APPENDIX A

No. 19-5541

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY R. BAILEY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ORDER

Before: BOGGS, WHITE, and MURPHY, Circuit Judges.

Larry R. Bailey, a pro se Kentucky plaintiff, petitions the court to rehear our order of February 28, 2020, affirming the district court's judgment granting summary judgment to the defendants on his complaint under the Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6801, *et seq.*

Bailey has not shown that we overlooked a point of law or fact in affirming the district court's judgment. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** his petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

NOT RECOMMENDED FOR PUBLICATION

No. 19-5541

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY R. BAILEY, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

O R D E R

Before: BOGGS, WHITE, and MURPHY, Circuit Judges.

Larry R. Bailey, a pro se Kentucky plaintiff, appeals the district court's grant of summary judgment to the Secretary of Agriculture (Secretary) and the other individual defendants in this case on his claim for injunctive relief under the Federal Lands Recreation Enhancement Act (FLREA), 16 U.S.C. § 6801, *et seq.* This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Admission into the nation's national forests is free. *See* 16 U.S.C. § 6802(e)(2); *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1242 (10th Cir. 2011). But the FLREA authorizes the Secretary to charge amenity fees for using federal recreational lands and waters, with the amount of the fee dependent upon the type of amenities a site contains. To charge a "standard amenity recreation fee," 16 U.S.C. § 6801(1), the site must contain designated developed parking; a permanent toilet facility; a permanent trash receptacle; an interpretative sign, exhibit, or kiosk; picnic tables; and security services. *See id.* § 6802(f)(4)(D). The Secretary is authorized to charge an "expanded amenity recreation fee," *id.* § 6801(2), "either in addition to a standard amenity fee

or by itself" for the use of, among other things, "highly developed boat launches with specialized facilities or services such as mechanical or hydraulic boat lifts or facilities, multi-lane paved ramps, paved parking, restrooms and other improvements such as boarding floats, loading ramps, or fish cleaning stations." *Id.* § 6802(g)(2)(B).

Bailey bought a 2017 annual pass to access the Marsh Branch Boat Ramp (Marsh Branch) in the Daniel Boone National Forest. Bailey received a 50% Golden Age discount on the annual fee of $30 because of his disability. A security light in Marsh Branch's parking lot remained broken for over a year, despite many complaints about the light that Bailey lodged with the Forest Service. Bailey claimed that the absence of a security light made the area dangerous at night, exposing him to injury from falls, wild animals, and menacing persons lurking in the parking lot.

Exasperated by the Forest Service's failure to act on his complaints, Bailey sued the Secretary and other federal agents under the FLREA, claiming that the light fixture was a "security service" that the Secretary was required to provide in order to charge an amenity fee under § 6802(f). Bailey sought an injunction compelling the Forest Service to repair the light. He also alleged that Marsh Branch did not have a picnic table, which he claimed the Secretary was also required by statute to provide.

The district court granted the Secretary's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court found that Marsh Branch was a "highly developed boat launch" because Bailey conceded that it contained multi-lane paved ramps, paved parking, boarding floats, and a boat ramp. And because Marsh Branch was a highly developed boat launch, it fell under the statutory provision for an "expanded amenity recreation fee" area, which does not require the Secretary to provide a security light or picnic tables. *See* 16 U.S.C. § 6802(g)(2)(B). The district court dismissed Bailey's complaint and denied his motion for reconsideration.

