



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

February 13, 2020

Mr. Daniel H. Jorjani  
Solicitor  
Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Dear Mr. Jorjani,

This is in reply to the letter of November 6, 2019, from Department of the Interior (Interior) Secretary David Bernhardt, to Office of Management and Budget (OMB) Acting Director Russell Vought, in which Secretary Bernhardt requested the views of OMB's Office of General Counsel (OGC) regarding the report issued by the U.S. Government Accountability Office (GAO) entitled, "Activities in National Parks during a Lapse in Appropriations," GAO Matter #B-330776. In that report, GAO concluded that Interior violated the purpose statute and incurred an Antideficiency Act violation when it obligated certain fees that were collected and retained pursuant to authority granted under the Federal Lands Recreation Enhancement Act during the partial lapse in appropriations that lasted from December 22, 2018, to January 25, 2019.

As you are aware, during the partial lapse in appropriations, my office was in communication with yours and reviewed this issue. At that time, we concurred with Interior's legal conclusions. We have since reviewed GAO's opinion, as well as Interior's letter of September 6, 2019, from Mr. Edward T. Keable, Associate Solicitor-General Law to Mr. Omari Norman, Assistant General Counsel for Appropriations Law, GAO. That letter is attached. OMB re-confirms our agreement with the reasoning set forth in Interior's letter and finds that no violation of the Antideficiency Act or the purpose statute occurred in this case.

Please call me if you have any questions.

Sincerely,

Mark R. Paoletta

Attachment



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

SEP - 6 2019

IN REPLY REFER TO:

Mr. Omari Norman  
Assistant General Counsel for Appropriations Law  
Office of the General Counsel  
Government Accountability Office  
441 G Street, NW  
Washington, D.C. 20548

Re: Department of the Interior—Activities in National Parks during a Lapse in Appropriations

Dear Mr. Norman:

This memorandum responds to your May 2, 2019, letter requesting factual information and the legal views of the Department of the Interior (Interior) on whether Interior complied with appropriations laws in its use of Interior, and specifically the National Park Service (hereinafter “NPS”), appropriations both during and subsequent to the partial government shutdown, under which NPS experienced a lapse in certain funding from December 22, 2018, through January 25, 2019. We understand that a congressional request for GAO’s legal opinion on these issues prompted your inquiry and that you assigned it matter number B-330776.<sup>1</sup>

As your letter explains, your review focuses on whether recreation fees NPS collected pursuant to the Federal Lands Recreation Enhancement Act (FLREA)<sup>2</sup> were available for purposes such as trash collection and maintenance of restrooms and sanitation at National Park sites that remained accessible. You are also concerned about whether Interior’s movement of obligations initially incurred against FLREA amounts during the shutdown to its Operation of the National Park System (ONPS) appropriation once the funding lapse ended, which essentially replenished the FLREA account, comports with appropriations law principles. Your letter recites the governing principles for determining the proper scope of an appropriation, poses a number of specific questions and includes a final catch-all request for any other information Interior would like you to consider.

To put Interior’s use of its FLREA fee balances in the proper perspective and to provide context for our specific responses, we believe it appropriate to begin with an explanation of FLREA

<sup>1</sup> See Letter from Representative McCollum, Chair, Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives, and Representative Grijalva, Chairman, Committee on Natural Resources, House of Representatives, to Comptroller General, GAO (Feb. 6, 2019), *available at* <https://mccollum.house.gov/media/press-releases/mccollum-callsofficial-oversight-opinion-administration-actions-during>.

<sup>2</sup> Pub. L. No. 108-447, div. J, title VIII, §§ 802-815, 118 Stat. 2809, 3377 (Dec. 8, 2004), classified at 16 U.S.C. §§ 6801-6814.



authority and the general reasoning regarding its proper scope, using the legal tests articulated in your letter along with any necessary supplements. We will close with our responses to your specific questions, including addressing the replenishment of FLREA balances.

### ***FLREA's Authorization for NPS to Expend Fees***

The FLREA authorizes certain Federal land management agencies, including the National Park Service,<sup>3</sup> to charge and collect recreation fees on federal recreational lands and waters.<sup>4</sup> It then mandates the creation of a special account for each agency authorized to charge fees: “[t]he Secretary of the Treasury shall establish a special account in the Treasury for each Federal land management agency.”<sup>5</sup> The FLREA further directs that fee revenue “shall—(1) be deposited in its special account; and (2) remain available for expenditure, without further appropriation, until expended.”<sup>6</sup>

Congress also required that 80% of the fees collected at a specific unit or area shall remain available, without further appropriation, until expended at that unit or area, although the Secretary may reduce that percentage to not less than 60% if the funds exceed the unit’s needs.<sup>7</sup> Any funds not distributed locally are available for expenditure agency wide.<sup>8</sup>

Once the fees are collected and identified for either local or agency-wide use, the FLREA clearly and incontrovertibly authorizes those funds for expenditure and use by the applicable land management agency, including the NPS. Indeed, the FLREA’s provision of budget authority to the NPS to expend funds is so clear that it is acknowledged in the GAO’s Principles of Federal Appropriations Law (the “Red Book”) as an example of an offsetting collection deposited in an expenditure account<sup>9</sup>: “For example, the Secretary of the Interior is authorized to collect recreation fees from visitors to national parks. These fees are available for expenditure without further appropriation by Congress. 16 U.S.C. § 6806.”<sup>10</sup> Accordingly, the NPS is authorized to obligate and expend funds out of its FLREA special account in accordance with the FLREA’s statutory purposes as discussed in the next section.

### ***Scope of FLREA Fee Authority***

The FLREA establishes a number of broad purposes for which the funds may be expended, stating they are available for: “(A) repair, maintenance, and facility enhancement related directly

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<sup>3</sup> The other agencies are the United States Fish and Wildlife Service, the Bureau of Land Management, the Bureau of Reclamation, and the Forest Service. See 16 U.S.C. § 6801(4).

<sup>4</sup> The majority of FLREA consists of provisions relating to the scope, manner, locations, general administration, and public participation relating to establishing and collecting fees, none of which is at issue here.

<sup>5</sup> 16 U.S.C. § 6806(a).

<sup>6</sup> *Id.* at § 6806(c)(1).

<sup>7</sup> *Id.* at § 6806(c)(2).

<sup>8</sup> *Id.* at § 6806(c)(3).

<sup>9</sup> The GAO Budget Glossary notes that: “Laws authorizing offsetting collections make them available for obligation to meet the account’s purpose without further legislative action,” as is the case with FLREA. United States Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process*, “Offsetting Collections,” GAO-05-634SP at 29, 32 (2005) (hereinafter “GAO Budget Glossary”).

<sup>10</sup> GAO, Principles of Federal Appropriations Law, 4<sup>th</sup> Ed., GAO-16-464SP, at 2-5 (2016) (hereinafter “GAO Red Book”).



to visitor enjoyment, visitor access, and health and safety; (B) interpretation, visitor information, visitor service, visitor needs assessments, and signs; (C) habitat restoration directly related to wildlife dependent recreation that is limited to hunting, fishing, wildlife observation, or photography; (D) law enforcement related to public use and recreation; (E) direct operating or capital costs associated with the recreation fee program; and (F) a fee management agreement established under 16 U.S.C. section 6805(a) or a visitor reservation service.”<sup>11</sup>

Your letter appropriately notes that we review the scope of an appropriation, such as that made by FLREA, within the context of the purpose statute, which provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made[.]”<sup>12</sup> As the Red Book notes, “the starting point in applying the purpose statute is that, absent a clear indication to the contrary, the common meaning of the words in the appropriation act and the program legislation it funds governs the purposes to which the appropriation may be applied.”<sup>13</sup> Accordingly, Federal agencies determine the scope of their appropriations by reference to the plain language of the appropriating statute.

