unit—two to four times the average rate for local housing.[31] The new deluxe housing accommodates fewer than 60 of the park's 5,000 employees; many still dwell in tent-cabins without running water.[32]

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http://www.fs.fed.us/eng/road_mgt/DOCroadanalysis.shtml/ (last modified 1999).

25. Gordon Gregory, *Protesters: Fees Devalue Wilderness Experience; Coordinated Rallies in Nine States Decry a User-Pay Test Program, which U.S. Agencies Say Aids Upkeep and Plugs Budget Gaps*, OREGONIAN, August 15, 1999, at D1.

26. Jane S. Shaw, *Perfect Spills*, THE AMERICAN SPECTATOR, 32 (Sept./Oct. 2001) (discussing maintenance problems in national parks due to budget cuts).

27. *See* Fretwell, *supra* note 19, at 4.

28. *Id.*

29. *Id.*

30. *See* Frank Greve, *Park Service Defends Price Of Outhouse*, SALT LAKE TRIBUNE, Oct. 8, 1997 (discussing expenses incurred during Parks Service improvements).

31. *See* John H. Cushman, *For National Parks' Employees, a Housing Crisis*, N.Y. TIMES, Aug. 12, 1997, at A1.

32. *See id*. (discussing that in 1997 in Yosemite National Park the average cost of new employee housing was $580,000 per unit—two to four times the average rate for local housing).

Importantly, such extravagant or unnecessary expenditures are often due to the requirements of congressional appropriations. As part of the appropriations process members of Congress may "earmark" spending for specific projects designed to appeal to their home constituency without taking into account the real needs of the park system.[33] Since 1987, for every one dollar of Park Service requested construction projects, Congress has appropriated approximately two dollars for their own specific construction projects.[34]

For example, $3 million was earmarked for Glacier National Park to restore a historic backcountry chalet system visited by less than one percent of park visitors.[35] National Park Service officials say, however, they could have allocated the funds to higher priority uses instead of chalet restoration, which was very low on the park's "to do" list.[36] More pressing needs include repair of the Going-to-the-Sun Road (used by 1,720,784 visitors in 2000),[37] improvements to visitor centers and restoration of the antiquated sewer system.[38]

As already discussed, part of the problem is that park managers do not make all the spending decisions. Under the politicized congressional appropriations process, the park's priorities have to wait. Those who do control the resources lack the incentives and the authority to invest wisely. The political process makes it more expedient to spend resources on a noticeable or mandatory, even if unnecessary, item rather than to pay for general upkeep.

3. Natural Resources on the Decline

Degradation on the federal estate is much deeper than infrastructure. The condition of natural resources, often what the lands are set-aside to protect, is also declining. The Wilderness Society has developed a list of the country's most endangered wildlands. The report reveals that environmental threats are on the

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33. *See* Annson Jr. *supra* note 16, at 19-20 (explaining that every congressman would either like to procure a national park for his district or fund new construction projects for existing parks already in his district).

34. *See id*. at 20.

35. *See* National Parks Service, FY01 *Greenbook Overview*, National Parks Service, *available at* http://data2.itc.nps.gov/budgetwab/fy2001/overview.pdf (2001).

36. *See id*.

37. *See id*.

38. *See* Edward T. Pound, *Costly Outhouses Monuments to Red Tape*, USA TODAY, Dec. 15, 1997, *available at* http://www.usatoday.com/news/acovmon.html.

rise across all of our federal lands.[39] In 1994 the National Parks Conservation Association (NPCA), a private organization that monitors park conditions, issued a "parks report card" that rated three out of four parks at "C" or below.[40] The preservation of cultural and natural resources, the core mission of the Park Service, is often neglected. For example,

- Biological diversity is declining in many parks, according to a prominent group of wildlife biologists, partly because ecological research is minimal.[41]
- Because many park resources are unaccounted for, the actual state of many natural resources is largely unknown. In 1995, the GAO noted that "Most park managers lack sufficient data to determine the overall condition of their parks' natural and cultural resources.".[42]
- Of the threatened and endangered species that make national parks their home, only 19 percent have shown any population improvement.[43]

Other federal land mangers also have to deal with deteriorating natural resources. For example,

- An estimated 39 million acres of our federal lands in the intermountain West are at risk of uncontrollable, catastrophic wildfire.[44] Nearly a decade of fire suppression in the region has changed the forest structure from once savannah-like pine forests to dense fir stands that are susceptible to bug infestation, disease, and conflagration.[45]

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39. *See* WILDERNESS SOCIETY, 15 MOST ENDANGERED WILDLANDS, 1999: PUTTING CONSERVATION FIRST, *available at* http://www.wilderness.org/newsroom/15most/ (1999).

40. Report of the National Parks & Conservation Association, *National Park Conditions: A Survey of Park Superintendents; Summary of Findings*, Colorado State University (1994). Grading, A through F, was based on the following criteria: natural resources, cultural resources, condition of infrastructure, quality of visitor information and programs, law enforcement, workforce and budget issues, availability of special programs. Data was provided via mailed survey to park superintendents.

41. FREDERIC H. WAGNER ET AL., WILDLIFE POLICIES IN THE U.S. NATIONAL PARKS 62 (1995).

42. U.S. GEN. ACCOUNTING OFFICE NATIONAL PARKS: DIFFICULT CHOICES NEED TO BE MADE ABOUT THE FUTURE OF THE PARKS, 1 (1995).

43. National Park Service, Rethinking the National Parks for the 21st Century, *available at* http//www.nps.gov/policy/report.htm (last visited on Apr. 8, 2003).

44. U.S. GEN. ACCOUNTING OFFICE, WESTERN NATIONAL FORESTS: A COHESIVE STRATEGY IS NEEDED TO ADDRESS CATASTROPHIC WILDFIRE THREATS 6 (1999).

45. Holly Lippke Fretwell, *Forests: Do We Get What We Pay For?* 1999 Pol. Econ. Res. Ctr. Pub. Lands Rep.

- Two-thirds of public grazing lands remain in less than good condition, according to a 1988 GAO report. Stream and riparian areas continue to be overgrazed.[46]

4. Expansion

As shown above in Figure 1, the park system has continued to expand even though the current system is in a state of disrepair. In fact, the number of national parks has increased to approximately 379.[47] This rapid growth represents an increase of nearly 45% in the number of parks in the system since 1970, in spite of the fact that the responsible government agency has been unable to maintain those parks already in the system. Congressional and executive branch actors are responding to the incentives of the political process by expanding areas for their constituency, a process referred to as "thinning the blood." Also cited as "park barrel politics" many new parks slide into the system to provide money for their congressional district. For example, nearly half a million each year is spent to preserve the Charles Pinckney National Historic Site, a house built after Pickney's death to memorialize his contributions to writing the U.S. Constitution.[48] Thus, while more new parks, national heritage centers, national historic sites, rivers, and battlefields are added to the system, the slice of appropriations left to fund existing parks (like Yellowstone, Grand Teton, and the Everglades) is diminished.

5. Overcrowding

The number of visitors to the national park system has increased sharply over the last 30 years. Since 1970 the number of people visiting national parks has more than doubled, rising from approximately 133 million visitors to almost 270 million.[49] A *Consumer Reports* survey found overcrowding and lack of facility maintenance to be among the greatest concerns of park visitors.[50]

Park managers are having trouble handling the number of visitors.

- Yosemite National Park is restricting park entry on the busiest days. Since 1993, the park entrance has been closed

46. Karl Hess Jr. & Jerry L. Holechek, *Beyond the Grazing Fee: An Agenda for Rangeland Reform*, 4 POL'Y ANALYSIS NO. 234 (July 13, 1995) *available at* http://www.cato.org/pubs/pas/pa-234.html.

47. National Park Service, *supra* note 35, at NPS-171.

48. *Id*. at 128.

49. Annson Jr., *supra* note 16, at 9.

50. *Rating the Parks*, CONSUMER REPORTS, June 10-17, 1997, at 12.

several times each year due to gridlock in the valley.[51]

- The Grand Canyon has become so congested that a public transportation system is planned. On an average summer day, 6,500 cars show up at the South Rim, but there are only 2,400 parking spaces.[52]

Increased crowds interfere with the quality of the park experience. Unlike theme park customers, those visiting national parks often choose parks as destinations because they desire to escape crowds and congestion. Overcrowding is a sign that the mechanism used to regulate access is not functioning adequately. Currently, parks restrict access by head counts or other similar mechanisms rather than by price. By charging a fee for entering parks and varying price according to demand (e.g. charging more for summer visitors than for winter visitors), the park service can reduce overcrowding. Such a system would mirror "peak load" pricing used in the electric utility industry.[53] The implementation of such a system, however, would require legislative oversight. In addition, it is the sheer number of visitors that provide park managers with political capital to obtain funds through the appropriation process.

6. Crowding Out of Private Providers

The harm caused by the current financing system extends beyond federal lands. By charging below-cost fees, public managers discourage others from providing outdoor recreation. Why aren't there more Kampgrounds of America, more youth hostels? Why isn't more hunting, hiking, and camping available on private lands? Federal recreation is available at such low prices that private landowners, who must pay the full cost of their businesses, have trouble competing. Even where private landowners do compete they must do so by supplying other forms of recreation: theme parks, amusement centers, and the sometimes garish museums often located near national parks. Thus, private landowners are either deterred from offering any recreational services or from offering services that compete with public lands. Ironically, the lack of private providers

51. Fretwell, *supra* note 19, at 5.

52. *Id*. at 10.