We reversed. *See Bailey v. United States*, No. 17-6408 (6th Cir. June 27, 2018) (order). We held that the district court erred in granting a motion to dismiss on the ground that Marsh Branch was an "expanded amenity recreation fee" area because it was not possible to determine the type of fee that users of Marsh Branch were paying from either Bailey's complaint or from permissible sources of judicial notice. *See id.*, slip op. at 3. We also thought that it was possible that the Secretary was using his authority under § 6802(g)(2) to charge both a "standard amenity

recreation fee" and an "expanded amenity recreation fee" to users of Marsh Branch. *See id.* We stated that on remand:

> the parties should be provided an opportunity to develop evidence about the designation of Marsh Branch. If the evidence adduced demonstrates that Bailey paid a standard plus expanded amenity fee, then the defendants are required to provide the six standard amenities enumerated in 16 U.S.C. § 6802(f)(4)(D). Conversely, the evidence may demonstrate that the Forest Service charges only an expanded amenity fee for Marsh Branch and therefore is not required to provide standard amenities. Currently, the record is silent as to what Bailey was charged for his pass.

Id., slip op. at 4.

On remand, the district court assigned the case to a magistrate judge to preside over discovery. The parties began to develop a discovery plan, but upon consideration of a motion filed by the defendants, the magistrate judge ruled that Bailey's FLREA claim was subject to the Administrative Procedures Act (APA), which meant that review of the Secretary's decision on Marsh Branch's fee designation was limited to the administrative record. Bailey's complaint was subject to the APA because he is ostensibly challenging the Secretary's decision to designate Marsh Branch as *only* an "expanded amenity recreation fee" area and *not* a "standard amenity fee" area. *See* District Court Dkt. No. 41, Admin. 2, at 0071. If Marsh Branch had been designated as a "standard amenity fee" area, the security lights in the parking lot would need to be fixed. *See* 16 U.S.C. § 6802(f)(4)(D). But an "expanded amenity recreation" area does not require the park service to maintain security services. The magistrate judge ruled that Bailey could supplement the administrative record only by showing that the defendants had deliberately or negligently excluded documents from the record or that there was background information that the court would need in order to review the agency's decision. The magistrate judge thus ordered that the parties would not be permitted to take discovery beyond the administrative record without leave of court. The district court overruled Bailey's objection to this order, as well as his objections to several other magistrate judge orders that denied his requests for discovery or to supplement the record.

The defendants filed the administrative record, and the parties filed cross-motions for summary judgment. The district court found that Marsh Branch is an expanded amenity recreation fee site based on the Forest Service Handbook, which discourages charging layered recreation fees

(i.e., charging both a standard amenity recreation fee and an expanded amenity recreation fee for the same site); Bailey's receipt of a discount on his annual fee, which was available only for expanded amenity recreation fee sites; and the amenities provided at Marsh Branch, which met the requirements for a highly developed boat launch. And the district concluded that because Marsh Branch is an expanded amenity recreation fee site, the Secretary was not required to provide a security light or picnic tables at the site.

On appeal, Bailey argues that: (1) the district court's limitation on discovery violated our remand order; (2) the district court abused its discretion in denying his discovery requests; (3) the district court should have construed an argument in his motion for summary judgment as a motion to amend his complaint; (4) defendants should have served their initial disclosures under Rule 26 of the Federal Rules of Civil Procedure as he requested; and (5) we should remand the case to the district court for reconsideration in view of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).[1]

Three of Bailey's assignments of error concern the district court's limitations on discovery, which he argues violated our mandate to allow the parties to develop evidence on Marsh Branch's fee designation and the fee that he paid to access Marsh Branch. He also complains that defendants did not serve their initial disclosures under Rule 26(a)(1). As stated, the district court held that general discovery was precluded by the APA, which limits review of an agency decision to the administrative record, *see S. Forest Watch, Inc. v. Jewell*, 817 F.3d 965, 977 (6th Cir. 2016), but it concluded that permitting Bailey to supplement the administrative record by showing that defendants had omitted documents from the record appropriately threaded the needle between the requirements of the APA and our remand order. Nevertheless, the district court denied each of Bailey's discovery requests, finding generally that he failed to establish grounds to supplement the administrative record or that he sought discovery on irrelevant issues.