Reviewing the plain language of the FLREA reveals that it uses terms that are broad and have commonly understood meanings and that the primary focus of the Act is to provide funding to support a safe and enjoyable visitor experience at the Federal lands that generated the fees, including parks units. It also authorizes the use of FLREA funds for operating a fee collection program. In all instances, though, the primary consideration for a proper expenditure may broadly be stated as “will it directly have a positive impact on the public when they are visiting their public lands?”.

Viewed in this light, FLREA unquestionably supports the use of its funds for such activities as trash collection and maintenance of restrooms and sanitation at National Park sites that remained accessible during the appropriations lapse. For example, FLREA fees are available for “maintenance [. . .] directly related to visitor enjoyment[.]” Maintenance generally encompasses the process of maintaining or keeping something in good condition and includes the actions necessary to provide access to clean and serviceable visitor restrooms and other sanitary services, including trash collection, at NPS sites accessible to the public. Similarly, the term “visitor services” covers the action of helping or doing work for visitors to such sites and authorizes the same sanitary and maintenance activities in relation to the needs of visitors to accessible NPS sites.

The assessment that FLREA permits the use of such funds for visitor services such as maintaining clean restrooms and picking up trash is not a new one. Going back to at least 2014, Interior has used FLREA fees for these purposes dozens of times, including to “clean and sanitize floating sanitation stations and mobile beach restrooms” in the Lake Mead National Recreation Area in 2014; “custodial operations at cabin and comfort stations, grounds maintenance; trash disposal and recycling of solid waste” at Cape Lookout National Seashore in 2015; campground maintenance at Voyageurs National Park in 2015; and cleaning and maintaining comfort stations at Arcadia National Park in 2016. A list of these examples may be

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<sup>11</sup> 16 U.S.C. § 6807(a)(3)(A)-(F).

<sup>12</sup> 31 U.S.C. § 1301(a).

<sup>13</sup> GAO Red Book, 4th Ed., 2017 Revision Page 3-11 GAO-17-797SP (2016).



found in Attachment A. Accordingly, expenses such as these are logically related to and clearly fall within the purposes of FLREA.

### ***Relationship of FLREA Fee Appropriation to Other NPS Appropriations***

This section addresses the concerns, raised both in your letter and related Congressional testimony,<sup>14</sup> about whether application of the so-called “pick-and-stick” rule prevents the use of FLREA funds for NPS operating expenses during the appropriations lapse. The pick-and-stick rule generally requires an agency that has two appropriations equally available for the same purpose to select one to utilize for that purpose and not to switch to the other appropriation upon the depletion of the selected appropriation. As shown below, we believe these concerns are unfounded for several reasons. First, Congress clearly intended the NPS and other federal land management agencies to use the FLREA budget authority provided in FLREA as a supplement to, and interchangeably with, its normal operating appropriations. Next, the budget authority provided in FLREA is not an appropriation to which the rule would apply and applying the rule would lead to absurd results and frustration of Congressional intent. Finally, even if the pick-and-stick rule might generally apply, it does not apply in the context of a lapse in appropriations.

- ***FLREA Fees Supplement NPS Operating Expenses***

The discussion above shows that Congress provided in the FLREA for the establishment of a “special account [. . .] **for each Federal land management agency**” and made the funds deposited in them available until expended for the purposes identified in the Act.<sup>15</sup> Although this language does not use words such as “supplement” or “in addition to,” the specification that these funds are “for” the land managing agencies to expend “for” FLREA purposes is an explicit statement that they can be used by the relevant agencies in addition to their operating appropriations. Congress placed no other limit on the use of those funds, except a 15% cap on administrative expenses and a prohibition on payment of employee bonuses with FLREA funds.<sup>16</sup> As those agencies operated programs directed to the same purposes as FLREA at the time of FLREA’s enactment (though without the explicit focus on the “visitor” experience), and continue to so operate with their other available appropriations, the obvious Congressional intent is that the agencies would expend the FLREA fees in support of and in conjunction with their existing sources of funds.<sup>17</sup> The FLREA funds thus overlap with and properly augment other agency appropriations to the extent of the authorized FLREA purposes. They are an authorized supplement to those funds.<sup>18</sup>

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<sup>14</sup> B-330720 at 3 (Feb. 6, 2019).

<sup>15</sup> 16 U.S.C. § 6806(b).

<sup>16</sup> *Id.* at § 6807(c), § 6814.

<sup>17</sup> See Statutory Interpretation: General Principles and Recent Trends, CONGRESSIONAL RESEARCH SERVICE at 48 (Sept. 24, 2014), available at [https://www.everycrsreport.com/files/20140924\\_97-589\\_3222be21f7f00c8569c461b506639be98c482e2c.pdf](https://www.everycrsreport.com/files/20140924_97-589_3222be21f7f00c8569c461b506639be98c482e2c.pdf).

<sup>18</sup> Interior recognizes that the definition of “Supplemental Appropriation” in the GAO’s *A Glossary of Terms Used in the Federal Budget Process* (2005) is “[a]n act appropriating funds in addition to those already enacted in an annual appropriation act. Supplemental appropriations provide additional budget authority usually in cases where the need for funds is too urgent to be postponed until enactment of the regular appropriation bill. Supplementals may sometimes include items not appropriated in the regular bills for lack of timely authorizations.” FLREA fees available for expenditure from the special account appear to technically fall within that definition, given that FLREA is a permanent indefinite appropriation of the recreation fees to the land managing agencies for use in addition to



The conclusion that FLREA funds supplement other sources of federal land management agency funding, including NPS, is consistent with available legislative history associated with the Act. As Congress eventually enacted the FLREA as part of the 2005 Omnibus Appropriations Act, there is essentially no formal legislative history of the Act itself. The predecessor bill on which it is based, the Federal Lands Recreation Enhancement Act, H.R. 3283, 108th Cong. (2004), however, contains a number of references to its purposes, often based on experiences with the then-existing recreation fee demonstration programs, that confirm that it is meant to be used in conjunction with existing appropriations. In testimony before the House of Representative's Subcommittee on National Parks, Recreation, and Public Lands, for instance, Representative Radanovich noted that "[i]t has always been my understanding that fees collected under this fee program were to supplement, not replace, annual appropriations."<sup>19</sup> The Department of the Interior similarly testified that, "Recreation fee revenues provide us important supplemental funding that better enables us to serve those using recreation amenities."<sup>20</sup> The GAO itself concurred with this assessment, noting that "H.R. 3283 would provide participating agencies with a permanent source of funds to supplement existing appropriations and to better address maintenance backlogs."<sup>21</sup>

The conclusion that the FLREA fees are a supplement to NPS operating appropriations is apparent when one considers the scope of overlap between the various sources of funds. The primary NPS appropriations account is the Operation of National Parks account, which is "[f]or expenses necessary for the management, operation, and maintenance of areas and facilities administered by the National Park Service and for the general administration of the National Park Service."<sup>22</sup>

The NPS organizes this appropriation by breaking it down across a number of functional areas, several of which are nearly coextensive with specific FLREA categories.<sup>23</sup> For example, the "Visitor Services" functional area encompasses educational and interpretive programs to enhance the visitor's experience and funds the same activities authorized in FLREA's category of "interpretation, visitor information, visitor service, visitor needs assessments, and signs."<sup>24</sup>

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their operating appropriations. Interior also recognizes, though, that "Supplemental Appropriation" is not typically used to refer to this scenario and instead describes additional appropriations typically provided in the annual discretionary appropriations process, such as in a supplemental appropriations act to address disaster recovery. Thus, while considering FLREA to be a "Supplemental Appropriation" may appropriately describe its effect, Interior is not necessarily asserting that the term be fully applied to the FLREA fees.