53. TOM TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 180-81 (1992) (explaining that because demand for goods or services at peak time impose "special" additional costs, peak-load pricing charges a higher marginal or incremental cost to those consuming services at peak times and lower marginal or incremental costs to those consuming at non-peak times).

only reinforces the demand for more federal lands that suffer from the severe disabilities discussed above.

For example, the privately owned Kentucky Caverns, once called Mammoth Onyx Cave, is part of the same karst (limestone formation) as Mammoth Cave National Park. It has been open for public tours since 1927. Since 1946, when nearby Mammoth Cave was designated a national park, the cave managers have had a heavily subsidized competitor. The National Park Service dropped the fees for touring the cave from the once-competitive rate of about $3 per person early in the century to $1.50.[54] Because the Park Service charged such low fees for cave tours, the Kentucky Caverns owner had to offer distinctive and unusual features just to keep people coming.[55] The owner could not continue to offer simple cave tours.

In the 1970s, the owner, Bill Austin, decided to create a North American wildlife exhibit.[56] This would mean adding bison to the existing stock of elk and white-tailed deer.[57] But in the 1980s, another nearby federal recreation site began offering below-cost competition on this as well.[58] The Land Between the Lakes Recreation Area, operated by the federally owned Tennessee Valley Authority, introduced an elk herd that visitors could see without charge.[59] Unable to compete with the free attraction, Austin shifted gears again.[60] He replaced elk with kangaroos, emus, and Aboriginal artifacts from Australia.[61] The facility is now known as Kentucky Down Under, an animal park with an Australian theme.[62]

The example of International Paper, one of the largest timber producers in the United States, illustrates the obstacles posed by below-cost recreation on federal lands. It varies the management of its timber holdings depending on whether or not those holdings are surrounded by federal recreation land.[63] In Arkansas, Louisiana, and

54. Interview with Joy Lions, Chief of Program Services, Mammoth Cave National Park (Sept. 16, 1999). Cave tour fees have since increased from $1.50 in 1980 up to $7 in 1998.

55. Interview with Bill Austin, owner, Kentucky Down Under (Aug. 11, 1999).

56. *Id*.

57. *Id*.

58. *Id*.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Telephone Communication with Tom Bourland, wildlife biologist with Crawford and Bourland, Inc., Shreveport, LA, (May 26, 1999). Bourland was previously employed as International Paper's wildlife manager for the mid-south region.

Texas, where the company is surrounded by private land, International Paper encourages wildlife and outdoor recreation.[64] Although the company has allowed access to hunters and campers for many years, it began to aggressively market its land to hunting clubs, individual hunters, and family campers in 1983.[65] By 1986, recreation revenues had reached $2 million, which amounted to 25 percent of International Paper's total profits in the region.[66] By 1999, recreation revenues from the region totaled $5 million.[67]

As proceeds from recreation increased, the company's managers deliberately made the land more attractive to its visitors. Trees are now left standing for wild-animal corridors, age diversity in the forests is maintained to support more wildlife variety, and buffers are preserved along watersheds and streambeds.[68] Nearly two-thirds of the company's six million acres are managed for recreation across the nation.[69]

In the Pacific Northwest, however, where International Paper recently sold most of its holdings, none of the company's land was managed for recreation.[70] The federal government owns nearly half of all lands in the Pacific Northwest,[71] and most of International Paper's holdings were surrounded by national forest.[72] Because hunting and camping are mostly free on Forest Service lands, the company could not earn from hunters and campers revenues necessary to cover its costs. As a result, regional managers paid little or no attention to recreational values and lacked incentive to improve and protect wildlife habitat. "Free" recreation on federal land discourages others from providing it.

B. Distorting Incentives

Distorted incentives stemming from the current system of financing are causing the deterioration of our recreational lands. To procure their budgets, land managers must respond to political

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64. *Id*.

65. *Id*.

66. *Id*.

67. *See* Fretwell, *supra* note 45, at 18.

68. TERRY L. ANDERSON & DONALD R. LEAL, ENVIRO-CAPITALISTS: DOING GOOD WHILE DOING WELL 7 (1997).

69. Telephone Communication with Tom Bourland, *supra* note 63.

70. *See* Fretwell, *supra* note 19, at 8.

71. *Id.*

72. *Id.*

power, as illustrated recently in Glacier National Park. The park's managers want funds for road and sewer repair, yet Montana's congressional delegation earmarked $6 million to rebuild a backcountry chalet system used by fewer than one percent of park visitors.[73] A single, self-composting privy has already cost $1 million.[74]

According to retired National Park Service Director Roger Kennedy, more money is spent on "congressionally identified" initiatives than on projects recommended by Park Service personnel.[75] Politicians find it more appealing to cut the ribbon of a newly constructed facility than repair an existing sewer system. From 1978 to 1997, spending for major Park Service repairs and renovations fell at an inflation-adjusted rate of 3.6 percent per year.[76] Evidence indicates that federal agencies, like nearly all governmental institutions, tend to let maintenance suffer.[77] Maintenance is almost always neglected until deterioration is so severe that it becomes an "infrastructure crisis"—at which time politicians can rush out and take credit for fixing it. While private companies consider preventive maintenance to be a long-term investment that affects the future productivity of a business, government officials do not have an incentive to maintain the long-term value of their "business." Rather, they have an incentive to "defer routine maintenance until major restoration or new capital purchases . . . are required."[78] One reason for this is that unlike maintenance, new capital expenditures can be financed with borrowed funds, deferring the costs into the future.

In addition, because visitors are not paying the bill, public land managers tend to ignore their wishes. For example, in 1996 Yellowstone park managers closed the Norris campground and two museums, saving the park $70,000 in operating expenses.[79] Ironically, even at low prices, the campground alone brought in revenues of $116,000, well above the cost of operation.[80] Managers ignored these

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73. *See* Pound, *supra* note 38.

74. *Id.*

75. *See* Frank Greve, *Senior Legislators Claim Park Funds for Pet Projects*, WASHINGTON POST, Dec. 1, 1997, at A23.

76. *See* OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2000 (1999), *available at* http://www.access.gpo.gov/usbudget/fy2000/other.html (downloadable Excel spreadsheet).

77. *See* Richard L. Stroup & Sandra L. Goodman, *Property Rights, Environmental Resources, and the Future*, 15 HARV. J. L.& PUB. POL'Y 427, 427-54 (1992).

78. *Id*. at 439.

79. *See* Fretwell, *supra* note 19, at 9.

80. *Id*.

revenues because the money went to the national treasury, not to the park itself for use in Yellowstone.[81] Thus, the park managers saved operating expenses by closing the campground and the museum, but taxpayers lost $46,000 and visitors lost the use of facilities that they clearly valued.

Exasperating the financial problems under the congressional appropriations process, any unspent funds are returned to the national treasury. This means that park managers who carefully conserved funds would not only go unrewarded but would, in fact, be penalized. The likely result of their prudence would be a smaller budget the next year. Further, emergency funds are rarely available. Hence, the majority of agency discretionary funds are retained throughout the year, the remainder being spent in the final days before the fiscal year ends. Former Yellowstone National Park comptroller, Don Striker, estimates that 75 percent of the park's discretionary budget is spent in the last two weeks of the fiscal year.[82] It is clear that the problem is incentives rather than the level of funding. From 1978 to 1997, the National Park Service's operating budget increased from nearly $800 million to about $1.2 billion, an average annual increase of 2.3 percent above inflation.[83] Full-time staff has increased from 15,836 to 17,216 employees, an 8.7 percent increase.[84] Yet visitation grew at a slower rate of only 1.2 percent per year from 1978 to 1997.[85] Forest Service and Bureau of Land Management budgets have also grown beyond inflation by about 1.2 percent and 1.5 percent, respectively.[86]

Occasional legislative changes allowed some revenues to stay where they were collected; these actions led almost inevitably to an equal decrease in appropriations the following year. For example, legislation passed by Congress in 1972 specified that visitor fees on federal lands be used by the agency that collected them.[87] The intent was to encourage agencies to collect more fees. However, the executive branch's Office of Budget and Management and Congress

81. Interview with Don Striker, Comptroller, Yellowstone National Park (Apr. 20, 1997).
82. Interview with Don Striker, Comptroller, Yellowstone National Park (Oct. 5, 2001).
83. *See* OFFICE OF MGMT. & BUDGET, *supra* note 76.
84. Leal & Fretwell, *supra* note 18, at 2.
85. *See* Fretwell, *supra* note 19, at 8.
86. *See* OFFICE OF MGMT. & BUDGET, *supra* note 76.
87. *See* Fretwell, *supra* note 19, at 8.

offset the fees by an equal decline in budget appropriations, thus eliminating any incentive to raise revenues.[88]

In general, financial support from recreation users has been minimal. Recreation fees covered only seven percent of the National Park Service's operating budget in 1995.[89] In that year, only one Park Service unit, Arches National Park in Utah, generated receipts that exceeded its operating budget. Even under the Fee Demonstration Program, fees in 2000 represented only 11 percent of the Park Service's total operating budget.[90] As for the Forest Service and Bureau of Land Management, they lose an average $355 million annually on recreation management.[91] In other words, they spend $355 million more on recreation each year than they receive in recreation fees.

III. GETTING THE INCENTIVES RIGHT

To solve the problems identified in Part II, we must redirect the incentives public land managers face. First, local managers must have flexibility to manage both financial and natural resources to meet area goals and be held accountable for their actions. Second, revenues generated at the park must be retained for on-site management. This will create incentives to respond to the demand for resource and facility upkeep. Fortunately, a straightforward method of accomplishing both of these objectives exists and has already proven itself through the Fee Demonstration Program, user fees that park managers can direct to local use.