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[1] Bailey did not assign error to the district court's ruling that defendants were entitled to summary judgment because Marsh Branch is an expanded amenity recreation fee site, and therefore the Secretary was not required to provide a security light or a picnic table at that site. Consequently, Bailey has forfeited appellate review of that ruling. *See United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006). In any event, as explained further below, the record conclusively demonstrates that Marsh Branch is an expanded amenity recreation fee site.

The mandate rule requires the district court to act in accordance with the orders of the court of appeals when a case is remanded for further proceedings. *See Allard Enters., Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 569-70 (6th Cir. 2001). "The trial court must 'implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.'" *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (quoting *United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir. 1991)). A court of appeals typically reviews de novo a district court's interpretation of a remand order. *See United States v. Bagley*, 639 F. App'x 231, 232 (5th Cir. 2016). But here, assuming that the district court's restriction on discovery violated the remand order, we conclude that the alleged violation did not affect Bailey's substantial rights, and therefore was harmless. *See* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); *Shinseki v. Sanders*, 556 U.S. 396, 408 (2009) (stating that whether an error is harmless depends "on the facts and circumstances of the particular case").

On remand, the principal question to be resolved was whether Marsh Branch is a "standard amenity recreation fee" area or an "expanded amenity recreation fee" area, and the administrative record conclusively shows that the Secretary designated Marsh Branch as a "highly developed boat launch," and therefore that it is an "expanded amenity recreation fee" area. Moreover, the administrative record conclusively establishes that Marsh Branch meets the requirements of a "highly developed boat launch" because it has, among other things, multi-lane paved ramps, paved parking, toilets, and a floating dock. *See* 16 U.S.C. § 6802(g)(2)(B). Although security lighting and a picnic area are amenities that a highly developed boat launch *may* provide, neither the FLREA, *see id.* § 6802(g)(2), nor the Forest Service's official guidance *requires* the provision of these amenities to qualify as an expanded amenity recreation fee site.

The second question on remand was the type of fee that Bailey actually paid and whether he paid both a standard amenity recreation fee and an expanded amenity recreation fee. Here, again, the record conclusively establishes that Bailey paid only an expanded amenity recreation fee to access Marsh Branch. Bailey admitted, and the administrative record shows, that he received a 50% Golden Age discount on the annual fee of $30. This discount was not available on the

standard amenity recreation fee. And the official guidance discourages charging both a standard amenity recreation fee and an expanded amenity recreation fee for the same site.

The record before the district court demonstrated that Marsh Branch is an expanded amenity recreation fee site. Bailey's discovery requests, had they been approved by the district court, would not have changed that outcome. Bailey sought discovery on how fee revenue was spent, whether the Forest Service issued parking tickets, and whether there were dangerous animals in the area that necessitated a security light. Bailey's request for initial disclosures from defendants sought essentially the same information. The district court's denial of discovery on these issues, and defendants' failure to provide initial disclosures to Bailey, did not affect his substantial rights because these issues were not sufficiently related to the two questions to be resolved on remand.

For instance, how the Forest Service spent the fee revenue it generated at Marsh Branch has minimal bearing on the kind of fee that it actually charged, and Bailey does not point to any statute or regulation that indicates otherwise. *See id.* § 6806(c)(1)(A) (requiring that at least 80% of site-specific recreation fees be retained for expenditure at that site); *id.* § 6807 (describing the authorized uses of site-specific fee revenue, which includes "repair, maintenance, and facility enhancement related directly to visitor enjoyment, visitor access, and health and safety"). In any event, this discovery request went beyond the parameters of our remand order, which stated that the relevant issue was the type of fee that the Forest Service charged, not how the money was spent. And whether there were wild animals in the area, which might have made the provision of a security light desirable as a matter of common sense, was not relevant to the issue whether the Secretary was mandated by statute to provide a security light. Also off-topic was Bailey's discovery request on the Forest Service's contracts with local law enforcement agencies. That information would not have resolved a fact of consequence, *see* Fed. R. Civ. P. 26(b)(1); Fed. R. Evid. 401, because the Forest Service may provide security services for expanded amenity recreation fee areas, including highly developed boat launches. *See* 16 U.S.C. § 6807(a)(3)(D) (providing that site-specific fee revenue may be spent on "law enforcement related to public use and recreation").