<sup>19</sup> *Legislative Hearing on H.R. 3283, to Improve Recreational Facilities and Visitor Opportunities on Federal Recreational Lands by Reinvesting Receipts from Fair and Consistent Recreational Fees and Passes, and for Other Purposes*, 108<sup>th</sup> Cong. 108-93 (2004) (statement of Rep. Radanovich). See also *The Impact Land Acquisition Has on the National Park Service Maintenance Backlog, Park Service Management Priorities, and Local Communities*, 108<sup>th</sup> Cong. 89-566 (2003) (statement of Courtney Cuff, Pacific Regional Director, National Parks Conservation Association).

<sup>20</sup> *Id.* (statement of Lynn Scarlett, Assistant Secretary, Policy, Management and Budget, U.S. Department of the Interior.)

<sup>21</sup> *Id.* (statement of Barry T. Hill, Director, National Resources and Environment, U.S. General Accounting Office).

<sup>22</sup> Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. E, title I (2019),

<sup>23</sup> See e.g., United States Department of the Interior, Budget Justifications and Performance Information, Fiscal Year 2019, National Park Service at ONPS-1 (2019) (hereinafter, the "Greenbook").

<sup>24</sup> 16 U.S.C. § 6807 (a)(3)(B).



“Park Protection” provides protection for visitors and coincides with FLREA’s authority to provide “law enforcement related to public use and recreation,”<sup>25</sup> while “Facility Operations and Maintenance” covers the operations and maintenance of buildings and other facilities and intersects with FLREA’s authority for “repair, maintenance, and facility enhancement related directly to visitor enjoyment, visitor access, and health and safety.”<sup>26</sup> Indeed, all of the activities authorized by FLREA encompass other NPS appropriations, with the main distinction being that FLREA requires the direct association of an expenditure with visitors or the recreation fee program itself.

Viewed in this light, FLREA fees fall within the category of fees regarding which the Redbook observes, “[o]f course, if and to the extent expressly authorized by statute an agency may retain fees and use them to offset operating costs.”<sup>27</sup> Congress has expressly authorized the use of properly charged and allocated FLREA fees for NPS operating expenses, to the extent that such use supports activities related to visitor use, safety, or enjoyment. In other words, as the NPS operating appropriations provide the park for the “visitors,” the FLREA funds necessarily must support, rather than replace, those appropriations supporting the visitor experience.

- ***The FLREA Fee Budget Authority Falls Outside the “Pick-and-stick” Rule***

Both your letter and Congressional testimony indicate that you are questioning whether the appropriations rule known as “pick-and-stick,” prevents the use of FLREA funds to fund expenses that would have otherwise been borne by other NPS appropriations. This pick-and-stick view suggests that once the NPS had used other appropriations for a given expense, such as restroom maintenance, that would foreclose any future use of FLREA funds for that expense.

At first glance, this may seem like a reasonable proposition. After all, as shown above, the FLREA unquestionably provides an appropriation in that it provides budget authority to the federal land managing agencies, including the NPS, by making each agency’s fees available until expended, without further appropriation, for expenses that fall within FLREA’s scope.<sup>28</sup> This test is simply that there be an identification of a source of funds and a direction to pay.<sup>29</sup> These are found in FLREA’s identification of the fees in the Special Account as the source of funds and the direction that “[a]mounts [in the Special Account . . .] shall be used only for [. . . the statutorily specified purposes].”<sup>30</sup> Furthermore, as noted above, there is substantial overlap between the purposes authorized by FLREA and the activities funded by NPS operating and construction accounts, so that if the NPS elects to use FLREA for a particular purpose, the “pick-and-stick” rule would foreclose it from using any other appropriations for that purpose.

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<sup>25</sup> *Id.* at § 6807 (a)(3)(D).

<sup>26</sup> See e.g., Greenbook at ONPS-1, Rec Fee-1 (2019).; This also funds work that falls within the NPS Construction account, which is “[f]or construction, improvements, repair, or replacement of physical facilities, and compliance and planning for programs and areas administered by the National Park Service.” Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. E, Title I (2019).

<sup>27</sup> GAO Red Book, 3<sup>rd</sup> Ed., GAO-07-508SP at 6-199 (2007).

<sup>28</sup> The FLREA appropriation also satisfies the general test for an appropriation that will satisfy the Constitutional provision that, “no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const., art. I, § 9, cl. 7.

<sup>29</sup> GAO Redbook, 4<sup>th</sup> Ed. GAO-16-464SP at 2-22 to 2-27 (2016).

<sup>30</sup> 16 U.S.C. § 6807(a)(3).



Application of the “pick-and-stick” rule in this circumstance, however, simply cannot be reconciled with the appropriations law principle noted above that if an agency has statutory authority to retain fees and is expressly authorized by statute to use the fees, those fees may offset the agency’s operating costs (as an offsetting collection).<sup>31</sup> This is precisely the case with FLREA, which, as the foregoing demonstrates, makes the fees available for the same purposes as the other NPS operating appropriations, so that the NPS is authorized to use the FLREA funds in the manner Congress intended: to offset costs associated with, or supplement, other NPS appropriations. As the “pick-and-stick” rule would prevent such use, it is not appropriate for it to govern the analysis of the proper use of FLREA fees. Rather, FLREA’s plain language and other general statutory interpretation principles govern the use of the fees.

When one considers the origins and rationale for the “pick-and-stick” rule, it becomes clearer that it should not apply to expenditures of offsetting collections such as the FLREA fees. The “pick-and-stick” rule originates from the Comptroller General’s efforts to accommodate the nature of appropriations acts, which tend to be very general and do not set out every permissible item of expenditure.<sup>32</sup> The Redbook section that sets out the necessary expense rule itself starts with the explanation that, “[i]n applying 31 U.S.C. § 1301(a) in a purpose analysis, it is not expected, nor would it be reasonably possible, that every item of expenditure be specified in the appropriation act.”<sup>33</sup> The “pick-and-stick” rule itself is articulated in the third step of the “necessary expense” rule, which, as your letter indicates, applies the purpose statute through a three-step analysis: (1) the expenditure must bear a logical relationship to the appropriation; (2) the expenditure must not be prohibited by law; and (3) the expenditure must not be otherwise provided for.

Although the Redbook discussion of the Necessary Expense rule initially only refers to consideration of the scope of “appropriations act[s],” the additional specificity of the term “appropriation act” is lost by the time the discussions reaches step (3), which only uses the term “appropriations.” This loss of focus on the term “appropriations act” in step (3) perhaps is the source of the mistaken belief that the “pick-and-stick” rule might prevent the use of the FLREA funds once they are used for a given expenditure.

