FOREST SERVICE BILL WOULD BRING BACK "FEE FOR ALL," RECREATIONISTS CRY FOUL

In the early days of recreation fees on public lands, land management agencies were granted temporary fee authority through the Fee Demo program which introduced the concept of "pay to play" for federal lands. There were few restrictions regarding when and where a recreation fee could be charged and agencies like the **US Forest Service** (USFS) and **Bureau of Land Management** (BLM) went a little crazy; imposing fees for a plethora of activities and locations that were previously free to access. The public responded by demanding that the fee authority of these agencies have limitations and, in 2004, Congress enacted the **Federal Lands Recreation Enhancement Act** (FLREA).

FLREA added provisions to define both where recreation fees could be charged on federal lands and where they could not. Specifically, FLREA states that recreation fees cannot be charged "solely for parking, undesignated parking, or picnicking along roads or trailsides; for persons who are driving through, walking through, boating through, horseback riding through, or hiking through Federal recreational lands and waters without using the facilities and services; and for camping at undeveloped sites that do not provide a minimum number of facilities and services."

FLREA also established a minimum number of amenities that must be provided before a site could qualify as a fee-based location. Seemingly, these amenities were meant to establish a site as one for Day Use such as picnicking, family reunions, parties and other gatherings. The six required amenities are (1) designated developed parking, (2) a permanent toilet facility, (3) a permanent trash receptacle, (4) an interpretive sign, exhibit, or kiosk, (5) picnic tables, and (6) security services. But, even after FLREA, many forests continued the repealed policies in effect since Fee Demo days.

In a statement made before Congress in 2015 addressing the changes between Fee Demo and FLREA, **Kitty Benzar** of the **Western Slope No Fee Coalition** said Congress enacted FLREA "to set limits and scale back on fees based on what Fee Demo had shown. FLREA's limiting language, had it been honored by the agencies," she continued, "could have achieved this and might have calmed much of the public's opposition. While the agencies made the appropriate changes in a few areas once FLREA was passed, in most places they carried on as if nothing had changed and recreation fees continued to spread to thousands of undeveloped and minimally developed areas."

Then came the *Smith* decision. In 2009, Sedona backcountry hiker **Jim Smith** challenged a ticket he received for failing to display a **Red Rock Pass** after parking his car off Vultee Arch Road in West Sedona to access a wilderness area. US District Court Magistrate **Judge Mark E. Aspey** not only dismissed Mr. Smith's ticket, he questioned the validity of the Red Rock Pass (RRP) program as it was implemented at that time. The **Red Rock Ranger District** was still running its recreation fee program based on the no-longer-valid Fee Demo rules and the judge told them to stop.

Following the *Smith* decision, the RRP program was revamped and the USFS seemed hell-bent on making sure as many as possible of the areas previously subject to fees had the required amenities to keep them that way. The installation of a single picnic table in a trailhead parking lot containing more than 40 parking spaces was enough to fit the bill. Then, a 9th Circuit Court of Appeals ruling in 2012 determined that just providing amenities wasn't enough: visitors had to actually use them.

The ruling in *Adams v. USFS* declared that the USFS could not charge a fee for forest visitors who only parked at a trailhead to go hiking without using any of a site's provided amenities or who parked along the roadside to picnic on the ground. Known as the **Mt. Lemmon Decision**, the case was brought by a group of hikers who argued against the **Coronado National Forest** imposing an entry fee at the base of Mt. Lemmon for access along the entire 28-mile stretch of highway that climbs to the summit. There are multiple trailheads and wayside areas along the way that are undeveloped. This ruling supersedes the *Smith* decision but, again, the RRRD never made adjustments to give hikers free access to developed sites when they are only there to hike.