Accordingly, for all of those reasons, we conclude that the district court's orders limiting discovery to the administrative record did not affect Bailey's substantial rights.

Bailey next argues that the district court erred in not permitting him to amend his complaint to add a claim that the Secretary was required to provide a light at Marsh Branch regardless of its designation. Bailey, however, did not file a formal motion to amend his complaint, and his argument in his motion for summary judgment that Marsh Branch is both a standard and expanded amenity fee area did not constitute a proper motion for leave to amend. *See PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 698-99 (6th Cir. 2004), *abrogated in part on other grounds*, *Frank v. Dana Corp.*, 646 F.3d 954, 961 (6th Cir. 2011). The district court therefore did not abuse its discretion in failing to grant Bailey leave to amend his complaint. *See id.*

Bailey argues that we should remand this case to the district court for reconsideration in view of *Kisor*. *Kisor* addressed when federal courts should defer to an agency's interpretation of ambiguous regulations, *see* 139 S. Ct. at 2408, but Bailey's initial brief failed to identify any allegedly ambiguous regulations that pertain to Marsh Branch's fee designation, nor did he develop any argument demonstrating that *Kisor* affects the outcome of this case. Bailey has therefore forfeited this assignment of error. *See McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997).

Finally, Bailey argues that counsel for the government behaved unethically in rejecting his discovery requests and his request for legal research materials and that the district court was biased against him because of his indigency and pro se status. As already explained, any errors by the district court and opposing counsel with respect to discovery matters were harmless, and Bailey's claim that the district court was biased against him is based entirely on the court's rulings, which is insufficient to establish judicial bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

We **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

Civil Action No. 6:17-cv-90-DCR-HAI

LARRY R. BAILEY Plaintiff

v.

UNITED STATES OF AMERICA, et al., Defendants

MOTION FOR SUMMARY JUDGMENT

Note: All exhibits are labeled on back of pictures.

Pursuant to the *Federal Rules of Civil Procedure Rule 56*, I come asking this Court for Summary Judgment on the issue of the security light.

I filed an Injunction against the Forest Service on two issues:

1. Repair and maintain the broken safety light that shines on the boat ramp at Marsh Branch.
2. Supply a picnic table at Marsh Branch.

On the 2nd issue of whether the Defendant must supply a picnic table, more evidence is needed to further the argument.

On the 1st issue, the Defendant's own Administrative Record and his actions in replacing the light with fee revenue proves he is legally obligated to maintain the light.

Regardless of which type of fee site Marsh Branch may be classified, the Defendant still has the responsibility to maintain the light at the boat ramp. He relies solely on the assertion that Marsh Branch is a highly developed boat launch to avoid the obligation. Even if that were the case the Administrative Record suggests that a light and security services are to be provided at a highly developed boat launch, **"Use of highly developed boat launches defined by having specialized facilities or services involving significant Federal investments, such as any combination of the facilities and services that follow: e. lighting for parking and ramp use..., f. security services."** (AR-0013). This is further supported by the fact that the light was paid for from the fee revenue, as stated in the Recreation Fee Program Information, **(RFPI),** (exhibit MB 1-3). And according to the Accomplishment Report was replaced with fee revenue, (AR-0181). The **RFPI** further states that fees are used to improve public safety (exhibit MB 2), which the Defendant also denies, (see Doc# Doc#13, ID#253). The Defendant refers to the **RFPI** as authority in his Motion for Summary Judgment to classify the annual fee cost but fails to mention the fact that it also makes him responsible for the light, (Doc#62-01, ID#639) citing (AR-0160). The Kiosk at Marsh Branch also states that security services may be provided by security cameras, (exhibit MB 3). The Defendant admittedly replaced the light with fee

revenue and included it in his pictures of the amenities at Marsh Branch, (see AR-0153-0161).