Reviewing the cases and examples cited regarding that step, though, makes it clear that the emphasis is on determining the breadth of, and interaction between, budget authority provided by two or more appropriations acts, rather than between appropriations acts and budget authority provided in acts other than appropriations.<sup>34</sup> Accordingly, we believe the “pick-and-stick” rule is properly confined to the context of determining the scope of distinct appropriations provided in annual appropriations acts, so that it would not govern the interplay of the use of budget

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<sup>31</sup> See *supra* note 9.

<sup>32</sup> GAO Red Book, 4<sup>th</sup> Ed. GAO-17-797SP at 3-14 to 3-16 (2017).

<sup>33</sup> *Id.*

<sup>34</sup> Of the thirty cases cited in the discussion of “Step 3,” most focus on the issue of a general versus specific appropriation, and only seven reach the issue of “pick and stick.” B-272191 (Nov. 4, 1997); B-307382 (Sept. 5, 2006); 68 Comp. Gen. 337 (Mar. 20, 1989); 59 Comp. Gen. 518 (June 11, 1980); GAO/RCED-96-58r; (Dec. 28, 1995); B-327003 (Sept. 29, 2015); B-322062 (Dec. 5, 2011). These “pick and stick” decisions involve comparisons of two or more appropriations acts, rather than a comparison of an appropriations act and the budget authority provided by another statute.



authority in the NPS' operation and constructions accounts, and budget authority provided in the FLREA, which authorizes expenditure of offsetting collections. This conclusion would also properly reconcile the otherwise existing incongruity that would result from applying "pick-and-stick" where Congressional intent clearly shows that FLREA funds are to be available to provide additional funds to offset operating expenses of the land management agencies.

The result that "pick-and stick" does not apply would also avoid legal and practical issues associated with how to apply the rule in the context of how the NPS budgets for expenditure of FLREA fees, which is primarily on a project-by-project basis. As the Fiscal Year 2019 NPS Budget Justification ("2019 Green Book") notes, "[o]verall, funds collected under FLREA are used to conduct visitor-related, critical deferred maintenance and facility condition improvements on visitor use facilities, restore natural and cultural resources for visitor enjoyment, and expand and improve educational and interpretive programs. Projects funded through the FLREA programs support the broader NPS effort to reach more visitors and enhance the overall visitor experience."

Not only does this project-based focus reveal that FLREA fees supplement general NPS operating appropriations, it also shows a conflict with the apparent premise and purpose of the "pick-and-stick" rule. The rule is intended to protect the Congressional power of the purse by preventing agencies from spending beyond the amount the Congress intended by using two equally available lump-sum appropriations. But, applying it in the context of specific FLREA projects is likely to frustrate Congressional intent, as the NPS and other FLREA land management agencies could be prevented from future expenditures otherwise clearly authorized in FLREA.

Furthermore, application of the rule in this context would make it nearly impossible for the NPS to determine when a prior fee-funded project will make future operating account funding improper and possibly lead to absurd results. An example of a FLREA fee projects from the 2019 Green Book may illustrate this point. One of the funded projects is in the Wupatki National Monument and involves trail repair on the Lomaki self-guiding trail, surveying and maintaining 48 miles of boundary fencing, and invasive plant removal in 35,254 acres of the Monument. If the "pick-and-stick" rule applied, it would presumably operate to preclude the use of NPS operating funding for this expenditure. What is not at all clear is the extent of the preclusion. Is the preclusion only applicable to that particular National Monument, rather than say, all parks? Is it applicable to trail repair only on the Lomaki trail, or other trails in the Monument as well? Is the preclusion only applicable to the 48 miles of repaired fence, or any other fencing in the Monument? Is the NPS unable to use its operations funding to clear acreage outside of that already treated through FLREA funds? Similarly, suppose there is an event that is expected to attract a large number of visitors to a park, such that the park needed to use FLREA to provide adequate law enforcement for the event—is the park then prevented from using its operating funds for future law enforcement at the park? Or only law enforcement at a similar event? Or the same event, if it occurs again the following year?

Thus, attempting to apply the "pick-and-stick" rule to the expenditure of the FLREA funds yields no actual benefit to the effort to protect the power of the purse in the context of the use of FLREA fees. Rather, the proper analysis and approach to the use of FLREA funds is to



recognize that they are essentially an authorized augmentation,<sup>35</sup> or supplementation, of the operating appropriations of the NPS and the other land management agencies. The power of the purse is protected, then, when the relevant agencies reasonably interpret of the scope of FLREA's authorized purposes and remain within such purposes when making expenditure determinations. This is precisely what the Department did during the appropriations lapse when faced with the absence of operating appropriations. It determined FLREA funds to be legally available for specific visitor-related services and made the determination to fund them from FLREA.

### ***Applicability of Pick and Stick in a Lapse***

Even if the “pick and stick” rule normally applies to purposes for which FLREA and ONPS are equally available, it does not apply when the ONPS appropriation lapses. Where “pick and stick” applies, it is clear that exhaustion of the selected appropriation does not permit use of the other equally available appropriation.<sup>36</sup> However, early pronouncements of the Pick and Stick rule also recognized that the “continued use of the appropriation selected to the exclusion of any other for the same purpose is required in the absence of changes in the appropriations acts.”<sup>37</sup> At issue, then, is whether a lapse in appropriations reflects an exhaustion of funds or a change in appropriations acts. DOI's view is that a lapse reflects a change in appropriations acts.

Appropriations authority for ONPS in fiscal year 2019 was first granted by the Continuing Appropriations Act, 2019.<sup>38</sup> This act appropriated sums for fiscal year 2019 for continuing projects and activities that were appropriated in fiscal year 2018 in specified appropriations acts, including the Department of the Interior, Environment, and Related Agencies Appropriation Act, 2018, which includes ONPS. Section 105 of the Continuing Appropriations Act, 2019 provides:

*Unless otherwise provided for in this Act or in the applicable appropriations Act for fiscal year 2019, appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs:*

- (1) the enactment into law of an appropriation for any project or activity provided for in this Act;*
- (2) the enactment into law of the applicable appropriations Act for fiscal year 2019 without any provision for such project or activity; or*
- (3) December 7, 2018.*

Section 105 granted ONPS appropriations and related authorities for the period of October 1, 2017 through December 7, 2018. On December 7, 2018, Section 105(3) was amended by

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<sup>35</sup> While the term “authorized augmentation” is not a term of art in the appropriations law context, it nonetheless appears to be an appropriate description of the actual legal effect of the FLREA appropriation. The “augmentation of appropriations” concept generally is used in the negative formulation that if an agency retains and uses funds received from outside sources without statutory authority, it funds have been “improperly augmented.” Where, as here, the opposite has occurred in that the NPS is authorized by the FLREA to retain the fees and to offset operating costs for the identified statutory purposes, the funds in the FLREA special account in fact represent an authorized augmentation of those operating appropriations.

<sup>36</sup> See B-307382 (Sept. 5, 2006)(citing 10 Comp. Gen. 440 (1931)).

<sup>37</sup> B-40899, 23 Comp. Gen. 827 (May 1, 1944) (citing 10 Comp. Gen. 440 (1931)).