A. Efficiency

User fees are prices that government agencies charge to consumers of services the government provides.[92] From an economic efficiency perspective, user fees, when properly applied, result in a

88. MACKINTOSH, *supra* note 10, at 70 (describing OMB's view that visitor fees were a bonus that could be used to offset the National Park Service's budget requests).

89. Leal & Fretwell, *supra* note 18, at 3.

90. See NAT'L. PARK SERV., NATIONAL PARK SERVICE 2002 BUDGET JUSTIFICATIONS, *supra* note 37, at 222; U.S. DEP'T OF THE INTERIOR (NAT'L. PARK SERV., U.S. FISH & WILDLIFE SERV., BUREAU OF LAND MGMT.) & U.S. DEP'T. OF AGRIC. (U.S. FOREST SERV.), RECREATIONAL FEE DEMONSTRATION PROGRAM PROGRESS REPORT TO CONGRESS FISCAL YEAR 2000 7 (2001).

91. *See* HOLLY LIPPKE FRETWELL, PUBLIC LANDS: THE PRICE WE PAY 12 (1998).

92. *See* Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L. REV. 795, 800 (1987) (defining a user fee as payment that reflects the value of service received).

more efficient allocation of goods and services. When consumers face an artificially low marginal price for a good or service, the net result is a level of consumption that exceeds the economically efficient level. However, when consumers face an appropriate price, their consumption of goods and services creates a situation in which the marginal benefit of consumption equals the marginal cost.[93] In the case of parks, this means that, at the margin, the number of visitors and the benefits they derive from using the resources equals the cost.

It is important to understand that a reduction in visits or visitors may have positive, not negative effects if overcrowding is a cause of degradation to resources and recreation quality. Reducing the number of visitors can relieve environmental stress and increase visitor enjoyment. Hence, assuming an elastic demand, in which demand for goods or services are sensitive to changes in price, imposition of user fees can assuage further degradation and crowding of the park system. Evidence described below suggests, in response to the Fee Demonstration Program, demand has not fallen in any meaningful way to date. This may imply that user fees are still too low or that visitor demand is inelastic, or insensitive to changes in price. Both are likely to play a role.

One solution to the problem described above is to implement "peak" or differential pricing that varies the user fee depending on the time of year or the attraction visited. Fees would be higher during popular times of the year, such as the summer, as compared to less popular times, such as the winter.[94] Fees might also vary according to the attraction park entrants wish to visit. Lower prices might be charged to visit the less popular attractions. Perhaps park managers, vested with both authority and accountability, might combine these approaches or create other methods of alleviating overcrowding through the development of new alternative attractions. As discussed below, New Hampshire has successfully employed differential pricing in its state park system. These approaches represent an alternative to the more drastic solution of simply raising prices across the board to induce further reductions in the number of visits or visitors. Reducing park congestion does not necessarily require pricing people out of parks.

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93. *See id.* at 809-11 (explaining that efficient pricing deters consumption of additional units of public goods and services up to the point where the marginal benefit equals the marginal cost to society).

94. *See* TIETENBERG, *supra* note 53 and accompanying text.

B. Fairness

Notwithstanding enhancing economic efficiency, the imposition of a user fee will have other important impacts. First, user fees do add a fresh source of income to what Congress currently annually appropriates, and this additional income facilitates the movement toward a balanced budget for maintaining and operating the parks. Second, by leaving approximately 80 percent of the funds collected in each park, individual park managers, freed from political pressures attached to annual appropriations, may direct these funds to uses in which the associated benefits are the highest. Incidentally, this may offer another explanation as to why parks participating in the Fee Demonstration Program have not seen an appreciable reduction in the number of visits or visitors.[95] In addition, consumer reaction to the imposition of the user fee provides information regarding the amount of the good or service to provide guiding park managers on how to use their overall budget including revenues from user fees and annual congressional appropriations.[96]

Of course, there is likely to be significant resistance to the implementation of a user fee, or an increased user fee, especially where to date, the perception has been that government provides the good for free. In fact, many may argue that moving from a system of financing government goods and services such as national parks through general tax revenues is unfair. However, quite the contrary is true. While fairness may be defined in a number of ways, true fairness dictates that people pay for what they consume. Under the current system of financing for national parks, those who do not use the parks subsidize those who do since Congress pays for park operations out of general tax revenues.[97]

Imposition of a user fee does not forestall important equity considerations. For example, if there is a significant concern that low income persons would be unable to afford a user fee for entering a national park, nothing precludes the relevant government agency or

95. To the extent that the user fees are used to improve park maintenance and infrastructure, and thus people's experience in the park, demand may actually be increasing due to an interaction between price and quality of experience resulting in an outward shift in demand for any level of the user fee.

96. *See* Gillette & Hopkins, *supra* note 92, at 806 (asserting that user fees exhibit evidence of people's willingness to pay for goods and services that informs government decisions to either increase or decrease the current amount provided).

97. *See id*. at 814-15(contending that user fees are fair since they reduce the burden on those taxpayers who do not themselves consume the good or service and thus receive little or no direct benefits).

specific park with providing a subsidy to these particular individuals rather than providing a single subsidy program to all regardless of ability to pay. In fact, national forests in Oregon and Washington have addressed the issue by providing persons volunteering a day of trail work with the Washington Trails Association, a partnership group, with a free single-day trail pass.[98] Two days of labor earn an annual permit.[99] Moreover, targeting specific persons allows the park system to charge an economically efficient user fee and avoid the gross problems of overuse associated with current congressional funding of the national park system. Finally, given that the anecdotal information shows little drop in visitation to date, it seems fair to say that fairness concerns have not yet materialized.

C. The Fee Demonstration Program

In 1996, in search of alternative methods to obtain funds for our federal lands, Congress authorized the Fee Demonstration Program.[100] The program provides increased funding to help restore degrading facilities and to help meet growing needs on our public lands. Four agencies are participating—the National Park Service, the Forest Service, the Bureau of Land Management, and the Fish and Wildlife Service.[101]

In fiscal year 2001, fee demonstration projects were operating at 415 sites. These included 137 sites managed by the Park Service, 100 by the Bureau of Land Management, 91 by the Fish and Wildlife Service, and 87 by the Forest Service. [102] Revenues from fees have doubled since the program began, increasing from about $93 million in fiscal year 1996, before the program was implemented, to nearly $200 million in fiscal year 2000.[103] Of course, fees still represent a small portion of total agency budgets.

98. Fretwell, *supra* note 19, at 14.

99. *Id*.

100. *Id*. at 10.

101. Each agency may choose up to one hundred sites at which higher fees or new fees can be charged. At least 80 percent of the fee revenues must be retained at the site where they are collected, with the remainder spent at agency discretion. Fee revenues can fund a broad array of activities ranging from costs of fee collection to resource preservation and law enforcement. The program is authorized to operate through 2001 and allows agencies until the end of fiscal year 2004 to spend the revenues collected.

102. *See* U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF AGRIC., *supra* note 90, at 1, 4.

103. *Id.*

Initial reports suggest that the demonstration program is a qualified success.[104] Despite higher fees, visitor numbers for all agencies were up 7 percent between 1996 and 2000.[105] And visitor response to surveys has been positive. From May 30 through August 18, 1997, the Cooperative Park Studies Unit of the University of Minnesota's College of Natural Resources conducted a survey at eleven units of the National Park System to study people's reactions to the Fee Demonstration Program.[106] Respondents came from all fifty states, the District of Columbia, Puerto Rico, Guam and twenty-four foreign nations. The following is a summary of their results:

- 96% of the respondents said the new fees *would not* influence their decision to make future park visits.[107]
- 71% of the respondents felt the new fees were about right; 12% thought the new fees were too low; and only 17% thought the new fees were too high.[108]

According to the study, the results were consistent across several important variables over which a significant amount of variation in results is often controlled for as part of surveys.[109] These variables included gender, age, education, race or ethnicity, and nationality.[110] Survey results were also consistent across park units, day, time and method of data collection.[111] The method of data collection included questionnaires and 26 focus groups. Overall, the survey concluded that visitors strongly support the Fee Demonstration Program.[112]

The one caveat of the study is that of the 17 percent of those individuals that felt the new fees were too high, the vast majority

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104. *See* GENERAL ACCOUNTING OFFICE, RECREATION FEES: DEMONSTRATION FEE PROGRAM SUCCESSFUL IN RAISING REVENUES BUT COULD BE IMPROVED 2-3 (1998) *available at* http://www.nps.gov/feedemo/rc99007.pdf (last visited Apr. 13, 2003).

105. This provides only a preliminary indicator of the impact because the report does not incorporate other factors that affect visitation such as weather, construction, and the state of the economy.

106. *See* ALLEN L. LUNDGREN ET. AL., MONITORING 1997 PARK VISITOR REACTIONS TO THE NATIONAL PARK SERVICE RECREATIONAL FEE DEMONSTRATION PROGRAM RESEARCH SUMMARY, COOPERATIVE PARK STUDIES UNIT, UNIVERSITY OF MINNESOTA, COLLEGE OF NATURAL RESOURCES, *available at* http://www.nps.gov/pub_aff/feedemo/visitor.htm (last visited Apr. 14, 2003).

107. *See id*. at 3.

108. *See id*. at 2.

109. *See id*. at 3.

110. *See id*. (explaining that despite the diversity in the characteristics of survey respondents their reactions to the Fee Demonstration Program were similar).

111. *See id*. (noting the consistency of survey respondents across date, time and method of data collection including onsite questionnaires, focus groups and informal discussions).