Furthermore, the Declaration of Dan Olsen states that the Marsh Branch site is managed and maintained by the Forest Service, (Doc#62-2, ID#643, Paragraph 3). Following that statement are the exhibits depicting the amenities managed and maintained by the Forest Service, (Doc#62-2, ID#643, Paragraph 4). The light is included in the images of items managed and maintained by the Forest Service.

The fact that the light was paid for with fee revenue, and was replaced with fee revenue, and is maintained by the Forest Service, proves that the Defendant is responsible for maintaining the light.

The Administrative Record including the **RFPI** and the underlying fact that he replaced the light with fee revenue, proves the Defendant is responsible to maintain the light.

No Federal Statute directly requires the light to be maintained, and none exists directly relieving him from the obligation. However, the Administrative Record clearly indicates the light was paid for by fee revenue and that it was repaired with fee revenue. Therefore, the Record combined with the Defendant's action repairing the light is proof that the light is included as an amenity and the Defendant must maintain it.

I request the District Court to grant Summary Judgment in respect to the Defendant's responsibility to maintain the light at the boat ramp at Marsh Branch.

Respectfully submitted,

Larry Bailey (pro se)
181 Ben Bailey Road
London KY.,40744

Certificate of Service

I hereby certify that on 3/14/19 a copy of this brief was sent USPS, to the council for the Defendant at the following address,

s/ Tiffany K. Fleming
Tiffany Konwiczka Fleming
Assistant United States Attorney
260 West Vine Street, Suite 300
Lexington, Kentucky 40507-1612

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

Civil Action No. 6:17-cv-90-DCR-HAI

LARRY R. BAILEY Plaintiff

v.

UNITED STATES OF AMERICA, et al., Defendants

REPLY TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT

NOTE:

In my motion for summary judgment I classified the light and picnic tables as two separate issues. I asked for summary judgment on the light because the Defendant's responsibility for maintaining it is not dependent on the site's fee classification. Even if the site were to be established as both a standard and expanded fee area, or even solely an expanded fee area, the Defendant would still be responsible for maintaining the light. I made that indication clear in my motion, (Doc#65-3, ID#712).

REPLY

The Defendant failed to provide sound legal proof that would overcome summary judgment.

The Defendant cites 16 U.S.C. § 6807(a)(3)(A), stating that fee revenue may be use for expenditures other than the required amenities. However, the light is not some random site item. It is an amenity provided by the Defendant and recorded in the Administrative Record **(AR)**.

The Defendant states that I concede the Federal Lands Recreation Enhancement Act **(FLREA)** does not directly require the light to be maintained. I also stated that **FLREA** does not relieve the Defendant of the obligation to maintain the light.

The Defendant cites 16 U.S.C. § 6807(a)(3)(A), saying that the spending of fee revenue has no effect on the designation of Marsh Branch as an expanded fee site. As previously mentioned in my motion for summary judgment, the fee designation is irrelevant to the Defendant's legal obligation to maintain the light.

The Defendant claims that nothing in **FLREA** or the **AR** requires a highly developed boat launch to have lights or picnic tables. My motion does not request summary judgment for the picnic table. However, the assertion that nothing in **FLREA** or the **AR** requires the Defendant to maintain the light is incorrect.

The Defendant failed to include the Recreation Fee Program Information **(RFPI)** guide posted in the Kiosk at Marsh Branch in the Administrative Record. And neither does he respond to my assertion that it supports the assertion that he is responsible for maintaining the light.

The Defendant asserts that nothing in **FLREA** or the **AR** requires a highly developed boat launch to have security services such as lights (omit picnic tables). The language in **FLREA** does not relieve the Defendant of his obligation to maintain the light. In fact, it proves he is responsible because he chose to install the light.

