



B-330776

September 5, 2019

Congressional Requesters

Subject: *Department of the Interior—Activities at National Parks during the Fiscal Year 2019 Lapse in Appropriations*

This responds to your request for our legal opinion regarding whether the Department of the Interior (Interior) complied with appropriations laws in its use of National Park Service (NPS) appropriations both during and subsequent to the partial government shutdown, during which NPS experienced a lapse in certain appropriations from December 22, 2018, through January 25, 2019.¹

Specifically, we considered whether Interior violated the purpose statute, 31 U.S.C. § 1301(a), when it obligated recreation fees, collected and retained pursuant to authority granted under the Federal Lands Recreation Enhancement Act (FLREA), for purposes such as trash collection and maintenance of restrooms and sanitation at national park sites that remained accessible to visitors during the shutdown. We also considered whether Interior violated the purpose statute when, once the funding lapse ended, Interior purported to “move” such obligations, initially incurred against FLREA amounts during the shutdown, to NPS’s Operation of the National Park System (ONPS) appropriation, effectively replenishing the previously obligated

¹ Letter from Senator Thomas R. Carper, Ranking Member, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, United States Senate, Senator Gary C. Peters, Ranking Member, Committee on Homeland Security and Governmental Affairs, United States Senate, and Representative Elijah E. Cummings, Chairman, Committee on Oversight and Reform, House of Representatives, to Comptroller General, GAO (May 23, 2019); Letter from Senator Tom Udall, Ranking Member, Committee on Appropriations, Subcommittee on the Interior, Environment, and Related Agencies, United States Senate, to Comptroller General, GAO (Feb. 15, 2019); Letter from Representative Raúl M. Grijalva, Chairman, Committee on Natural Resources, House of Representatives, and Representative Betty McCollum, Chair, Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, House of Representatives, to Comptroller General, GAO (Feb. 6, 2019); (collectively, Request Letter).

FLREA account balance. See, e.g., Letter from Acting Secretary, Interior, to Representative Betty McCollum, Chair, Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, House of Representatives (Feb. 6, 2019). Of particular significance here, Interior acknowledged that these obligations would have ordinarily been charged to the ONPS appropriation and ultimately recognized that its decision to obligate the FLREA fees during the shutdown was a means to circumvent the effect of the lapse in ONPS funding. *Id.* Indeed, Interior stated that “[t]his simple, two-step approach provides a useful model for dealing with lapse conditions in the future.” *Id.* Finally, we considered whether Interior’s actions complied with the Antideficiency Act, 31 U.S.C. § 1341(a).

As discussed below, we conclude that Interior violated the purpose statute when, during the shutdown, it obligated FLREA fees for expenses that it would normally charge to ONPS appropriations. Because NPS did not have an ONPS appropriation at the time that it incurred the obligations at issue, Interior also violated the Antideficiency Act and should report its violation as required by 31 U.S.C. § 1351. As explained below, while Interior should correct its Antideficiency Act violation, it must report the violation to Congress and enumerate actions it has taken to prevent recurring violations in the event of future funding lapses. With this decision, we will consider such violations in the future to be knowing and willful violations of the Act.

In accordance with our regular practice, we contacted Interior for its legal views and factual information on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting Solicitor/Principal Deputy Solicitor, Interior (May 2, 2019); GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <http://www.gao.gov/products/GAO-06-1064SP>. We requested that Interior provide its explanation of the pertinent facts and its legal views by June 7, 2019. However, we did not receive a response from Interior prior to publishing this opinion.

An agency’s failure to respond will not preclude our issuance of an opinion. GAO-06-1064SP, at 7. We take our responsibility to Congress seriously, and will not allow an agency’s lack of cooperation to interfere with Congress’s oversight of executive spending. In this case, we reviewed publicly available documents, such as Interior’s congressional budget justifications (CBJ) and correspondence between Interior and Members of Congress. These documents provided sufficient information to issue a legal opinion on NPS’s activities. Accordingly, we issue our opinion in this matter notwithstanding Interior’s failure to timely respond to our request for information.

BACKGROUND

NPS receives a fiscal year ONPS appropriation “[f]or expenses necessary for the management, operation, and maintenance of areas and facilities administered by [NPS] and for the general administration of [NPS].” See, e.g., Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. E, title I, 133 Stat. 13, 211–212