<sup>38</sup> Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. C sec. 101 (2018).



striking December 7, 2018 and inserting December 21, 2018, which extended the availability of the ONPS appropriation to that same date.<sup>39</sup> By December 22, 2018, Congress and the President had not enacted into a law an appropriation for ONPS, enacted into law an appropriations act for Interior, Environment, and Related Agencies without a provision for ONPS, or extended the termination date of the continuing resolution. Consequently, the appropriation authority granted to ONPS through the Continuing Resolution Act, 2019 ceased with no other authority to replace it. Beginning on December 22 and lasting throughout the lapse, ONPS had no current budget authority. ONPS did not exhaust its funds limitation. Rather, ONPS expired altogether, pursuant to the changes enacted by Congress in the Consolidated Appropriations Act, 2019, as amended, and lacked budget authority with respect to not just amount, but time and purpose as well.

DOI views the outright expiration of budgetary authority incident to a lapse as a change incident to the Continuing Appropriations Act, 2019, and not a mere exhaustion of funds. Congressional action with respect to ONPS made it such that ONPS had no appropriations authority whatsoever during the period of lapse. DOI, in choosing to utilize the otherwise available FLREA appropriation, did not choose it to the exclusion of an otherwise equally available ONPS appropriation, because Congress made it that so that no ONPS appropriation existed during the lapse. Consequently, the use of FLREA during the lapse does not violate the pick and stick rule.<sup>40</sup>

### ***Responses to the Specific Questions***

The following section repeats your specific questions and provides Interior's response.

#### **Step 1: logical relationship between expenditure and the appropriation**

1. FLREA authorizes NPS to establish and collect recreation fees at "Federal recreational lands and waters." 16 U.S.C. § 6802(a). The statute directs that such fees be established in a manner consistent with certain criteria, including consideration of the benefits and services provided to the visitor. 16 U.S.C. § 6802(b). NPS's "Director's Order #22: Recreation Fees," which describes the agency's policy for administering the Recreation Fee Program, states that the fee program will be designed to provide "enhanced visitor experiences," and, further, that "the

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<sup>39</sup> Making Further Continuing Appropriations for Fiscal Year 2019, and for Other Purposes, Pub. L. No. 115-298 (2018).

<sup>40</sup> The use of fee funds provided by statute during a lapse in appropriations is not a novel occurrence. Article III courts, during the 2019 lapse in appropriations, appear to have likewise obligated against fee funds in order to maintain operations. See Thomas Kaplan, *Federal Courts, Running Out of Money, Brace for Shutdown's Pain*, THE NEW YORK TIMES (Jan. 18, 2019), available at <https://www.nytimes.com/2019/01/18/us/politics/courts-money-government-shutdown.html>; Melissa Heelan Stanzione, *Federal Courts, Supreme Court to Remain Open During Shutdown*, BLOOMBERG LAW (Dec. 21, 2018), available at <https://news.bloomberglaw.com/us-law-week/federal-courts-supreme-court-to-remain-open-during-shutdown>. In fact, using available fee funds to maintain operations comprises part of the federal courts' contingency plan and its "Guide to Judiciary Policy." See Judge John D. Bates, *Status of Judiciary Funding and Guidance for Judiciary Operations During a Lapse in Appropriations*, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 3; Attachment 1, Sept. 24, 2013, <https://legaltimes.typepad.com/files/shutdown.pdf>.



expenditure of revenue . . . will provide high quality enhancements that directly impact the visiting public.”

*As this paragraph introduces your set of questions regarding the logical relationship of NPS expenditures during the lapse to the purposes of the FLREA special account, it implies that Director’s Order #22 (“DO 22”) sets the parameters for the legality of such expenditure. DO 22, however, guides the overall management of its NPS’s Fee Program, primarily focusing on FLREA, but also including other authorities under which NPS collects fees. As the proper establishment (governed by 16 U.S.C. § 6802), retention, and management of fees are key concerns for the FLREA and related fee authorities, much of DO 22 is devoted to matters associated with those efforts and with general program guidance. In that regard, DO 22 articulates 13 principles and objectives, with the foremost principle being that “[t]he program will be designed with the primary purpose of supporting the NPS mission to protect park resources and provide enhanced visitor experiences.” As your letter notes, another principle is that “[t]he expenditure of revenue collected under this program will provide high quality enhancements that directly impact the visiting public.” Other principles are that “[t]he program will emphasize customer service” and “[t]he program will strive to return, as much as possible, the revenue collected to parks for projects that enhance the visitor experience.”*

*While these and the other nine principles guide NPS’s management of its Fee Program, no one principle dictates whether a given expenditure is lawful or consistent with DO 22. In fact, DO 22’s specific guidance on the expenditure of FLREA fees is set forth in Section 9 and is entirely consistent with the statutorily authorized FLREA expenditure categories found at 16 USC 6807(a)(3).*

a. Please provide examples highlighting the distinctions between the benefits and services offered at the parks at which NPS has determined that recreation fees will be collected, versus parks that visitors may enter free of charge, including whether parks that visitors may enter free of charge offer restrooms and/or trash receptacles for visitor use.

*FLREA does not establish a two-tiered regime wherein the NPS is authorized to expend funds on a wholly new range of benefits and services for parks that collect recreation fees to the comparative detriment of parks that do not collect recreation fees. Rather, as explained above, FLREA is better read to supplement NPS’s operating expenses such that benefits and services FLREA expenditures enhance the benefits and services at the park at which they are expended above and beyond what the benefits and services would otherwise be in the absence of the FLREA authority.*

*As explained in DO 22 at paragraph 1.1, “[t]he majority of funds used for national park management come from Congressional appropriations. The rationale for supplementing appropriated funds with visitor fees is that people who use the parks should pay part of the cost incurred by the NPS for their visit, including expenses associated with avoiding and mitigating impacts on resources and responding to increased demand for visitor facilities and services. Studies demonstrate that visitors both understand why parks collect fees and support the practice.” Thus, the only distinction, also as discussed above, between the benefits and services offered by fee parks and non-fee parks is that the fee parks may have additional available*



*funding for projects that directly involve the visitor experience. The types of services the parks may provide is not at all impacted by the availability of FLREA fees.*

*Fiscal year 2018 examples of recreation fee funded projects of the NPS include: rehabilitation of the Annie Creek Canyon Loop Trail at Crater Lake National Park, replacement of an information kiosk at Klondike Gold Rush National Historical Park, repair and replacement of the flagstone walkway between the visitor center and a flagpole at Chickamauga and Chattanooga National Military Park, the repair and improvement of a restroom/comfort station at campground in Prince William Forest Park, and, at Yellowstone National Park, various activities including the removal of graffiti and trash around Old Faithful and other thermal features.<sup>41</sup> Each of these recreation fee funded projects enhanced the visitor experiences at those parks beyond what would otherwise be the experience if NPS could only expend funds acquired through the annual appropriations process. Moreover, NPS's decision to use recreation fee funds for these various projects does not make it so that parks without recreation fee authority can no longer rehabilitate trails, replace informational kiosks, repair and replace walkways, repair and improve comfort stations, or remove graffiti and trash from areas surrounding protected natural resources.*

*Parks that visitors enter free of charge will use operating funds to provide restrooms and/or trash receptacles for visitor use. If existing appropriations from the annual NPS appropriations process are insufficient to provide acceptable restrooms and/or trash receptacles, such as during a lapse, a FLREA funded project may be appropriate to enhance visitor services in that area.*

b. Please provide your views on whether restrooms and trash receptacles constitute “enhanced visitor experiences,” as contemplated by the Order.