112. *Id*. at 4.

came from lower income strata. Table 1 shows the income distribution of this 17 percent.

Table –1
Income Distribution of Survey Respondents Who Felt the New Fees Were Too High

Income	
$65,000 or more	13%
$40,000 to $64,999	18%
$25,000 to $39,999	17%
$15,000 to $24,999	24%
$14,000 or less	28%

Source: Figure 3 from ALLEN L. LUNDGREN, DAVID W. LIME, CYNTHIA A. WARZECHA & JERILYN L. THOMPSON, MONITORING 1997 PARK VISITOR REACTIONS TO THE NATIONAL PARK SERVICE RECREATIONAL FEE DEMONSTRATION PROGRAM RESEARCH SUMMARY, COOPERATIVE PARK STUDIES UNIT, UNIVERSITY OF MINNESOTA, COLLEGE OF NATURAL RESOURCES, *available at* http://www.nps.gov/pub_aff/feedemo/visitor.htm

Some might argue that these results suggest that the concerns of those questioning the fairness of the Fee Demonstration Program may be valid to some extent as over 52 percent of those who believed the new fees to be too high had incomes of less than $25,000.[113] However, drawing such an inference is unwarranted for several reasons. First, it is unclear whether the fact that those who have less income think prices are too high demonstrates anything significant about fundamental fairness. Second, putting this number in perspective, it represents only 9 percent of the total survey respondents.[114] While one could argue that fairness dictates a redistribution of income so that all people can enter the parks for free, one can also argue that people should pay for the park services they use through entrance fees just as people pay for the electricity and water they consume.[115]

113. *See id.* at 2-3.

114. *See id.* at 2. Only 17 percent of the total survey respondents thought the new fees were too high, and 52 percent of those had an annual income of less than $25,000. This 52 percent represents only 9 percent of total survey respondents.

115. Granted, electricity and water utilities often provide special assistance to low-income

Furthermore, a simple analysis demonstrates that other costs, particularly transportation, not the entrance fees associated with the Fee Demonstration Program, represent the real barriers that low-income persons face in visiting national parks.[116] Consider a trip from July 22 to July 29, 2001 to Yellowstone National Park. Based on data from the Energy Information Administration, the average cost of all types of gasoline, including leaded and unleaded, was $1.30 per gallon from 1996-2000.[117] Next, choosing three cities from different parts of the country, San Francisco, Phoenix, and Cleveland and applying this average per gallon cost yields an estimated round trip fuel cost of $141, $145 and $225, respectively, for a trip to Yellowstone National Park.[118] Several other costs must also be factored into the cost of

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households. However, such assistance is usually provided on a case-by-case basis, not a blanket policy like the historical policy of free uncontrolled access to national parks. A similar approach could be employed as part of a permanent park fee system by subsidizing lower income visitors on an individual basis. Nevertheless, as discussed below, given that on average, entrance fees comprise a very small percentage of the total cost of visiting a national park, subsidies might be better directed at more significant costs such as transportation.

116. This argument is premised on the Travel Cost Method (TCM) or Recreational Demand Models, an economic technique for estimating benefits from the recreational use of natural resources. *See* SCOTT J. CALLAN & JANET M. THOMAS, ENVIRONMENTAL ECONOMICS & MANAGEMENT, 246 (1st ed. 1996) (defining TCM as the use of "the complementary relationship between the quality of natural resources and its recreational use value"). TCM is an accepted technique within the mainstream of the economics community and has been applied in a variety of studies. *See e.g.*, Nancy E. Bockstael, et al., *Measuring the Benefits of Improvements in Water Quality: The Chesapeake Bay*, 6 MARINE RESOURCE ECONOMICS 1 (1989); Nancy E. Bockstael et al., *Estimating the Value of Water Quality Improvements in Recreational Demand Framework*, 23 WATER RESOURCES RESEARCH 951 (1987); MARION CLAWSON, METHODS FOR MEASURING THE DEMAND FOR AND VALUE OF OUTDOOR RECREATION (1959); Robert Mendelsohn, *Modeling the Demand for Outdoor Recreation*, 23 WATER RESOURCES RESEARCH 961 (1987); J.F. Dwyer et. al., *Estimating the Value of Urban Forests Using the Travel Cost Method*, 9 JOURNAL OF ARBORICULTURE 182 (1983); Jeffrey E. Englin & Robert Mendelsohn, *A Hedonic Travel Cost Analysis for Valuation of Multiple Components of Site Quality: The Recreation Value of Forest Management*, 21 JOURNAL OF ENVIRONMENTAL ECONOMICS AND MANAGEMENT 275 (1991); V. Kerry Smith & William H. Desvouges, *The Generalized Travel Cost Model and Water Quality Benefits: A Reconsideration*, 52 SOUTHERN ECONOMIC JOURNAL 371 (1985); V. Kerry Smith et. al., *Estimating Water Quality Benefits: An Econometric Analysis*, 50 SOUTHERN ECONOMIC JOURNAL 422 (1983); John K. Mullen & Fredric C. Menz, *The Effect of Acidification Damages on the Economic Value of the Adirondack Fishery to New York Anglers*, 67 AMERICAN JOURNAL OF AGRICULTURAL ECONOMICS 112 (1985); William J. Vaughan & Clifford S. Russell, *Valuing a Fishing Day: An Application of a Systematic Varying Parameter Model*, 58 LAND ECONOMICS 450 (1982).

117. *See* Table 9.4 – Motor Gasoline Retail Price, U.S. City Average *available at* http://www/eia.doe.gov/pub/energy.overview/monthly.energy/txt/mer9-4.

118. *See* MapQuest at http://www.mapquest.com (estimating one-way mileages for from the airport in San Francisco, Phoenix and Cleveland to Bozeman, MT were 1085, 1117 and 1730, respectively). Driving transportation costs were estimated by multiplying the average cost per gallon of gasoline with the estimated round trip mileage to drive from each city to Yellow Stone

driving. For example, the driving time from each of these cities is 22, 24.5 and 29 hours, respectively. Assuming that a family of three is taking the trip, $35 per day on food is a conservative estimate of daily food costs. From San Francisco, assuming that it takes two days to drive each way, the round trip cost of food is $140.00. Likewise, assuming it takes two days to drive from Phoenix and three from Cleveland, the round trip food costs would equal $140.00 and $210.00. The total cost of driving would then be $281.00 from San Francisco, $285 from Phoenix and $435.00 from Cleveland. Since these cost estimates do not include any tolls, lodging or other incidentals, they must be considered conservative estimates.

Alternatively, if one were to fly from these cities to Bozeman, the cheapest flight would have been $361.50, $345.60, and $577.00 per person.[119] Assuming the same family of three was to fly from each city to Bozeman the total cost of the flights would have been $1084.50, $1036.80 and $1731.00. Staying six nights in Bozeman costs $561.00, or on average, $93.50 per night for hotel and does not include food and other costs.[120] Finally, even if the family is going to spend more than one day in the park, the family may enter and re-enter as often as they wish over a seven day period for as little as $20.00.[121]

When compared to all of the other costs, the $20.00 entrance fee would not seem to be the deciding factor in whether a family will travel to Yellowstone, regardless of the income level. Other costs, such as travel and lodging, appear to dominate the decision. Indeed, as shown in Table 2, using the costs outlined above, the $20.00 entrance fee is less than 2 percent of the cost of a vacation that includes Yellowstone regardless of the mode of travel used.

National Park and return.

119. *See* Worldweb Reservations available through any number of Internet search engines and Alaska/Horizon Flight Selection, *available at* http://shopping.alaskaair.com/fairlist (representing the lowest cost roundtrip fare charged on Northwest Airlines from Cleveland and Alaska Airlines from Phoenix and San Francisco to Bozeman, MT for the period July 22-July 29, 2001). A Saturday night stay over was selected to obtain the lowest cost fare. Northwest was selected because it flies the most direct route to Bozeman from Cleveland with only one stop in Minneapolis. Alaska Airlines was chosen as it only makes one stop in traveling to Bozeman and is also a low-cost carrier.

120. The per night cost of staying at a hotel is the average of daily rate charged using a AAA Motor Club discount at the Holiday Inn ($98 per night) and the Fairfield Inn ($89 per night) in Bozeman, MT for the period July 22- 29, 2001. Each hotel was contacted directly to obtain rate information.

121. *See* Yellowstone National Park.Com *at* http://www.yellowstonenationalpark.com/information.htm (last modified on June 28, 2003).

Table - 2
Entrance Fee as a Percentage of the Cost of a Vacation that Includes At Least One Visit Yellowstone National Park

City	Cost of Vacation if Driving	Entrance Fee as a Percentage of Cost if Driving	Cost of Vacation if Flying	Entrance Fee as a Percentage of Cost if Flying
Cleveland	$1206	1.7%	$2502	0.7%
San Francisco	$1192	1.7%	$1856	1.1%
Phoenix	$1196	1.7%	$1808	1.1%

The entrance fee will not prohibit anyone from taking a destination visit to Yellowstone or any other national park where the travel cost represents a substantial majority of the cost.[122] Such fees, however, may affect visits to parks where travel costs are not of great concern.

As demonstrated below, the tangible benefits of the Fee Demonstration Program outweigh any of the minor burdens imposed on individual parties. There are also less obvious positive impacts that make possible the tangible benefits and thus also serve to tip the balance in favor of the Fee Demonstration Program. The program provides participating federal areas with a revenue stream that is independent of the annual appropriations process. Though not currently replacing all funds provided through congressional appropriations, fees from the program depoliticize, at least in part, the funding of park, forest, and other federal land operations. Managers need not fully concern themselves with the political whims

122. Table 3 further demonstrates that the entrance fees are not onerous or unfair. In Table 3, the entrance fee to Yellowstone National Park, taken as a percentage of the conservatively estimated transportation costs, shows that the $20.00 fee is no more than 4.8% of the cost.