(Feb. 15, 2019); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. G, title I, 132 Stat. 348, 640 (Mar. 23, 2018). The ONPS appropriation covers the management and operation of park areas, including facility operations and maintenance activities, an element of which consists of “daily custodial and janitorial functions.” Interior, *Budget Justifications and Performance Information Fiscal Year 2019, National Park Service* (2019 CBJ), at ONPS-53, available at https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_nps_budget_justification.pdf; Interior, *Budget Justifications and Performance Information Fiscal Year 2018, National Park Service* (2018 CBJ), at ONPS-Ops&Maint-3, available at http://www.doi.gov/sites/doi.gov/files/uploads/fy2018_nps_budget_justification.pdf. Specifically, in its congressional budget justification, Interior states that the funds requested for ONPS’s “Facility Operations” component of the budget would “enable[] parks to focus on routine building maintenance and small repair jobs that contribute to the upkeep of facilities . . . like cleaning restrooms and emptying waste receptacles” 2019 CBJ, at ONPS-53. While both facility *operations* and facility *maintenance* activities are funded through the ONPS appropriation, Interior distinguishes between these functions:

“The Facility Operations function encompasses day-to-day activities that allow for the continued use of facilities and are conducted with employee and visitor safety as the primary goal. These activities in a park are separate from, but work in concert with, the Facility Maintenance regimen, which is used to directly extend the life of the resource and provide long-range development and protection of facilities. The two functions collaborate to ensure an efficient, effective, and comprehensive maintenance program. The Facilities Operations function incorporates the planning, organizing, directing, and controlling of the day-to-day work activities.”

2019 CBJ, at ONPS-53–ONPS-54. See also 2018 CBJ, at ONPS-Ops&Maint-4. Many of the activities covered in the Facilities Maintenance component of NPS’s budget for the ONPS appropriation are “larger than basic operational budgets can handle.” 2019 CBJ, at ONPS-56. See also 2018 CBJ, at ONPS-Ops&Maint-6.

Pursuant to FLREA, NPS collects recreation fees at 112 of the 419 sites that it manages. NPS, *About Us: Your Fee Dollars at Work*, <https://www.nps.gov/aboutus/fees-at-work.htm> (last visited July 1, 2019). See 16 U.S.C. § 6802. Amounts collected are available until expended, in relevant part, for “repair, maintenance, and facility enhancement *related directly to visitor enjoyment, visitor access, and health and safety*.” 16 U.S.C. §§ 6806(b), 6807(a)(3)(A) (emphasis added). Sites that collect FLREA fees are required to retain at least 80 percent of the collections for use at that site, unless the Secretary determines that the site’s revenue exceeds its needs, in which case a minimum of 60 percent must be retained. 16 U.S.C. § 6806(c). The remaining amounts are made available to NPS “for expenditure on an agency-wide basis.” *Id.*; 2019 CBJ, at

Rec Fee-2 (“NPS consolidates fees not retained by collecting parks in a central account used for projects that compete for funding servicewide. Projects are ranked, rated, and ultimately chosen by the Director.”).

Funds collected under FLREA are generally used “to conduct visitor-related, critical deferred maintenance and facility condition improvements on visitor use facilities, [to] restore natural and cultural resources for visitor enjoyment, and [to] expand and improve educational and interpretive programs.” 2019 CBJ, at Rec Fee-2 (NPS policy requires parks to obligate 55 percent of new allocations to deferred maintenance projects). Such projects have included the application of gravel to the surface of Sheep Mountain Road to ensure visitor safety in Badlands National Park, the repair of an entrance station, including a roof replacement, to enhance the experience of Prince William Forest Park visitors, and the repair of the main sewer system throughout the White Sands National Monument to maintain restroom facility function and guest comfort. 2019 CBJ, at Rec Fee-7, Rec Fee-8; NPS, *Your Dollars at Work, White Sands National Monument*, <https://www.nps.gov/whsa/learn/management/yourdollarsatwork.htm> (last visited July 12, 2019). Deferred maintenance and capital improvement plans for the upcoming fiscal year are identified in Interior’s congressional budget justification. See, e.g., 2019 CBJ, at Rec Fee-12–Rec Fee-99. Projects announced for fiscal year 2019 included the replacement of deteriorating trail bridges in the Muir Woods National Monument, construction of a campground at the Petrified Forest National Park, and replacing an aging wastewater system at Yosemite National Park. 2019 CBJ, at Rec Fee-58–Rec Fee-61, Rec Fee-66, Rec Fee-82.

During the partial government shutdown, NPS experienced a lapse in certain appropriations, including the ONPS appropriation, from December 22, 2018, through January 25, 2019. At the outset, NPS’s shutdown contingency plan stated that NPS would, “[e]ffective immediately upon a lapse in appropriations, . . . take all necessary steps to suspend all activities and secure national park facilities that operate using appropriations that are now lapsed” *National Park Service Contingency Plan* (Jan. 2019), at 1, available at <https://www.doi.gov/sites/doi.gov/files/2018-01-nps-contingency-plan.pdf> (last visited July 12, 2019). Of note, NPS would “cease providing visitor services, including restrooms, trash collection, facilities and road maintenance (including plowing), campground reservation and check-in/check-out services, backcountry and other permits, and public information.” *Id.* While NPS would not be providing visitor services during the funding lapse, parks, roads, trails, and open-air memorials would generally remain accessible to visitors.² Staffing was

² During previous government shutdowns, Interior closed access to NPS sites. See, e.g., *Amendment to National Park System Closure Determination and Notice* (Oct. 11, 2013), at 1, available at <https://www.doi.gov/sites/doi.gov/files/migrated/shutdown/fy2014/upload/Concession-s-Amendment-to-Closure-Notice.pdf> (last visited Aug. 13, 2019) (“[E]ffective at 12:01 a.m. on October 1, 2013, all units of the National Park System nationwide

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to be maintained at the level necessary for the protection of life, property, public health and safety. *Id.* at 3.