FLREA was due to expire at the end of 2014. Several temporary measures have been enacted that have extended that date through September 30, 2019. As it is currently written, the law certainly has its problems. But through the court system, ambiguous language the USFS used to continue the policies of Fee Demo have been reined in and clarified. In Sedona, for example, the RRRD was required to reduce the area for which fees could be charged to two highway corridors and seven individual sites containing the six legally required amenities. But the Mt. Lemmon decision has left even those areas open to legal challenge, as that decision determined that, if the facilities are not used, visitors do not owe a fee to the USFS.

A recent challenge to a *Violation Notice* for "failure to display a Red Rock Pass" issued to a Sedona resident parked at Midgely Bridge to go hiking was dismissed; unfortunately, not by a judge. A federal prosecutor in the **US District Court** in Flagstaff made the decision, though he stated that he disagreed about applying the Mt. Lemmon decision in this case. So, as long as FLREA remains in place, court challenges may be the only course of action to narrow any ambiguous definitions the law contains and hold public lands agencies responsible for complying with the law as the courts have interpreted it.

That is, if FLREA stays the way it is. Of concern is a seemingly innocuous bill that has been approved by the US House of Representatives and made its way to the US Senate. That bill is **House Resolution 289**, the **Guides and Outfitters Act**.

Also known as the GO Act, HR 289 is intended to streamline the processes by which commercial guides and outfitters and other group and event organizers acquire permits from the USFS and BLM for their business use of public lands. On the surface, it seems harmless and like it might be an effective way to reduce government costs by, for example, reducing the number of man-hours needed to issue permits. But there is some troubling language in the bill that could open the doors, once again, to Fee Demo-like unrestricted application of recreation fees.

In Section 2 of the legislation, the bill would amend FLREA to allow fees for "special recreation permits" which may be required "for specialized individual and group use of Federal facilities and Federal recreational lands and waters, such as, but not limited to, use of special areas or areas where use is allocated, motorized recreational vehicle use, and group activities or events."

This language would essentially be a return to the hotly contested Fee Demo days when the USFS and BLM used their authority to require fees for nearly every recreational activity on public lands. It could circumvent efforts to restrict fee authority put into place by FLREA and upheld in federal courts.

First, the bill does not define "specialized use" or "special areas" leaving it up to land agencies to decide what individuals or groups and what areas it calls "special." In essence, it means that any person, any group, and any location could be deemed "special" by the USFS or BLM and permits and fees could then be imposed.

Under Fee Demo, that's exactly what happened. Land agencies subjected visitors to fees for just stepping foot on federal land with no limits on what activities were subject to charges. Maybe you remember the days when a RRP was required on every acre of federal land around Sedona.

And since FLREA also introduced the practice of "fee retention," which allows federal land agencies to hang on to the fees collected (rather than having them put into the federal government's general funds and then re-allocated through the budgeting process), there is great incentive to charge fees on every square foot of land they hold dominion over.

Another problem is the phrase "such as, but not limited to." The power of those words is immeasurable. They open the door wide for federal land agencies to add any activity to the list contained in the legislation. Absolutely anything done on federal land could be subject to a recreation fee. And, what's worse: *not paying the fee is a federal criminal offense.*

in a press release, Ms. Benzar said, "Remember that failure to pay a federal recreation fee is a federal misdemeanor, with penalties that can go as high as a $100,000 fine and/or a year of incarceration. No law that carries criminal penalties should ever contain a phrase like 'such as, but not limited to' — it's an open invitation to agency abuse. There would be nothing to stop them from administratively adding things that require fees to the list of examples in the bill, transforming law-abiding citizens into criminals if they don't pay those fees."

The GO Act was passed by the House of Representatives on October 2 and has been sent to the Senate for consideration. There is every possibility that it could be swiftly passed by the Senate and FLREA could be altered to allow a recreation fee free-for-all. Ms. Benzar said "It's essential that every Senator hear from their constituents before this bill goes any further toward being enacted. The part of Section 2 that allows the agencies to define for themselves what is a 'specialized use' or a 'special area' must be removed."

ABOVE: Jim Smith on one of his favorite Sedona hiking trails. | PHOTO BY K. BENZAR