Table – 3
Entrance Fee as a Percentage of the Cost of Travelling to Yellowstone National Park

City	Cost of Vacation if Driving	Entrance Fee as a Percentage of Cost if Driving	Cost of Vacation if Flying	Entrance Fee as a Percentage of Cost if Flying
Cleveland	$435	4.6%	$1731	1.2%
San Francisco	$421	4.8%	$1085	1.8%
Phoenix	$425	4.7%	$1037	1.9%

of senators and congressman who oversee their appropriations bills. They are able to direct funds to those items such as road maintenance, water systems upgrades, trash collection, and resource stewardship, all of which have been neglected because of line item funding and other budget requirements included in appropriations bills. Still, it is worth noting that because the Fee Demonstration Program focuses solely on recreation fees, recreation opportunities and visitor demand for them will take priority over other management functions.[123]

At the same time, independent judgment together with reduced political ties makes federal land managers more accountable both to their superiors and to visitors for the use of funds and the results obtained. Such accountability can be an important motivation to manage federal lands efficiently and to provide the best recreational opportunities possible. Managers can be evaluated less on their political prowess and more on their ability to effectively administer national parks and forests.

Finally, as Table 4 illustrates, even for the Forest Service, where the support for fees has been less than the other agencies, overall reaction to the fees has been positive. Granted, in the summer of 1999, a one-day protest was organized to oppose the program, especially at Forest Service sites where no fees had previously been charged,[124] and several congressmen, including fiscal conservatives, tried to eliminate the Forest Service from the Fee Demonstration Program.[125] Even so, a Forest Service survey indicated high to neutral acceptance of fees on public lands from 60 percent of the respondents.[126] The results in Table 4 illustrate this overall positive response. These results are based on a site-by-site analysis that the Forest Service conducted at six sites, analysis of national comment cards, and a random sample of 109 newspapers since 1996.[127]

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123. This is similar to the Forest Service focusing on timber harvest once a portion of fees was retained for restoration under the Knudson-Vandenburg Act.

124. *See* Fretwell, *supra* note 19, at 11.

125. *Id.* at 11.

126. *See* U.S. DEP'T OF THE INTERIOR & U.S. DEP'T. OF AGRIC., *supra* note 90, at 1. *See also* GENERAL ACCOUNTING OFFICE, *supra* note 104, at 80-85.

127. *See* U.S. DEP'T. OF AGRIC. (U.S. FOREST SERV.), RECREATION FEE DEMONSTRATION PROGRAM: INVESTING IN THE GREAT OUTDOORS, *available at* http://www.fs.fed.us/recreation/fee_demo/fee_intro.shtml 4 (2000).

Table – 4
Forrest Service Sites – Public Reaction To User Fees Under the Fee Demonstration Program

Site	Positive	Negative
Boundary Water Canoe Area	87%	13%
Vail Pass Winter Recreation Area	46%	22%
Desolation Wilderness	64-78%	22-36%
White Mountain National Forrest	68-72%	15-16%
Cataract Lake Fee Area	64%	14%
Tonto National Forrest	55-64%	22-26%
National Comment Cards	77%	19%
News Article Analysis	65%	35%

Source: USDA FOREST SERVICE, RECREATION FEE DEMONSTRATION PROGRAM: INVESTING IN THE GREAT OUTDOORS, *available at* http://www.fs.fed.us/recreation/fee_demo/fee_intro.shtml (2000).

Other survey results are consistent with the overall positive results from the University of Minnesota study.[128] These results include:

- The Fish and Wildlife Service found that 86 percent of visitors surveyed considered the fees to be about the right amount.[129]
- A Bureau of Land Management visitor survey indicated the majority of respondents found fees to be about right.[130]
- Interest groups that monitor federal recreation, including the American Recreation Coalition, National Parks Conservation Association, and Washington State Mountaineers, have also supported the program.[131]

In one specific example, Rocky Mountain National Park increased its entrance fee by $5, some camping fees by $2 and other camping fees by $6. The number of visitors in 1995 decreased only 3.4 percent from 1994, the year in which it had seen the highest number of visitors to the park. The total increase in revenue for the park was projected

128. LUNDGREN ET. AL., *supra* note 106.
129. *See* U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF AGRIC., *supra* note 90, at 8.
130. *Id.*
131. *See* GENERAL ACCOUNTING OFFICE, *supra* note 104, at 85.

to be as much as $1.5 million, which would be used to help address a $50 million maintenance back log in the park.[132]

It is too early to evaluate the Fee Demonstration Program completely. Only 24 percent of the new fee receipts had been spent by March 1998, when the General Accounting Office prepared its comprehensive report.[133] However, some evidence is available. At first, the costs of fee collection itself consumed nearly 30 percent of any new revenues.[134] Parks charging new fees had to set up fee stations and arrange for sale of passes near the parks.[135] Indeed, the most noticeable effects of the program have involved pricing and fee collection. For example, thirty Park Service sites have installed automated fee-collection machines, which accept cash or credit cards.[136] As visitors approach within fifty miles of Grand Canyon National Park, they can pre-purchase passes, then zip through a dedicated lane at the park entrance rather than wait to purchase entry permits. Other such changes include:

- Visitors heading toward one of four southern California national forests can purchase a permit at any of 350 local businesses.[137]
- White Mountain National Forest in New Hampshire requires a trail park permit but allows visitors without a pre-purchased forest permit 14 days to mail in payment.[138]
- A visit to the Web page of Paria Canyon-Coyote Buttes in Utah, managed by the Bureau of Land Management, provides information about location and reservation availability (entry into the canyon is limited to twenty backpackers per day). Interested parties can purchase a backpacking permit online.[139]

While improving fee collection took time and money, it was not the biggest expenditure. As many had hoped, the largest portion of the new fees is being used to improve services, repair and maintenance, and protection of natural resources previously

132. *See* DENVER ROCKY MOUNTAIN NEWS, Dec. 24, 1996, at 8A.
133. *See* GENERAL ACCOUNTING OFFICE, *supra* note 104, at 34.
134. *See* Fretwell, *supra* note 19, at 12.
135. *Id*.
136. *Id*.
137. *Id*.
138. *Id*.
139. *Id*.

neglected.[140] The results are very positive. Table 5 lists the manner in which in the Forest Service spends fees collected as part of the Fee Demonstration Program in Fiscal Year 1999.

Table –5
Forest Service Allocation of Revenue from the Fee Demonstration Program
Fiscal Year 1999

Expenditure	
General Operations (trash collection, restroom maintenance)	30.8%
Cost of Collection	18.8%
Repairs and Maintenance	10.8%
Signs	10.3%
Upgrading Facilities	6.2%
Health and Safety	6.0%
Law Enforcement	3.5%
Resource Preservation	3.1%
Other Costs	2.6%
Habitat Improvement	0.4%

Source: USDA FOREST SERVICE, RECREATION FEE DEMONSTRATION PROGRAM: INVESTING IN THE GREAT OUTDOORS, *available at* http://www.fs.fed.us/recreation/fee_demo/fee_intro.shtml (2000).

Other specific examples of expenditures from across the national park and forest system include the following:

- Natural Bridges National Monument in Utah, which is managed by the Park Service, used fees to rebuild 5,000 feet of deteriorating trails. The monument had not had a trails maintenance and repair program in over thirteen years; it now has a trail maintenance crew of five.[141]
- Fees helped Grand Teton National Park survey wildlife in the park and monitor water quality.[142]
- At the Forest Service's Mount St. Helens National Monument, fees kept open three visitor centers that

140. *Id*. at 13.
141. Letter from Keith Stegall, SEUG Trails Coordinator, Canyonlands National Park (Dec. 18, 1998) (on file with author).
142. Interview with Bob Schiller, Chief of Resource Management (Oct. 6, 1999).

otherwise might have been closed. Other funds at Mount St. Helens were used for plowing snow to provide early access to the monument's popular Windy Ridge and Lava Canyon areas.[143]

- The Waterside Theater on Roanoke Island is being repaired, and all costs are being covered from recreation demonstration program fees.[144]
- Fees from the demonstration program are being used to repair the Carl Sandburg National Historic Site. Significantly, the fee revenues used in this project were from the portion of the fees collected at parks participating in the demonstration program to those parks or sites that were not. According to Connie Backlund, superintendent of the site, the repairs would not have been possible without revenues from the Fee Demonstration Program.[145]
- At Zion National Park, revenues from fees are being used to improve seemingly mundane yet very important items including improving trail-heads, providing restroom facilities at trailheads, and providing regular trash collection. Fees are also used to enhance signage along trails and to pay for additional rangers, along with search and rescue operations.[146]

Managers at some agencies are experimenting with differential pricing, a technique typical of the private sector. Some Bureau of Land Management and Forest Service sites have begun to charge lower weekday prices to encourage midweek rather than weekend visitation.[147]

- At Tonto National Forest in Arizona, an annual day-use pass valid seven days a week costs $90 per year. But a $60 pass is valid Monday through Thursday.[148]
- At the Lower Deschutes Wild and Scenic River in Oregon, the Bureau of Land Management charges a $10 camping fee

143. *See* USDA FOREST SERV., *Mount St. Helens Lowers Some Prices After First Season of Fee Collections*, *available at* http://www.fs.fed.us/gpnf/press/1998/pr91.htm (Jan. 5, 1998).