On January 5, 2019, the Acting Secretary of the Interior issued a memorandum to the Deputy Director of NPS directing the use of FLREA fees to address maintenance and sanitation issues that had developed at parks that remained accessible to visitors during the shutdown. Memorandum from Acting Secretary, Interior, to Deputy Director, NPS (Jan. 5, 2019). Specifically, 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 reached a zero balance.” *Id.* 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.” *Id.*

On January 25, 2019, Congress and the President enacted a continuing resolution³ providing appropriations through February 15, 2019. Pub. L. No. 116-5, § 101, 133 Stat. 10, 10 (Jan. 25, 2019). Of critical importance here, in a February 6, 2019 letter to Members of Congress, the Acting Secretary of the Interior asserted that the continuing resolution authorized Interior to “move obligations incurred during the appropriations lapse from the FLREA fee account and apply those obligations to funds in the [ONPS] account . . . *where such obligations would have ordinarily been charged.*” See, e.g., Letter from Acting Secretary, Interior, to Representative McCollum, Chair, Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, House of Representatives (Feb. 6, 2019) (emphasis added). Interior asserted that this allowed it to replenish the FLREA account balances. Equally significant, the Acting Secretary asserted that “[t]his simple, two-step approach provides a useful model for dealing with lapse conditions in the future.” *Id.* The Acting Secretary’s statements recognize that Interior’s actions served to circumvent the effect of a lapse in ONPS appropriations.

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were closed to public visitation and use . . . national closure was necessitated by a lapse in funds appropriated by Congress for the operation of the National Park System. Under the provisions of the Antideficiency Act . . . in the absence of an appropriation [NPS] is able to undertake only very limited activities, primarily related to emergencies.”).

³ A continuing resolution is “[a]n appropriation act that provides budget authority for federal agencies, specific activities, or both to continue in operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.” GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 35–36.

DISCUSSION

At issue here is (1) whether recreation fees collected by NPS pursuant to FLREA were available to provide basic visitor services such as trash collection and maintenance of restrooms and sanitation at park sites that remained accessible during the partial government shutdown, (2) whether Interior properly “moved” obligations initially incurred against FLREA amounts during the partial government shutdown to its ONPS appropriation once the funding lapse ended and Congress had enacted amounts to the ONPS appropriation, and (3) whether Interior complied with the Antideficiency Act.

Use of FLREA amounts

Appropriated funds are available only for authorized purposes. 31 U.S.C. § 1301(a). As each authorized expense is not stated explicitly in an appropriation, application of the purpose statute involves a three-step analysis, known as the necessary expense rule: (1) the expenditure must bear a reasonable, logical relationship to the appropriation; (2) the expenditure must not be prohibited by other law; and (3) the expenditure must not be otherwise provided for. See, e.g., B-303170, Apr. 22, 2005. With regard to step 3, a specific appropriation prevails over a more general appropriation, and where neither is more specific, the agency must select which to charge for the expenditure in question. See, e.g., B-307382, Sept. 5, 2006. Once that election has been made, the agency must continue to use the same appropriation for that purpose, unless the agency informs Congress of its intent to change for the next fiscal year. *Id.* At issue in this opinion are steps 1 and 3. With regard to step 2, we are not aware that Congress and the President have enacted a statute that specifically prohibits the use of NPS appropriations for custodial services. In fact, Congress annually enacts an ONPS appropriation for expenses associated with the management, operation and maintenance of NPS facilities, which NPS routinely informs Congress it will use for day-to-day custodial services.⁴

Step 1: Logical relationship

Generally, to interpret a statute, we begin with the text, giving ordinary meaning to statutory terms unless otherwise defined. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006). We do not construe statutory terms in isolation, but rather, in context of the whole statute. See 2A Sutherland, *Statutes and Statutory Construction* § 46:5 at 204 (7th ed. 2014) (“A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. . . . each part or section should be construed in connection with every other part or section to produce a harmonious whole.”). See also *United Savings Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (“Statutory construction . . . is a holistic endeavor.”);

⁴ See *infra* note 8.