*Although there is no requirement under the order that all FLREA expenditures enhance visitor experiences, if existing appropriations from the annual appropriations process are insufficient to provide restrooms and trash receptacles, then clean and sanitary restrooms and trash receptacles would constitute enhanced visitor experiences as contemplated by the Order.*

c. The Order states in section 9 that guidance and specific procedures for allowable expenses are issued annually and also refers to the FLREA Handbook and Reference Manual 22B: Recreation Fee Project Management. Interior’s congressional budget justifications for fiscal years 2018 and 2019 refer to an updated expenditure policy. To the extent that this material provides guidance and agency determinations regarding the purpose availability of the fees, please describe this guidance and/or these determinations.

*Reference Manual 22B provides examples of activities that fall within the various categories of expenditures authorized by FLREA, but does not further restrict the purpose availability of FLREA. The current Recreation Fee Policy, which was in effect during the lapse in appropriations, provides that “[r]ecreation fees must be expended on activities that have a direct visitor connection and are driven by visitor needs. Because all functions of the NPS benefit the public, the critical test is that the work directly benefits park visitors by improving a visitor facility or experience. A project that only incidentally or indirectly improves a visitor*

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<sup>41</sup> See Greenbook, Rec Fee-6 to Rec Fee-14 (2020).



*facility or experience is not considered to be driven by a direct visitor need.” This policy also places a limitation on the use of recreation fee revenues for seven categories of expenditures.<sup>42</sup>*

2. In the January 5, 2019 memorandum, the Acting Secretary gave the following directive to NPS: “immediately utilize [FLREA] funds to address the following items in a manner that maintains: restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and staffing entrance gates as necessary to provide critical safety information. These operations shall be maintained until such funds have a zero balance.” The Acting Secretary also stated that he would work with the Deputy Director of NPS to “direct the expenditure of fees” to parks that “do not charge fees or have insufficient available balances.”

a. The Acting Secretary’s January 5 memorandum as well as a January 6 press release from NPS’s Deputy Director indicate that a decision was made two weeks into the partial government shutdown to use FLREA fees to address maintenance and sanitation issues that had developed at parks that remained accessible. NPS’s Contingency Plan, dated “January 2019,” states that parks that collect fees under FLREA will use the available balance to provide such basic visitor services.<sup>10</sup> Please clarify whether FLREA fees were obligated in this manner during the shutdown prior to the determination referenced in the January 5 and 6 communications.

*Prior to the determination referenced in the January 5 and 6 communications, NPS did not incur obligations against FLREA fees to provide basic visitor services during the period December 22, 2018 through January 5, 2019.*

b. Please describe with specificity the expenses for which FLREA fees were obligated between December 22, 2018, and January 25, 2019.

*Between December 22, 2018 and January 5, 2019, the NPS incurred no obligations for basic visitor services and excepted activities using FLREA. Between January 6, 2019 and January 25, 2019, the NPS incurred obligations totaling \$10,293,768 for basic visitor services and excepted activities using FLREA (Attachment 2.b.1). These expenses included the provision of basic visitor services and excepted activities where appropriate under FLREA authority. The expenses include staffing necessary to maintain restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and staffing entrance gates as necessary to provide critical safety information. Expenses also include indirect costs necessary to plan and oversee the provision of basic visitor services and excepted activities where appropriate. Finally, at the Statue of Liberty and Ellis Island National*

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<sup>42</sup> “Recreation Fee funds are not to be used for:

1. Biological monitoring of endangered species
2. Employee bonuses and awards
3. Permanent salaries, except for WASO program management, Harpers Ferry Center, Denver Service Center, Regional capacity and park cost of collection costs (see discussion on use of career seasonals below)
4. Purchase of vehicles (patrol car, ambulance, bus, etc.)
5. Purchase of large equipment items (snowplow, backhoe, etc.)
6. Purchase of small equipment items used in daily operations (computer, software, camera, radios, etc.)
7. Employee housing”



*Monument, additional costs within the Museum Division and Management Division were incurred under FLREA (see Attachment 2b.2).*

c. Please provide your legal views on whether fee collections pursuant to FLREA are available, in accordance with the purpose statute, for basic visitor services, such as maintaining trash collection, restrooms and sanitation, as well as any other expenses described in your response to question 2b.

*As shown above, FLREA fees are available for basic visitor services, including trash collection, restrooms and sanitation, as well as other expenses described in the response to question 2b.*

3. The Acting Secretary of the Interior stated that obligations incurred against FLREA fees during the shutdown would have ordinarily been charged to the ONPS appropriation.<sup>11</sup> Further, the description in NPS's fiscal year 2019 congressional budget justification of the "Facility Operations" component of its ONPS appropriation includes "daily custodial and janitorial functions" among the planned activities to be funded by the account, and states that the funds requested "enable[] parks to focus on routine building maintenance and small repair jobs that contribute to the upkeep of the facilities [. . .] like cleaning restrooms and emptying waste receptacles[.]"

a. Please confirm that the ONPS appropriation is the appropriation that NPS would typically obligate for basic visitor services, such as maintaining trash collection, restrooms and sanitation, and any other expenses described in your response to question 2b.

*ONPS is the appropriation that NPS would typically obligate for basic visitor services, such as maintaining trash collection, restrooms and sanitation, and most other expenses described in 2b. Entrance gates are typically staffed by fee collectors who are paid for by FLREA while collecting fees and providing visitor information.*

4. NPS's congressional budget justification includes a table, "NPS Budgetary Resources: Recreation Fee Programs," which includes a heading, "Obligations by Project Type."

a. Please confirm whether the information in this Recreation Fee Program table is limited to obligations of amounts collected pursuant to FLREA.

*The information in the Recreation Fee Program table is limited to obligations of amounts collected pursuant to FLREA.*

b. With regard to NPS's obligation of FLREA fees, please provide examples of the kinds of expenses that are included in the "NPS Budgetary Resources: Recreation Fee Programs" table under the "Obligations by Project Type" subcategories: Facilities Routine/Annual Maintenance; Facilities Deferred Maintenance; Facilities Capital Improvement; Interpretation and Visitor Services; and Habitat Restoration.



*Please see Attachment 4b, which summarizes all projects funded in FY 2018, for examples of habitat restoration, visitor and interpretive services, and facilities routine maintenance, deferred maintenance, and capital improvement.*

## **Step 2: expenditure not otherwise prohibited**

5. FLREA requires that at least “80 percent of the recreation fees and site specific agency pass revenues collected at a specific unit or area” remain available for expenditure at that unit or area, and allows the Secretary to reduce this required minimum to 60 percent if the Secretary determines that revenue at the particular unit or area exceeds reasonable needs. 16 U.S.C. § 6806(c). Prior to moving obligations incurred against FLREA fees during the shutdown to charge NPS’s ONPS account, was NPS in compliance with these percentages? Please explain.