144. *See* Jerry Allegood, *'Lost Colony' Theatre Getting $350,000 in Improvements*, THE NEWS AND OBSERVER OF RALEIGH, Jan. 20, 2000, at A-3.

145. *See* Julie Ball, *Flat Rock: Carl Sandberg Site Under Renovation,* ASHEVILLE CITIZEN-TIMES, Dec. 23, 1999, at B2.

146. *See* Craig Martin, *Backcountry User Fees are Becoming More Common in National Parks*, THE SANTA FE NEW MEXICAN, May 6, 1999, at C-1.

147. These prices were in effect in mid-1999.

148. *See* Fretwell, *supra* note 19, at 13.

per site per day on summer weekends, but only $5 in the middle of the week and during off-season weekends.[149]

- A trails pass program on Washington and Oregon national forests costs trail users $3 a day or $25 annually to park at trail heads.[150]

The Forest Service has found that differential pricing increases public acceptance of fees.[151] Users can choose a pass that meets their specific needs, and lower-income users have better access.[152] It also helps disperse visitation into shoulder seasons, which reduces operating costs by reducing the need for additional staff, facilities, and maintenance and decreasing damage to resources.

There are shortcomings in the initial implementation of the fee programs. Confusing, layered, and excessive fees still abound. For example, hiking in the Olympic National Forest in Washington requires a trailhead parking fee of $10 per vehicle per week.[153] While there are no backcountry or overnight fees on the national forest, when the trail crosses the boundary into Olympic National Park, hikers become subject to a $5 backcountry hiking permit and $2 per night fee—neither of which is available for purchase on the national forest.[154]

In some cases, managers have responded innovatively to complaints. White Mountain National Forest in New Hampshire restructured its fees to require payment only in areas where visitors' fees would be put to use: trails, picnic areas, and campsites.[155] Compliance doubled, from 30 to 65 percent, greatly reducing the cost of enforcement.[156] Similarly, after one year in the program, the Forest Service managers at Mount St. Helens cut the annual pass from $24 to $16, with no charge during the winter months.[157]

In some cases, cooperation among land agencies can eliminate duplication and confusion. In Utah, for example, a single entrance fee provides entrance to the Park Service's Timpanogos Cave National

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149. *Id*. at 13-14.

150. *Id*. at 14.

151. *Id*.

152. *See* U.S. DEP'T. OF THE INTERIOR AND U.S. DEP'T. OF AGRIC, *supra* note 90, at 33.

153. Interview with Katherine A. Fuller, Supervisory Park Ranger, Olympic National Park (Mar. 4, 2002).

154. *See* Fretwell, *supra* note 19, at 14.

155. *Id.*

156. Interview with Tom Moore, Supervisor, White Mountain National Forest, Gorham, New Hampshire, (Dec. 8, 1998).

157. *Id.*

Monument and the Uinta National Forest, which surrounds it. However, because the federal fee program is a pilot program scheduled to end in 2004, agencies lack a strong incentive to work out complicated cooperative arrangements.

One result is a burgeoning black market in passes to Yellowstone National Park. Because many Yellowstone visitors stay only a short time, the seven-day, nontransferable entry pass has become popular for trade.[158] The Golden Eagle pass, which permits the purchaser entry to any park for a year for $50, has also changed hands illegally.[159] According to news reports, in 1997 Yellowstone confiscated three hundred Golden Eagle passes used by individuals other than the purchaser.[160] The seized Golden Eagle permits had a potential value to the park of $6,000.[161] A single-day pass offered at a lower price than the week-long permit would reduce such transfers. This might also address any lingering concerns about equity and fairness due to the Fee Demonstration Program. Along these same lines, brochures and other information might be posted to assist visitors in quickly selecting the most economical fee structure for their needs.

D. Legal Constraints on User Fees

Prior to implementing user fees, public agencies must ensure that fee programs, including the Fee Demonstration Program, must meet important criteria established by courts.[162] A number of cases provide the parameters that agencies such as the National Park System and Forest Service must follow in charging a fee for the services they provide.

In *National Cable Television Ass'n v. U.S.*,[163] one of the seminal cases on the validity of federal government user fees, the Supreme Court held that a fee imposed on the cable industry was beyond the Federal Communication Commission's authority because it was designed to recover the entire cost of administering the relevant

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158. *See* HIGH COUNTRY NEWS, Aug. 14, 1998. Long lines for cars without passes also encourage this trade. "Express lane" entry passes, which are good for seven days, are sold at twenty businesses in West Yellowstone to help prevent backup at the West gate. While popular in the winter months, they are rarely used during peak summer months.

159. *See* Fretwell, *supra* note 19, at 15.

160. *Id.*

161. *Id.*

162. *See* Gillette & Hopkins, *supra* note 92, at 827 (explaining that case law and federal legislation requires a discernable connection between user fees and discernible benefits).

163. 415 U.S. 336 (1974).

regulatory program.[164] The authority to impose fees, found in the Independent Offices Appropriation Act of 1952, limits such fees to the "value to the recipient."[165] The Court has explained that, unlike a tax that Congress may simply impose through legislation, a fee is incident to a voluntary act on the part of a person requesting some form of service from a government agency.[166] By acting in response to the voluntary request, the government agency is bestowing a benefit on the "requestor," and thus may charge a fee in exchange.[167] In recovering the cost of the entire program, the FCC was charging the cable companies not only the value of the services rendered but also for the protection of the public interest society received through the implementation of the regulatory program.[168] The Court remanded the case so that the FCC could revise the fee to eliminate this improper "surcharge" on the cable companies.

In the companion case, *Federal Power Comm'n v. New England Power Co.*,[169] the Supreme Court ruled that the Federal Power Commission could not charge electric and gas utilities in addition to the annual filing fees, levies to recover the costs of administering regulatory programs.[170] The Federal Power Commission argued that it was entitled to recover the entire cost of the regulatory program that had been instrumental in fostering the financial stability of utilities in both industries.[171] The Court ruled that imposing a fee in this manner was not only inconsistent with the power to levy fees under the Independent Offices Appropriations Act, but was also more consistent with a tax since the fee was not associated with any specific service.[172] Specifically, the Court stated:

> Though it greatly narrows the dimensions urged by the Commission, it keeps within the boundaries of the "fee" system and away from the domain of "taxes" toward which the Commission's

164. *Id.* at 343-44.

165. 31 U.S.C. § 483a (1994).

166. *See National Cable Television Ass'n*, 415 U.S. at 340 (explaining that taxation is a legislative function that may be imposed without any associated benefits where a fee is related to a voluntary request that bestows a unique benefit on the recipient).

167. *Id*. at 340-41.

168. *Id*. at 341-42 (asserting that a charge the recoups the cost of providing benefits to society as a whole is akin to imposing a tax).

169. 415 U.S. 345 (1974).

170. 31 U.S. § 483a.

171. *See Federal Power Comm'n*., 415 U.S. at 347-48 (describing the Commission's position that by ensuring financial stability the regulatory program directly benefited all electric and gas utilities).

172. *See id*. at 349-50.

> "economic climate" argument would lead. Some of the assessments made by the Commission . . . would be on companies [that] had no proceedings before the Commission during the year in question. The "identifiable recipient" of a unit of service from which "he derives a special benefit," . . . does not describe members of an industry, which have neither asked for nor received the Commission's services during the year in question.[173]

Plainly, the decision to visit a national park is a voluntary act. Thus, in principle the Fee Demonstration Program complies with the requirement that federal user fees be imposed on those voluntarily availing themselves of the benefit of government services. Unlike the regulatory programs under the Federal Power or Natural Gas Act, fees imposed on park visitors through the Fee Demonstration Program are identified with beneficiaries of the specific government services, the ability to enter and enjoy the recreational opportunities of national parks, at least for the 80 percent of the fees that remain in the parks where they have been collected. On the other hand, the remaining 20 percent of the fees are distributed to parks other than those where the fee was collected. At least this portion of the fee looks more like a tax, placing the Fee Demonstration Program in jeopardy of running afoul of *New England Power Co.*

Later in *National Cable Television Ass'n v. Federal Communications Comm'n*,[174] the cable industry challenged the annual authorization fee the Commission imposed as compared to the filing fee addressed in the earlier action.[175] The Court of Appeals for the District of Columbia held that the annual authorization fee, based on the number of system subscribers, was not reasonably related to the cost of service.[176] However, the court did not require that there be an exact relationship between the fee and the benefit conferred. Instead, all that is required is a "reasonable relationship" between the fee and the cost of providing the service that confers the requisite benefit on the recipient.[177] Clearly, the user fees assessed through the Fee Demonstration Program must be related to the cost of providing natural and recreational as well as other park services. Examples of the use of the fees collected through the current program, including trash collection, repair of restroom facilities and roads, described in

173. *Id*. at 351.

174. 554 F.2d 1094 (D.C. Cir. 1976).

175. *Id*. at 1096.

176. *Id.* at 1108-09 (asserting that no evidence in the record established a relationship between the number of subscribers in a cable television system and the cost or regulation).

177. *Id*. (explaining that administrative ease may be considered in calculating a fee).

greater detail in Part VI below, demonstrate a reasonable relationship between the current fees and the cost of providing the park services. The rule of *National Cable Television Ass'n*, however, does provide a warning that government agencies should not view the Fee Demonstration Program as a "profit making" opportunity that could be used to fund unrelated priorities for which their general budget is insufficient. The validity of the Fee Demonstrations Program is called into question again by this decision due to the allocation of 20 percent of the fees to other parks.