B-321685, Mar. 14, 2011, at 4 (“The Supreme Court has indicated that the meaning of a statute is to be determined not just by ‘reference to the language itself,’ but also by reference to ‘the specific context in which that language is used and the broader context of the statute as a whole.’” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

Under FLREA, NPS has authority to establish and collect recreation fees at lands or waters it manages. 16 U.S.C. § 6802. 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). Amounts collected are available, in relevant part, for “repair, maintenance, and facility enhancement related directly to visitor enjoyment, visitor access, and health and safety.” 16 U.S.C. § 6807(a)(3)(A). FLREA requires triennial reports to Congress providing examples of projects that were funded using the fees as well as future projects to be funded using the fees. 16 U.S.C. § 6808.

The Merriam-Webster Dictionary defines “repair” as “to restore by replacing a part or putting together what is torn or broken”; “maintenance” as “the upkeep of property or equipment”; and “enhance” as “to increase or improve in value, quality, desirability or attractiveness.” Merriam-Webster Dictionary Online, *Definition of repair*, available at www.merriam-webster.com/dictionary/repair (last accessed July 22, 2019); Merriam-Webster Dictionary Online, *Definition of maintenance*, available at www.merriam-webster.com/dictionary/maintenance (last accessed July 22, 2019); Merriam-Webster Dictionary Online, *Definition of enhance*, available at www.merriam-webster.com/dictionary/enhance (last accessed July 22, 2019). While the inclusion of these terms in section 6807 could potentially encompass a range of activities, NPS’s implementation of FLREA is instructive, as it reflects the agency’s longstanding interpretation and application of the purpose of its fees. NPS’s policy governing the use of FLREA fees, as well as its presentation of the recreation fee program to Congress in the agency’s annual budget justifications and statutory triennial reports, indicate that Interior has, prior to the partial government shutdown, regarded NPS’s FLREA fees as available primarily for significant efforts that would increase the quality of park resources and visitor experiences.⁵ Such efforts would not include the provision of basic custodial services.

The internal process that NPS established to govern expenditure of its fees in accordance with FLREA requires detailed planning and contains multiple levels of review, suggesting that typical practice involves careful consideration surrounding how FLREA fees are expended. NPS’s “Director’s Order #22: Recreation Fees” sets

⁵ FLREA also provides fee collection authority to the United States Fish and Wildlife Service, the Bureau of Land Management, the Bureau of Reclamation, and the Forest Service. 16 U.S.C. § 6801 (defining “Federal land management agency”); 16 U.S.C. § 6802 (authorizing various fee authorities). This opinion does not evaluate other agencies’ interpretation of FLREA or their obligation of fees.

forth the agency's policy for administering recreation fees collected pursuant to FLREA. Interior NPS, *Director's Order #22: Recreation Fees* (May 14, 2010), at 2, available at http://www.nps.gov/policy/DOrders/DO_22.pdf (Order). Under the "Principles and Objectives of the Fee Program" heading, the Order states that the program "will be designed with the primary purpose of supporting the NPS mission to protect park resources and provide enhanced visitor experiences[,] and that "[t]he expenditure of revenue collected under this program will provide high quality enhancements that directly impact the visiting public." Order, at 3. The Order describes the procedures in place to govern expenditure of the fees and "to ensure . . . a direct visitor connection" and "the integrity of the program." Order, at 12. Included among these processes is the annual submission of a 5-year Recreation Fee Comprehensive Plan (RFCP) by each park, which serves as the approval mechanism for projects under \$500,000. Order, at 12. See also *Triennial Report to Congress, Implementation of the Federal Lands Recreation Enhancement Act* (May 2012) (2012 Triennial Report), at 65, available at https://www.doi.gov/sites/doi.gov/files/migrated/ppa/upload/FLREA_Triennial_Report_2012_FINAL.pdf (each park includes an obligational strategy to complete approved projects in its RFCP, which is reviewed and approved by regional as well as national offices to confirm that plans have a direct visitor connection, among other things). NPS also utilizes an annual Service-wide Comprehensive Call to ensure that "expenditures are properly planned and [are] in compliance with the law and NPS policy." 2012 Triennial Report, at 65–66 (guidance for the call "emphasizes that recreation fee funds must be used for high priority visitor projects"). Certain capital projects also require approval from Interior, the Office of Management and Budget (OMB), and Congress. Order, at 12. Parks must obligate a minimum of 55 percent of their fees for deferred maintenance projects, and NPS caps the amount available for expenses associated with the cost of collection and targets a certain percentage of collections for carryover. See 2019 CBJ, at Rec Fee-2; Decision Briefing Document from Deputy Director Exercising the Authority of the Director, NPS, to Secretary Interior (May 14, 2019), at 6.