*Prior to moving obligations incurred against FLREA fees during the shutdown to charge the ONPS account, NPS was in compliance with these percentages. NPS allocates revenue to fee-collecting parks in accordance with 16 USC 6806(c) on a monthly basis; calculations for funds retained by parks are completed based on the prior month’s revenue totals once the prior accounting period is closed. Funds resulting from revenue collected are initially posted to the accounting system in non-consumable status, and are allocated to parks in consumable status after retained revenue calculations are complete.*

## **Step 3: expenditure not otherwise provided for**

6. To facilitate our understanding of how NPS typically operates its Recreation Fee Program and communicates with Congress regarding the use of the collections, please describe NPS’s process for selecting expenses and projects for which FLREA fees will be obligated in a given fiscal year, including the following information:

a. Please explain how NPS uses the Recreation Fee Comprehensive Plan(s) (RFCP) including the purpose the RFCP serves for NPS, and the extent to which the RFCP represents the actual obligations and expenditures that NPS will incur against FLREA fees in a given fiscal year.

*NPS has utilized the Recreation Fee Comprehensive Plan (RFCP) since 2008. This 5-year planning tool was developed in response to a Congressional directive in FY 2007 after 2 audits by OIG and GAO that questioned NPS planning and spending on deferred maintenance (DM). The purpose of the RFCP is to provide parks with a tool to better plan the expenditure of their FLREA fees. Individual park project information is auto-populated from the Project Management Information System (PMIS) into the RFCP. In addition, there are numerous reports that assist the parks and regions by providing a snapshot of current project information and expenditures. Parks are annually required to update the RFCP with current and out-year planned projects. The RFCP does not represent actual obligations/expenditures the NPS will incur in a given year; these are recorded in the financial system.*

b. NPS includes summary information regarding the projects in the RFCP in its congressional budget justification. Is this information intended to inform Congress of all potential uses of FLREA fees in a given fiscal year? Please explain.



*The summary table included in the budget justification shows actual and estimated budgetary resources for the prior year, current year, and budget year. The budget justification also includes project level detail for projects greater than \$500,000 in total cost that are 10% or more Capital Improvement. This is consistent with House Report 109-465 and the Department of the Interior Deferred Maintenance and Capital Improvement Planning Guidelines (attachment 6b, page 15). Projects that fall outside these requirements are not detailed in the budget justification.*

c. If there is a process for changing the planned use of the fees, please explain this process, including any practice of notifying Congress regarding such changes.

*In limited cases, projects that meet the construction or expanded infrastructure reporting requirements discussed in 6b will not be planned at the time the budget justification is published, but are too urgent to wait for publication in the subsequent year's budget justification. In those instances, the NPS and/or Department of the Interior will notify via email the House and Senate majority and minority clerks for the Subcommittees on Interior, Environment and Related Agencies, Committee on Appropriations, prior to proceeding with the project. The budget justification includes the footnote that "Execution of the recreation fee program is dynamic; projects may shift between fiscal years as funding and scope allows."*

7. Has NPS previously obligated FLREA fees for basic visitor services, such as maintaining trash collection, restrooms and sanitation, and any other expenses described in your response to question 2b?

*The NPS has previously obligated FLREA fees for the activities described in 2b, as authorized by FLREA. Please see Attachment 4b for examples from FY 2018 FLREA projects.*

8. Please provide your legal views on whether the ONPS appropriation or the FLREA fees are more specifically available for purposes of providing basic visitor services, such as maintaining trash collection, restrooms and sanitation, and any other expenses described in your response to question 2b.

*Given the nexus to visitor services, each are equally available, as explained above.*

9. Please provide your legal views on whether FLREA fees supplement the ONPS appropriation, including any statutory language demonstrating congressional intent that both appropriations be available for the same expenses.

*FLREA fees supplement the ONPS, NPS Construction, and other available NPS appropriations, to the extent there is a nexus between the funded activity and visitors to the park and/or the FLREA fee program. When the activity falls within FLREA purposes, FLREA in essence operates as an authorized supplement of the otherwise available appropriation.*

10. In a February 6, 2019 letter to various Members of Congress, the Acting Secretary of the Interior stated that Interior moved "obligations incurred during the appropriations lapse from the



FLREA fee account to apply those obligations to funds in the [ONPS] account . . . where such obligations would have ordinarily been charged.” The Acting Secretary states that this move allowed Interior to restore the FLREA account balances.

a. Please explain whether Interior or NPS notified Congress in advance of incurring the obligations against the FLREA fees that would have ordinarily been charged to the ONPS appropriation, including the manner and specific timing of any such notification.

*Please see attachment 10a, an email from the NPS to the House and Senate majority and minority clerks for the Subcommittees on Interior, Environment and Related Agencies, Committee on Appropriations, on January 6th, 2019, informing them of the change to the NPS' contingency plan.*

b. Please explain whether Interior or NPS notified Congress in advance of moving the obligations initially incurred against the FLREA fees to the ONPS account, including the manner and specific timing of any such notification.

*Please see attachment 10b, a letter from the Acting Secretary to the Chair and Ranking Members of the House and Senate Subcommittees on Interior, Environment and Related Agencies, Committee on Appropriations, on February 6, 2019, informing them of the Department's plan to move the obligations originally incurred against the FLREA fees to the ONPS account. This notification occurred in advance of the movement of the obligations, due to the timing of costs recording in the financial system.*

c. The February 6 letter states that “[t]his simple, two-step approach provides a useful model for dealing with lapse conditions in the future.”

Please provide your legal views on whether this approach is consistent with step 3 of the purpose analysis. In particular, if NPS would ordinarily record these obligations against the ONPS account, please explain the authority under which NPS could instead record these obligations against a different appropriation subject to subsequent adjustment.

*As expressed more fully above, FLREA is best understood as a supplement to ONPS and other operation appropriations of the land management agencies. Accordingly, step 3 of the purpose analysis is inapposite. In regards to NPS's authority to adjust the FLREA obligations to ONPS, we begin with the principle that agencies should not deobligate a proper and unliquidated obligation unless there is some valid reason for doing so.<sup>43</sup> Otherwise, such deobligations risk violations of the Anti-Deficiency Act. However, as GAO recognizes, this general maxim does not apply where there is no risk of an Antideficiency Act violation, and should not limit agencies' flexibility in its use of appropriations or other budget authority in such circumstances.<sup>44</sup>*

*For example, in 1993 the Army was authorized to use portions of its fiscal year 1993 Operations and Maintenance (O&M) appropriation for real property maintenance, in addition to fiscal year*

<sup>43</sup> See GAO Redbook, 3rd Ed. GAO-06-382SP at 7-60 (2006).

<sup>44</sup> *Id* at 7-61.



1993-1994 funds from its Real Property Maintenance, Defense appropriation available for the same purpose. In fiscal year 1994, Army deobligated over \$20 million from the RPM-D account that were obligated in fiscal year 1993 and obligated the same amount to expired, but unobligated 1993 O&M funds. Though Army's Office of the Inspector General objected to this movement of obligations, GAO found that if the obligations fell within the scope of the O&M appropriation and could have properly been charged to that account at the time of obligation, the shift in obligations would be proper pursuant 31 USC 1553(a) and a simple use of the flexibility afforded to the agency by Congress when Congress made the O&M appropriation supplemental to the RPM-D appropriation.<sup>45</sup> GAO stated the determination as to whether the obligation was properly chargeable to O&M hinged on whether the obligations met the time, purpose, and amount requirements imposed on the O&M appropriation, and found that the obligations did represent bona fide needs of the appropriations. Moreover, GAO asserted without citation that it was equally clear that Army could have moved the obligations before the close of 1993 to maximize the flexibility that Congress had afforded it.