Similarly, in *Seafarers International Union of North America v. United States Coast Guard*,[178] a more recent case, the Court of Appeals for District of Columbia affirmed the lower court's ruling that the Coast Guard was permitted to charge fees for issuing merchant marine licenses, certificates of registry or merchant marine documentation.[179] The fees covered the cost of processing applications, proctoring and grading examinations along with notification of individual results and issuing licenses and certificates.[180] The private benefit the Coast Guard conferred on the applicants was the ability to pursue professional employment.[181] On the other hand, the Coast Guard was prohibited from charging applicants for the FBI background checks performed as part of the process. The background checks conferred primarily a public benefit in terms of overall maritime safety, as compared to the private benefit of professional employment.[182]

The Court of Appeals for the District of Columbia reversed the district court on this matter. The court reasoned that so long as a user fee is within the authority the organic statute confers the relative weight of the private versus public benefit is irrelevant. After analyzing the authorizing statute, the court found that the FBI background checks were intended to fulfill a statutory requirement that the Coast Guard deny the applications of those who have been convicted of a drug related crime within the last ten years.[183] The Coast Guard was permitted to charge a fee because employing FBI

178. 81 F.3d 179 (D.C. Cir. 1996)

179. *Id*. at 181.

180. *Id.* at 181-82.

181. *Id.* at 182 (concurring with the District court that the Coast Guard's merchant marine licensing program conferred individualized private benefit justifying the imposition of user fees under *National Cable Television Ass'n*).

182. *Id*.

183. 46 U.S.C. § 7503(b)(1)(2000).

background checks was a reasonable way to complete this statutorily required portion of the application process.[184] However, the court did state that to the extent that FBI background checks reviewed criminal histories beyond those required in the organic statute, the Coast Guard would have to prorate the fee.[185] Therefore, *Seafarers International* provides another important reminder that the park fees should not exceed the authority conferred in the 1996 enabling legislation. To date, while several people have questioned whether charging a fee is consistent with the original purpose of the national park system as conceived in the 19th century,[186] no one has questioned that the fees are within the authority Congress provided in the legislation authorizing the Fee Demonstration Program.

Finally, in a case whose circumstances most closely resemble those of the Fee Demonstration Program, the Eighth Circuit Court of Appeals upheld a $150 fee imposed by the Surface Transportation Board to process requests to use or acquire to-be-abandoned railroad rights-of-way for interim recreational purposes or rail banking.[187] This program is designed to preserve railroad rights-of-way and foster development of nature trails as recreation opportunities.[188] Under this program, third parties apply to the Surface Transportation Board to use the right-of-way for temporary recreational trail use and rail banking. As part of this application, the third party agrees to accept financial responsibility, including any taxes, legal liability and management costs, for the right-of-way.[189] By accepting such responsibility, the third party prevents an official "abandonment" of the right-of-way that would result in the interest reverting to the property owner and allows the Surface Transportation to maintain jurisdiction for potential reactivation for railroad use in the future.[190]

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184. *Seafarers Int'l Union*, 81 F.3d at 185-86.

185. *Id.* at 185-86 (holding that to the extent that the background check "sweeps more broadly than the statutory authorization" then the full cost of the background check should not be assessed against the applicant).

186. For example, notwithstanding the tremendous potential of the Fee Demonstration Program to provide an important source of needed funding, one need only enter "Fee Demonstration Program" into any general internet search engine to find numerous web pages protesting the "concept" of charging to enter national parks.

187. *See* Nebraska Trails Council v. Surface Transp. Bd., 120 F.3d 901, 903 (8th Cir. 1997).

188. *Id*. at 903.

189. *Id*. at 904.

190. *Id*. at 904.

In *Nebraska Trails Council*, the fee was promulgated under section 553 of the Administrative Procedures Act,[191] while the cable television fees were implemented through Federal Communications order after notice and a hearing. Further, in imposing the fee the Surface Transportation Board has carefully delineated those who receive a special benefit from those who do not. The fee was imposed for trail use conditions and not environmental or historic preservation conditions because the latter two do not receive any identifiable special benefit as required under *Nat'l Cable Television Ass'n* and *U.S. Fed. Power Comm'n v. New England Power Co*. The special benefits in *Nebraska Trails Council* included the processing of the trail use request and the opportunity to negotiate with a railroad to secure the right-of-way for a 180-day period without concern of abandonment (and reversion of the property interest to the original owner).[192] The concern in this case is not a concern in the context of the Fee Demonstration Program. By imposing entrance fees only on park visitors, there is no need to delineate between those who receive the special benefit and those who do not.

Moreover, in contrast to *Nat'l Cable Televisions Ass'n* where a "reasonable relationship test" was applied, the court in *Nebraska Trails Council* claimed to have reviewed the fee based on an arbitrary and capricious standard.[193] However, the court ultimately assesses the fee based on its reasonableness as an approximation of the actual cost of providing trail use request processing services.[194] Thus, the "reasonable relationship" test appears to be the standard that fees charged at national parks under the Fee Demonstration Program will have to meet.[195] Again, these cases merely reiterate the point that the user fees must be reasonable and should not be used to subsidize unrelated government programs. In so doing, the courts have placed an indirect check to ensure that government agencies, including those authorized under the Fee Demonstration Program, do not exceed the authority Congress has provided.

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191. *Id*. at 905 (explaining that under § 553 of the Administrative Procedures Act agency actions are reviewed under the arbitrary and capricious standard and generally receive substantial deference from the judiciary).

192. *Id*. at 906-07.

193. *Id*. at 905 (holding that the scope of the court's review was limited to reviewing whether the regulation implementing the fee was "arbitrary, capricious, an abuse of discretion, or otherwise no in accordance with the law").

194. *Id*. at 908 (explaining that the fee was reasonable having been based on a careful study of costs the Board incurred in processing trail use requests).

195. *Id*. at 908.

In addition, the empirical evidence shows that the Fee Demonstration program adequately addresses the judicial standards of fairness. In *Nebraska Trails Council,*[196] the court found that the Surface Transportation Board, by lowering the application fee from $650 to $150, had addressed the concern that some might be discouraged from seeking trail use conditions.[197] In other words, the fee was reasonable and fair. Similarly, the entrance fees charged under the Fee Demonstration Program are reasonable. Given the vast extent of services provided at a national park including roads, restroom facilities, park rangers, trash collection, etc., a $20 fee for an entire family to enter for seven days is undoubtedly reasonable. Further, beyond the $20 fee, Yellowstone offers a variety of fees to accommodate different needs. For example, an Annual Area Pass, good for Yellowstone and Grand Teton national parks for a year, is available for only $40.[198] Indeed there are a number of options including the Golden Access Passport,[199] Golden Age Passport[200] and Golden Eagle Passport.[201]

Moreover, as *Nebraska Trails Council* stated, "Given that the $150 fee represents only a small portion of the funds a trail use requester must amass in assuming financial responsibility for a railroad right-of-way, this burden does not seem excessively onerous."[202] As shown above, with entrance fees ranging from only as much as 4.8 percent to as little as 0.7 percent of the total cost of a trip,

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196. *Id*.

197. *Id*. at 907 (describing this fee reduction as appropriately addressing public policy concerns that the fee will deter applicants from seeking trail use conditions). Further, the Surface Transportation Board had implemented a waiver system that the court found addressed fairness concerns even though an applicant might have to first pay the fee and then seek a waiver and refund. *Id*.

198. Yellowstone National Park.Com *available at* http://www.yellowstonenationalpark.com/information.htm (last modified on June 28, 2003).

199. *Id.* The Golden Access Passport is available to the blind or disabled at any federal lands where an entrance fee is charged. Holders of the Golden Access Passport and anyone accompanying them in a private non-commercial capacity are admitted free to federal areas that charge entrance fees. *Id*.

200. *See id.* The Golden Age Passport may be obtained by persons over sixty-two years of age for a one-time fee of $10. Holders of the Golden Age Passport and anyone accompanying them in a private non-commercial capacity are admitted free to federal areas that charge entrance fees. *Id*.

201. *See id.* The Golden Eagle Passport, good for one year from the date of purchase, may be purchased by persons of any age and is good for admission at any federal area where an admission fee is charged. *Id*.

202. *See Nebraska Trails*, 120 F.3d at 907 n.4.

the Fee Demonstration Program cannot be considered excessively onerous.

IV. FEES IN STATE PARK SYSTEMS

As the federal government moves ahead with fees, it can learn a lot from state park systems, some of which have experienced fiscal restraints in recent years. In some cases, state legislators have told their park managers that they must start supporting themselves, a trend that is pushing state park systems toward fiscal self-sufficiency and innovation.[203] Indeed, several states have statutes authorizing entrance and user fees at their state parks.

In 1980, general taxes supported 64 percent of total state park budgets. In 1997, that figure had fallen to 36 percent. User fees rose from 17 percent of spending in 1980 to 34 percent in 1997.[204] A few state park systems have cut all fiscal ties, giving autonomy to park management.

New Hampshire

The New Hampshire Division of Parks and Recreation is required to finance the department's nearly $5 million operating budget as well as a portion of construction improvements from user fees. As a result of this pressure, New Hampshire became the first state park system to implement differential pricing. A campground with a scenic view may cost more than one without, and higher prices are charged during periods of peak demand. Such differential fees send signals to park managers about what visitors prefer and are willing to pay. They also help disperse visitors throughout the park system and throughout the year, increasing visitation during shoulder seasons.[205]

Texas

With over 500,000 acres and more than 24 million visitors a year, the Texas state park system became self-sufficient in 1994. Three years earlier, the state legislature announced that general funds, which covered 60 percent of the park system budget, would be

203. *See* Leal & Fretwell, *supra* note 18, at 9.