As an oversight mechanism, Congress requires Interior to report to Congress triennially on the FLREA fee program, including examples of how the fees are being used. 16 U.S.C. § 6808. The NPS fee program that Interior depicts in these reports is one under which visitors pay for a heightened quality of experience and fees retained are reinvested into the parks to perform maintenance and repairs, to enhance accessibility to various park resources, to increase learning opportunities for visitors, or to add other comparable value. *Triennial Report to Congress, Implementation of the Federal Lands Recreation Enhancement Act* (May 2015) (2015 Triennial Report), at 27 ("A substantial portion of FLREA revenues address maintenance backlog issues."); 2012 Triennial Report, at v (recognizing perceived relationship between fees paid and amenities and services provided). NPS projects highlighted in triennial reports include: the creation of an accessible trail to a scenic overlook at the Keweenaw National Historic Park, the repair of four miles of gravel roads and parking areas at Harpers Ferry National Historic Park, and the construction of a pervious walkway to Herbert Hoover's gravesite. 2015 Triennial

Report, at 38, 41; 2012 Triennial Report, at 25. The projects highlighted in Interior's congressional budget justifications similarly emphasize deferred maintenance projects and other such enhancements in providing examples of how recreation fees have been obligated. See, e.g., 2019 CBJ, at Rec Fee-6– Rec Fee-11.

In our opinions, when assessing whether an expenditure has a reasonable, logical relationship to the appropriation, we consider the agency's explanation and look to ensure that, generally, such relationship is not "so attenuated as to take it beyond that range" of permissible discretion. B-223608, Dec. 19, 1988. See also *United States Department of the Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1349 (D.C. Cir. 2012). Here, Interior did not respond to our request for its explanation. We note that in a January 9, 2019 letter from the Acting Secretary of the Interior to Chair McCollum, Interior asserted that its decision to use FLREA fees for services including maintaining restrooms, sanitation, and trash collection at park sites that remained accessible to visitors during the shutdown was consistent with the common meanings of the terms in 16 U.S.C. § 6807(a)(3). See Letter from Acting Secretary, Interior, to Representative Betty McCollum, Chair, Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives (Jan. 9, 2019). However, Interior's January 9 letter and subsequent communications on February 6 highlight that Interior's decision to obligate FLREA fees was also based in addressing lapse conditions. According to the January 9 letter, Interior shifted its policy regarding the use of the fees during the shutdown to meet its "dual mandate" to conserve park resources and to allow for their enjoyment by the American people "through the use of retained fee monies to maintain the parks during this period of lapse in appropriations." *Id.* Statements in Interior's February 6 communications further belie any suggestion that the legal availability of the fees was the sole basis or consideration for their obligation, as the Acting Secretary further emphasized that his actions were taken for the purpose of "dealing with lapse conditions." See, e.g., Letter from Acting Secretary, Interior, to Representative McCollum, Chair, Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, House of Representatives (Feb. 6, 2019).

While FLREA authorizes NPS to use fees for "repair, maintenance, and facility enhancement related directly to visitor enjoyment, visitor access, and health and safety[.]" in this context, maintenance and facility enhancement does not include the provision of basic, day-to-day custodial services like cleaning restrooms and taking out the trash. 16 U.S.C. § 6807(a)(3)(A). The statute as a whole contemplates that fees would be established in consideration of the benefit being provided to the visitor and that the site collecting the fee would retain the majority of collections for use at the site, such that visitors are contributing to their enhanced experience.⁶ Further,

⁶ Some other agencies with authority to charge fees under FLREA may collect such fees only at certain sites, including those that contain, among other things, permanent trash receptacles and permanent toilet facilities. 16 U.S.C. § 6802(f)

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NPS’s publicly available documents and the information it reported to Congress concerning its expenditure of the fees demonstrate the agency’s own historical perspective on the proper use of its collections: activities NPS categorized as visitor services, facility maintenance, and/or facility improvement, include rehabilitating, repairing, and relocating several miles of trails, rehabilitating a public use comfort station, including *replacement or rehabilitation* of several restrooms inside, as well as expanding a parking lot. 2015 Triennial Report, at 38–41; 2012 Triennial Report, at 24, 26, 28. As publicly-available NPS documents reflect, maintenance and facility enhancement under FLREA does not include basic, day-to-day custodial services.

Even if we were to accept that Interior’s range of permissible discretion permits it to use FLREA fees for basic, day-to-day custodial services, such a use of the fees still does not withstand scrutiny under step 3 of the necessary expense analysis. We now turn to that analysis.