Although the ONPS appropriation was not available at the time of obligation due to the lapse in appropriations, subsequent Congressional action, both in the Continuing Resolution and the 2019 Consolidated Appropriations Act retroactively made ONPS appropriations available during the lapse period.<sup>46</sup> Consequently, NPS's lapse-related FLREA obligations fall within the time period availability of the ONPS. The moved FLREA obligations are also within the purpose and amount requirements of the ONPS appropriation. Consequently, the FLREA obligations are validly obligable against the ONPS appropriation. Consistent with the opinion in B-272191, because the charges are validly obligable against the ONPS appropriation, the movement of obligations by the NPS is consistent with the flexibility Congress granted the land management agencies when it enacted the supplemental FLREA budget authority.

## Other Questions

11. In the February 6 letter, Interior states that Public Law 116-5 extended appropriations through February 15 and "explicitly [made] such funds cover the period during which there was a lapse." In addition, Interior notes that section 104 of Public Law 115-245 states that "[a]ppropriations made and authority granted pursuant to this Act shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under the Act." Interior concluded that these two provisions "enabled the Department of the Interior to move obligations incurred during the appropriations lapse from the FLREA fee account and apply those obligations to funds in the NPS operating account now available under the FY 2019 CR."

a. Please state precisely which provision of Public Law 116-5 "explicitly [made] such funds cover the period during which there was a lapse."

*Section 102 of Public Law 116-5 explicitly made funds made available by the Continuing Appropriations Act (Public Law 115-245, Division C) available for the period during which*

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<sup>45</sup> B-272191 (Nov. 4, 1997).

<sup>46</sup> See *infra*, Response to 11.a.



*there was a lapse. Section 102 provides that "For the purposes of division C of Public Law 115-245, the time covered by such division shall be considered to include the period which began on or about December 22, 2018, during which there occurred a lapse in appropriations." Further, Section 101(1) amended Section 105(3) of the Continuing Appropriations Act by striking the date and inserting February 15, 2019, making that the end date of availability of funds under the Act, and fully encompassing the period of the lapse in appropriations.*

b. Please explain your legal views on the authority granted by the provision in Public Law 116-5 to which Interior refers, including your legal analysis that led to the conclusion that this provision supports Interior's actions to move obligations incurred against the FLREA fees during the funding lapse to the ONPS account once the funding lapse ended.

*As a preliminary matter, our views regarding the authority granted by Public Law 116-5, though relevant on February 6 during the pendency of the Continuing Resolution, became mooted by the passage of the Consolidated Appropriations Act, 2019 on February 15. The Consolidated Appropriations Act, 2019 made funds, including funds for ONPS, available for the fiscal year ending September 30, 2019.<sup>47</sup>*

*By making funds available for the period including the lapse, first through the extension of the Continuing Resolution by PL 116-5, then through the Consolidated Appropriations Act, 2019, Congress made the ONPS appropriation available for obligations validly incurred during the lapse in appropriations.*

c. Section 104 of Public Law 115-245 reflects a standard provision included in continuing resolutions that describes the coverage of the continuing resolution. It provides that funds appropriated by the continuing resolution are to remain available to liquidate obligations properly incurred under the continuing resolution. 62 Comp. Gen. 9 (1982). While a subsequent regular appropriation would replace the continuing resolution, to the extent that funds in the applicable account of such appropriation are insufficient to liquidate obligations validly incurred against the account under a continuing resolution, the purpose of this standard provision is to allow those obligations to be liquidated against the continuing resolution. *Id.* See also B-300673, Jul. 3, 2003. As section 104 specifically concerns liquidating obligations incurred against amounts appropriated by a continuing resolution, please explain how section 104 authorized the movement of obligations incurred against FLREA fees in the absence of a continuing resolution to the ONPS account once the funding lapse ended.

*We do not read the relevant opinions regarding Section 104 of Public Law 115-245 to indicate that the sole purpose of this standard provision is to allow obligations validly incurred against a continuing resolution to be liquidated against the continuing resolution if the latter-enacted regular appropriation is insufficient to liquidate such obligations, though we agree that is the effect when read in conjunction with the standard provision found at Section 106 of Public Law 115-245.<sup>48</sup> Once the period of authority of the continuing resolution concluded on February 15,*

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<sup>47</sup> Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. E, title I (2019).

<sup>48</sup> Section 106 states "Expenditures made pursuant to this Act shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law."



*Section 104 allowed the appropriations made available by the continuing resolution to remain available for obligations validly incurred during the continuing resolution period that could not be moved pursuant to Section 106 to appropriations made under the Consolidated Appropriations Act, 2019.*

*However, this standard provision has other effects when read alone and during the pendency of the continuing resolution and stands for exactly what it says: "Appropriations made and authority granted pursuant to this Act shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this Act." On February 6, 2019, when Interior wrote its letter during the pendency of the continuing resolution, this provision, based on its plain meaning, meant that ONPS, an appropriation made under the continuing resolution, was available to cover all obligations and expenditures incurred for activities during the period for which funds were available, which as of that date expressly included the period of time covered by the lapse in appropriations.<sup>49</sup> The operative effect of this language, while the continuing resolution was in effect, was that the ONPS appropriation was available for obligations incurred during the lapse against the FLREA appropriation, and that the Department could utilize the flexibility afforded to it by Congress to move the obligations to ONPS during the period of the continuing resolution.<sup>50</sup>*

*However, because NPS did not adjust any of the lapse-period obligations from FLREA to ONPS until after Congress enacted the Consolidated Appropriations Act, 2019, the Department's views on the effect of Section 104 expressed during the continuing resolution are ultimately immaterial to the legal basis for the obligation adjustments made after enactment of regular appropriations.*

12. The Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A), provides that an agency may not obligate or expend in excess or in advance of an appropriation.

a. Please provide your legal views on whether NPS violated the Antideficiency Act when it obligated FLREA fee amounts for basic visitor services, such as maintaining trash collection, restrooms and sanitation, and any other expenses described in your response to question 2b.

*Please see above. The NPS at all times during the lapse obligated only funds legally available for the expenses for basic visitor services.*

b. If these obligations have been liquidated, please provide your legal views on whether NPS violated the Antideficiency Act at the point of expenditure.

*At no point did the NPS expend funds in excess or advance of available appropriations, given the availability of FLREA during the shutdown and subsequent availability of the ONPS funds.*

13. Please provide any other relevant facts or legal views on this matter that you would like us to consider.

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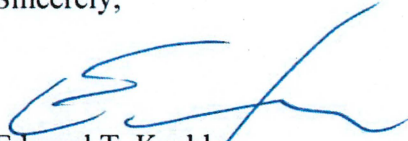
<sup>49</sup> See *supra*, Response to question 11a.

<sup>50</sup> See *supra*, Response to question 10c.



*The use of FLREA fees to maintain public access to National Parks during the lapse in appropriations was consistent with Congress's intent in enacting such Act. More importantly, preserving the health of the Parks for the American people was the duty of the Secretary, pursuant to 54 U.S.C. § 100101, which requires the Secretary to "conserve [ . . . ] and provide for the enjoyment of [the Parks] for future generations."*

Sincerely,



Edward T. Keable  
Associate Solicitor-General Law

Enclosures