204. *See* NAT'L. ASSOC. OF STATE PARK DIRECTORS, ANNUAL INFORMATION EXCHANGE: STATE PARK STATISTICAL DATA FOR THE YEAR ENDING JUNE 30, 1980 11, 14 (1981); NATIONAL ASSOCIATION OF STATE PARK DIRECTORS, THE 1998 ANNUAL INFORMATION EXCHANGE: A STATISTICAL REPORT OF STATE PARK OPERATIONS FOR THE PERIOD JULY 1, 1996 THROUGH JUNE 30, 1997 29, 43 (1998).

205. *See* Leal & Fretwell, *supra* note 18, at 12.

eliminated from the system except for a small tax on recreational equipment sales designated for parks. After contemplating closure of a number of parks, state park officials redesigned the system. Park managers were given incentives to raise revenues and cut costs. A portion of the higher park receipts would remain within the park where they were generated, and all savings were to be applied to the following year's budget.[206]

Although there have been some problems in carrying out the plan,[207] park managers quickly became innovative in providing services to park visitors and in protecting resources. For example, visitors at Brazos Bend State Park can enjoy a two-hour nocturnal "owl prowl" for $3 per person or watch alligators from a pontoon boat for $8 per person. Huntsville State Park holds trail runs, "fun runs," and an annual "canoe rendezvous" that generate as much as $7,000 annually.[208]

Though fee generation has become a priority, resource protection is still critical. The additional money generated at Brazos Bend State Park helped pay for a plant shredder to create small openings for wildlife in dense areas of vegetation.[209] A comparison of Big Bend National Park in Texas with nearby Big Bend Ranch State Park underscores the continued importance of resource protection.[210] The national park faces serious deterioration of facilities and trails, yet there is no deliberate effort to control where visitors go in order to limit their impact on the park trails.[211] In contrast, Big Bend Ranch State Park is divided into zones in which the number of visitors at any given time is strictly controlled. Environmentally sensitive areas are monitored to assess the effects of public use, and visitors can be rerouted to minimize harmful human impacts.[212]

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206. *Id*.

207. Because incentive payments came from anticipated revenues rather than current earnings, a year of drought in 1996 and flooding in 1997 left Texas parks in the red. Funds were insufficient to cover all operating expenses and incentive payments. As a result, incentive payments were eliminated from the system in 1998. Interview with John Emerson, Texas Parks & Wildlife Department, June 2, 1998.

208. *See* Leal & Fretwell, *supra* note 18, at 14.

209. *Id.*

210. *Id.* at 20-25.

211. *See* TEXAN PARKS AND WILDLIFE DEPARTMENT, BIG BEND NATIONAL PARK: STATE OF THE PARK REPORT: BIG BEND NATIONAL PARK RIO GRANDE WILD AND SCENIC RIVER 7 (1996).

212. *See* TEXAS PARKS AND WILDLIFE DEPARTMENT, BIG BEND RANCH STATE NATURAL AREA MANAGEMENT PLAN 21 (1994).

In addition, a portion of park revenues is placed into a statewide fund to help maintain parks that have ecological value but do not attract enough visitors to be self-supporting. As Huntsville State Park Superintendent Wilburn Cox said, "Protection of our natural resources remains our first priority."[213]

Other Parks

Other examples illustrate the vitality and accountability that come from relying on visitors, not taxpayers, for funds:

- Baxter State Park is different from most state parks in Maine, which are funded almost entirely by tax dollars. The park, originally purchased and donated by former Governor Percival Baxter, was later designated Baxter State Park. The park, now over 200,000 acres of wilderness, is a paradise for the naturalist, mountain climber, hiker, and photographer. User fees and interest earned from the park's trust fund left by the late governor pay all park expenses.[214] Consistent with Governor Baxter's wishes, the park has been reluctant to accept funding with strings attached, and it recently cut its final tie with state government by declining an $80,000 annual allocation for road maintenance.[215] Park managers control access by limiting the size of parking lots and trailheads. The state was putting pressure on the park to widen roads and enlarge parking lots, so the park turned down the funding.[216]
- In 1992, after a series of budget cuts, the park system of Bellevue, a city near Seattle, Washington, formed an Enterprise Division. This division raises revenues by charging market fees for activities such as golf, swimming, tennis, boat launching, company picnics, weddings, and basketball, volleyball, and softball leagues—activities previously supported by tax dollars. Grants and donations enable low-income people to participate without paying the fees. The division generated $20,207 more revenue than expenses in 1997.[217]

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213. Interview with Wilburn Cox, Superintendent, Huntsville State Park (Jan. 1996).

214. Interview with Roxanna McLean, Administrative Secretary, Baxter State Park (Aug. 5, 1999).

215. *See* Mary Anne Lagasse, *Baxter Declines DOT Road Funding*, BANGOR (MAINE) DAILY NEWS, Jan. 15, 1999.

216. *See* Fretwell, *supra* note 19, at 18.

217. *See* BELLEVUE PARKS AND COMMUNITY SERVICES, 1997 ENTERPRISE DIVISION

- On the 1.6 million acres of the Fort Apache Reservation in east-central Arizona, the White Mountain Apache Tribe has created a rich array of recreation opportunities. Visitors pay to hunt, fish, and camp. Hunting options range from inexpensive hunts for small game to expeditions for trophy elk that can cost $12,500 or more. By offering different experiences at different prices, the White Mountain Apache obtain funds for wildlife management and research and protection of the endangered Apache trout and the Mexican spotted owl.[218]

V. CONCLUSION AND RECOMMENDATIONS FOR THE FUTURE

The Fee Demonstration Program provides the first step toward achieving Congress' original vision of self-sufficient federal parks and recreation lands. Not only is there a sound legal foundation for the program, but also making the Fee Demonstration Program permanent and expanding it to all federal recreational lands would take us further toward this goal.

- A permanent program would allow agencies to make long-term plans for recreation development, to invest in start-up costs needing amortization over several years, and to justify the commitment of time required to design interagency fees and passes. (Incentives for long-term planning are missing since the Fee Demonstration Program is scheduled to end in 2004.)
- Expanding the program to include all federal areas, not just the several hundred currently in the program, would motivate managers to give resource stewardship and provision of basic services priority over politics and to keep prices low while still increasing revenues. The program would provide individual managers with autonomy and the direct accountability that accompanies it.
- Legislation prohibiting fee collection at certain sites or limiting use of fee receipts should be repealed. All legislation must be consistent with program guidelines and all public recreation activities should fit agency missions.[219]

ANNUAL REPORT (Bellevue, WA) 6 (1997).

218. *See* Terry L. Anderson, *Conservation - Native American Style*, PERC POLICY SERIES, (July 1996) *available at* http://www.perc.org/publications/policyseries/conservation.php?s=2 (last visited September 5, 2003).

219. *See* U.S. DEPARTMENT OF THE INTERIOR & U.S. DEPARTMENT OF AGRICULTURE,

- Layered and excessive fees should be eliminated.
- Expanding the program will allow privately operated parks, campgrounds, etc. to compete on an even playing field. By increasing the fees and improving their services, privately owned recreation areas will no longer have to compete with under-priced public alternatives.
- All fees should remain in the park where collected to ensure that the program does not violate the legal restrictions on governmental implementation of a fee system.

Both the federal Fee Demonstration Program and the experience of state and local parks illustrate the benefits of visitor fee systems. However, the greatest shortcoming of the Fee Demonstration Program is its inability to address agency expenditures. Congress still finances the vast majority of the federal agencies' budgets through appropriations. As long as this practice remains the status quo, agencies have little incentive to control costs except those linked to the demonstration program (the more efficient they are in using those fees, the more money they have to use at their discretion). Other unspent funds (such as congressional appropriations) must still be returned to the national treasury, and Congress will still determine the bulk of their budgets. The motivation to drive up budgets still exists, and opportunities for political interference still abound.

Ultimately, costs and revenues will come into line only if the parks and other units are required to fully fund themselves. To achieve that end, more drastic steps are required.

- To bring in competition and fiscal prudence, budget appropriations should be frozen at their present levels. Additional funds must come from other sources. These additional revenues would be used at the individual parks where they are collected, and any cost savings by the park manager could be used in subsequent years. Managers must have the flexibility to use revenues as they see fit, while also being required to meet their budgets.[220]
- Ultimately, most federal parks and recreation sites should be financially self-sufficient. The discipline of self-support would reduce park managers' fiscal promiscuity and curtail pressure to initiate congressional pet projects.

RECREATIONAL FEE DEMONSTRATION PROGRAM PROGRESS REPORT TO CONGRESS FISCAL YEAR 1998, 42 (1999) (explaining that currently some fee activities are not included under the scope of the program, such as permits for outfitters and guides).

220. Managers must continue to abide by agency goals and missions.

It is true that some lands under federal management are not likely to become financially self-sufficient. These should be placed under the umbrella of a trust or endowment system.[221] A portion of fees from agency and interagency park passes could help pay their way.

Many people are troubled by the state of our national parks and the heavy costs to taxpayers of recreation on other federal lands. Misplaced incentives direct federal land managers to respond to the whims of political forces rather than to conserving and showcasing their natural resources. By changing these incentives, we can encourage federal land managers to be more responsive to visitors, more responsible with maintenance, and more protective of natural resources. A move toward self-sufficiency must be made to protect and restore our public lands in the twenty-first century.

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221. *See* Richard Stroup & John Baden, *Endowment Areas: A Clearing in the Policy Wilderness?* 2 CATO JOURNAL 91-108 (1982).