Step 3: Otherwise provided for

A specific appropriation prevails over a more general appropriation, and where neither is more specific, the agency must select which to charge for the expenditure in question. See, e.g., B-307382, Sept. 5, 2006. Once that election has been made, the agency must continue to use the same appropriation for that purpose, unless the agency informs Congress of its intent to change for the next fiscal year. *Id.*

NPS receives an ONPS appropriation that is available “[f]or expenses necessary for the management, operation, and maintenance of areas and facilities administered by [NPS] and for the general administration of [NPS][,]” which Interior has told Congress is the appropriation typically charged for daily custodial services. Pub. L. No. 116-6, 133 Stat. at 211–212; 2019 CBJ, at ONPS-53; Letter from Acting Secretary, Interior, to Representative McCollum, Chair, Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, House of Representatives (Feb. 6, 2019). In contrast, FLREA expenditures are available, in relevant part, for “repair, maintenance, and facility enhancement related directly to visitor enjoyment, visitor access, and health and safety.” 16 U.S.C. § 6807(a)(3)(A).

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(authorizing the Bureau of Land Management, the Bureau of Reclamation, and the Forest Service to collect “standard” amenity fees at such locations). However, Congress did not enact such conditions for NPS’s collection authority. See 16 U.S.C. § 6802(e) (authorizing entrance fees at NPS sites); 16 U.S.C. § 6802(g) (authorizing NPS to collect an “expanded amenity recreation fee” where Interior determines such a fee is warranted). FLREA does not specifically authorize NPS to collect user fees based on the provision of sanitation services.

We conclude that, as between the two appropriations, the expenditures at issue here are properly chargeable to the ONPS appropriation, not the FLREA fees. As we noted earlier, to interpret a statute, we begin with the text, giving ordinary meaning to statutory terms unless otherwise defined. *Sebelius*, 569 U.S. at 376. Importantly, the set of terms Congress uses in the ONPS appropriation differs from the set of terms used in FLREA. See *generally* 2A Sutherland, § 45:14, at 139–141 (noting the commonsense principle that “when people say one thing, they generally do not mean something else.”). Merriam-Webster defines “management” as “the conducting or supervising of something”; “operation” as “the quality or state of being functional”; “administration” as “the act or process of administering something”; and “maintenance” as “the upkeep of property or equipment.” Merriam-Webster Dictionary Online, *Definition of management*, available at <https://www.merriam-webster.com/dictionary/management> (last accessed July 22, 2019); Merriam-Webster Dictionary Online, *Definition of operation*, available at www.merriam-webster.com/dictionary/operation (last accessed July 22, 2019); Merriam-Webster Dictionary Online, *Definition of administration*, available at www.merriam-webster.com/dictionary/administration (last accessed July 22, 2019); *Definition of maintenance*. Clearly, expenses to carry out day-to-day functioning fall more squarely within the common understanding of this set of terms, rather than the “repair, maintenance, and enhancement” set of terms in FLREA. See, e.g., B-320329, Sept. 29, 2010 (“A word in a list, in particular, is given more precise content by the neighboring words with which it is associated.”) (citing *United States v. Williams*, 553 U.S. 285, 294 (2008)). Congress has distinguished between “operation” and “maintenance” by opting to include both terms within the language of the ONPS appropriation. See, e.g. *Nero v. Mosby*, 890 F.3d 106, 124 (4th Cir. 2018) (noting that statutory construction should give meaning to all parts and avoid interpretations that would render terms superfluous). Indeed, Interior itself distinguishes between those activities that constitute facility *operations* and those that constitute facility *maintenance* in its congressional budget justifications, placing daily custodial services entirely within the “operations” component—a category of expense that is, notably, not included among the authorized uses of FLREA fees.⁷ See 16 U.S.C. § 6807; 2019 CBJ, at ONPS-53–ONPS-54, ONPS-56–ONPS-57.

Here, NPS’s actions, except for the duration of the funding lapse, have recognized that the ONPS appropriation, rather than the FLREA fees, is the proper appropriation for the provision of basic custodial services like trash collection and the maintenance of restrooms and sanitation; it is the ONPS appropriation that NPS has

⁷ FLREA fees may be obligated for “direct operating or capital costs associated with the recreation fee program”; however, “operating” costs, in this context, are distinct from those we have been discussing in this opinion. 16 U.S.C. § 6807(a)(3)(E). This provision refers to the overhead costs associated with collecting fees. Order, at 14 (describing this category to include “costs that occur as a direct result of collecting, remitting, transporting, protecting, storing, or securing fee funds”).

consistently elected to charge for such expenses.⁸ In fact, NPS's use of the ONPS appropriation for day-to-day operational tasks predates the enactment of FLREA. See, e.g., *Budget Justifications and Performance Information Fiscal Year 2004, National Park Service*, at ONPS-64–ONPS-65, available at <https://www.nps.gov/upload/fy-2004-greenbook.pdf> (describing facility operations activities as “day-to-day activities that allow for continued use of facilities” including “cleaning and custodial work” and “trash collection”). Conversely, collections from FLREA's predecessor, the Recreation Fee Demonstration Program, were “dedicated primarily to identified, backlogged maintenance, rehabilitation and resource management projects.” *Id.*, at RecFee-2. See generally *Budget Justifications and Performance Information Fiscal Year 2006, National Park Service*, available at https://www.nps.gov/aboutus/upload/FY_2006_greenbook.pdf, at RecFee-2 (noting that the expenditure categories in FLREA are similar to those of the Recreation Fee Demonstration Program). Under the facts and legal framework at issue here, it is clear that only the ONPS appropriation, and not the appropriation of the FLREA fees, is available for the day-to-day operational tasks at issue. Longstanding NPS practice established under both FLREA and its predecessor program only buttresses this conclusion.

But, even if we were to view both FLREA fees and ONPS appropriations legally as equally available for basic custodial services, here, because NPS has historically charged the ONPS appropriation for such expenses, and clearly elected to continue to charge the ONPS appropriation for such expenses in fiscal year 2019, as reflected in its congressional budget justification for fiscal year 2019, the ONPS

⁸ See, e.g., 2019 CBJ, at ONPS-53; 2018 CBJ, at ONPS-Ops&Maint-3–ONPS-Ops&Maint-4; *Budget Justifications and Performance Information Fiscal Year 2017, National Park Service*, available at https://www.doi.gov/sites/doi.gov/files/uploads/FY2017_NPS_Budget_Justification.pdf, at ONPS-Ops&Maint-3–ONPS-Ops&Maint-4; *Budget Justifications and Performance Information Fiscal Year 2016, National Park Service*, available at https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2016/upload/FY2016_NPS_Greenbook.pdf, at ONPS-Ops&Maint-4; *Budget Justifications and Performance Information Fiscal Year 2015, National Park Service*, available at https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2015/upload/FY2015_NPS_Greenbook.pdf, at ONPS-86–ONPS-87; *Budget Justifications and Performance Information Fiscal Year 2014, National Park Service*, available at https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2014/upload/FY2014_NPS_Greenbook.pdf, at ONPS-90; *Budget Justifications and Performance Information Fiscal Year 2013, National Park Service*, available at https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2013/upload/FY2013_NPS_Greenbook.pdf, at ONPS-82. See also *Budget Justifications and Performance Information Fiscal Year 2012, National Park Service*, available at https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/FY2012_NPS_Greenbook.pdf, at ONPS-85.

appropriation was the only appropriation available for this purpose in fiscal year 2019. See B-307382, Sept. 5, 2006 (“Where one can reasonably construe two appropriations as available for an expenditure not specifically mentioned in either appropriation, we will accept an administrative determination as to which appropriation to charge. . . . [h]owever, once an election is made, continued use of the same appropriation to the exclusion of any other for the same purpose is required.”) (citations omitted); 2019 CBJ, at ONPS-53. On rare occasions, *where Congress so indicates*, two appropriations may be available for the same purpose; but, in this case, Interior has not pointed to any statutory language evidencing Congress’s intent that both FLREA fees and ONPS appropriations be available for the provision of basic custodial services. See, e.g., B-328477, Sept. 26, 2017; B-327003, Sept. 29, 2015. Indeed, Interior acknowledged that it ordinarily obligates the ONPS appropriation for these expenses, rather than the FLREA fees. See, e.g., Letter from Acting Secretary, Interior, to Representative McCollum, Chair, Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, House of Representatives (Feb. 6, 2019). Given these facts, it is clear that Interior violated the purpose statute when it obligated NPS’s FLREA fees for expenses such as trash collection and maintenance of restrooms and sanitation between December 22, 2018, and January 25, 2019.

“Movement” of obligations

On January 25, 2019, Congress and the President enacted a continuing resolution providing appropriations through February 15, 2019. Pub. L. No. 116-5, § 101, 133 Stat. 10, 10 (Jan. 25, 2019). On February 6, 2019, the Acting Secretary of the Interior sent letters to Members of Congress asserting that the continuing resolution authorized Interior to “move obligations incurred during the appropriations lapse from the FLREA fee account and apply those obligations to funds in the [ONPS] account . . . where such obligations would have ordinarily been charged.” See, e.g., Letter from Acting Secretary, Interior, to Representative McCollum, Chair, Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, House of Representatives (Feb. 6, 2019). Interior asserted that this allowed it to replenish the FLREA account balances and that “[t]his simple, two-step approach provides a useful model for dealing with lapse conditions in the future.” *Id.*

Specifically, Interior stated that Public Law 116-5 extended appropriations through February 15 and “explicitly [made] such funds cover the period during which there was a lapse.” *Id.* In addition, Interior relied on section 104 of Public Law 115-245, which 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 this Act.” Pub. L. No. 115-245, div. C, § 104 (Sept. 28, 2018). It is Interior’s position that section 104 of Public Law 115-245 and provisions of Public Law 116-5 enabled the “movement” of FLREA obligations to the ONPS appropriation.

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). Generally, a subsequent regular appropriation would replace a continuing resolution; but, to the extent that funds in the applicable account of a regular 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, July 3, 2003. Section 104 specifically concerns the liquidation of obligations incurred against amounts *appropriated by a continuing resolution* and does not support the “movement” of obligations incurred in the absence of a continuing resolution against amounts appropriated by a permanent provision of law. Consequently, we disagree with Interior’s interpretation. However, as we explain below in our discussion of the Antideficiency Act, Interior should correct the Antideficiency Act violation it incurred when it improperly charged obligations to its FLREA account that it acknowledges would have been charged to the ONPS appropriation account but for the lapse of funding of that account.

Antideficiency Act

The Antideficiency Act prohibits obligations or expenditures in excess or in advance of available appropriations, unless otherwise authorized by law. 31 U.S.C. § 1341(a), B-329955, May 16, 2019; B-329603, Apr. 16, 2018; B-327432, June 30, 2016. If a program has no available appropriations, and no exception to the Antideficiency Act applies, the agency must commence an orderly shutdown and suspend its normal operations. B-330720, Feb. 6, 2019. The agency may only resume its activities once Congress has enacted an appropriation. *Id.*

Here, Interior violated the Antideficiency Act when it obligated FLREA fees during the shutdown for expenses that ordinarily would have been charged to its ONPS appropriation. FLREA fees were not available for this purpose and, at that time, Interior had no appropriation for this purpose. Interior must report its violation as required by the Act. 31 U.S.C. §§ 1341(a), 1351.

Generally, an agency is expected to correct Antideficiency Act violations by adjusting its accounts to charge the proper appropriation. E.g. B-328477, Sept. 26, 2017. When Interior incurred these obligations during the shutdown, it had not yet received an appropriation in its ONPS account at the time of obligation. Interior received an ONPS appropriation, however, with the enactment on January 25 of a continuing resolution available through February 15, 2019 (Pub. L. No. 116-5), and a full-year appropriation enacted on February 15, 2019 (Pub. L. No. 116-6). These appropriations are available for Interior’s fiscal year 2019 ONPS costs, and, as such, Interior should correct its Antideficiency Act violation by adjusting its FLREA and ONPS accounts to reflect the obligations incurred during the shutdown. When Interior submits its Antideficiency Act report to Congress, it should explain the

adjustment of accounts necessitated by its violation of the Act; and it should enumerate actions taken to prevent recurring violations in similar circumstances in the future.

While Interior advances its “simple, two-step approach” as a model for future funding lapses, that approach, as set out here, violates the Act. With this decision, we will consider any future use of the “two-step approach” to be a knowing and willful violation of the Antideficiency Act. The Act provides, in that event, that Interior officials responsible for obligations in violation of the Act shall be “fined not more than \$5,000, imprisoned for not more than 2 years, or both.” 31 U.S.C. § 1350.

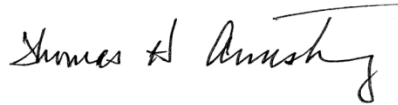
CONCLUSION

As discussed above, Interior violated the purpose statute, and incurred an Antideficiency Act violation, when it obligated FLREA fees during the shutdown for activities like trash collection and maintenance of restrooms and sanitation at national parks. Interior must adjust its accounts to correct the violation. Although Interior can correct the violation, it must report the violation, explain the correction, identify officials responsible for the violating obligations, and explain actions taken to preclude such violations in the future.

Interior’s assertion, in its February 6 letter, of a “simple, two-step approach” demonstrates a misunderstanding and misapplication of both the purpose statute, and the Antideficiency Act, and it tears at the very fabric of Congress’s constitutional power of the purse. We will consider any future application of this “two-step approach” to be a knowing and willful violation of the Act, subjecting Interior officials to penalties.

Congress has expressed its prerogatives through laws that it enacted through the process set forth in the Constitution. Interior disregarded not only the laws themselves but also the congressional prerogatives that underlie them. Instead of carrying out the law, Interior improperly imposed its own will. Interior cannot select which restraints apply to its appropriations and when these restraints apply. Congress provided Interior extraordinary authority with the enactment of FLREA, permitting Interior, without further congressional action, to collect and use fees. The “simple, two-step approach” is an abuse of the trust Congress placed in Interior with the enactment of FLREA.

If you have any questions, please contact Shirley Jones, Managing Associate General Counsel, at (202) 512-8156, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a long horizontal line extending from the top of the "T".

Thomas H. Armstrong
General Counsel

List of Requesters

The Honorable Gary C. Peters
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Thomas R. Carper
Ranking Member
Permanent Subcommittee on Investigations
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Tom Udall
Ranking Member
Subcommittee on the Interior, Environment, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
House of Representatives

The Honorable Raúl M. Grijalva
Chairman
Committee on Natural Resources
House of Representatives

The Honorable Betty McCollum
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Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
House of Representatives