The following explains why the Defendant does not defeat my Motion for Summary Judgment.

The Defendant claims the plain language in 16 U.S.C. § 6802(g)(2)(B) relieves him of any responsibility to maintain the light. That is incorrect. The language in that statute allows the Defendant to choose from a list provided under the statute and the Administrative Record. In fact, out of the 10 facilities and services allowed by law, a highly developed boat launch is the only one that allows the Defendant to choose from amenities suggested by the statute and the Federal Lands Recreation Enhancement Act **(REA).**

Specifically, 16 U.S.C. § 6802(g)(2) **(C), (D), (E), (F), (G), (H),** and **(I),** express exactly what amenities must be provided. Sections **(A),** and **(J)** contains a specific list that the Defendant must provide a majority of. However, section **(B), a highly developed boat launch**, allows the defendant to choose options not specifically listed in the statute. Statute 16 U.S.C. § 6802(g)(2)**(B)** uses the

language, **"such as"** and, **"other"** which allows the Defendant to go beyond what is suggested and choose from the amenities suggested by the Federal Lands Recreation Enhancement Act.

Expanded amenity recreation fees may be charged for the following 10 facilities and services, 16 U.S.C. § 6802(g)(2).

(A) Use of developed campgrounds that provide at least a **majority of the following...**

(B) Use of highly developed boat launches with specialized facilities or services **such as** mechanical or hydraulic boat lifts or facilities, multi-lane paved ramps, paved parking, restrooms and **other** improvements **such as** boarding floats, loading ramps, or fish cleaning stations...

(C) Rental of cabins, boats, stock animals, lookouts, historic structures, group day-use or overnight sites, audio tour devices, portable sanitation devices, binoculars or other equipment.

(D) Use of hookups for electricity, cable, or sewer...

(E) Use of sanitary dump stations...

(F) Participation in an enhanced interpretive program or special tour...

(G) Use of reservation services...

(H) Use of transportation services...

(I) Use of areas where emergency medical or first-aid services are administered

from facilities staffed by public employees or employees under a contract or reciprocal agreement with the Federal Government...

(J) Use of developed swimming sites that provide at least a **majority of the following...**

The language in FLREA does not limit the amenities to be chosen for a highly developed boat ramp to the ones suggested in the statute. If that were the case, the language would have not included suggestive words like **"such as"** and **"other"**.

Most importantly, the Defendant has chosen some of those amenities from the suggested ones listed in the Federal Lands Recreation Enhancement Act **(REA)**, (AR-0006). In particular, he chose to install a light to make the ramp safe at night, (AR-0013). That choice was recorded in his own **RFPI** as part of the **AD** and posted in the Kiosk at the site.

The Defendant admits to choosing a light for the ramp from a list of options suggested in the Administrative Record, **"Marsh Branch does have a combination of those facilities and services {R.6-2: Declaration of Dan Olsen}"**, (Doc#73, ID#737). That choice is recorded in the **(AR)** in the **(RFPI)** guide, and in his own declaration, (Doc#62-2).

The Defendant chose to provide the light as an amenity and recorded the choice in the Administrative Record. He installed the light with fee revenue which

was recorded in the **AD** and has recently repaired the light with fee revenue.

The Defendant offers no court opinion to support the claim that he has no responsibility to maintain the light. The only mandatory authority that the he uses in his Response is **FLREA**, specifically 16 U.S.C. § 6802(g)(2)(B). As previously mentioned that statute does not limit the Defendant to the amenities suggested. Therefore, the suggestive language in **FLREA** and the Defendant's decision to provide the light as an amenity, recorded in his own **AR**, clearly indicates he is responsible for the light.

The Defendant has not provided sufficient legal evidence proving he does not have to maintain the light.

The District Court should grant Summary Judgment and direct the Defendant to maintain the light in the future.

Respectfully submitted,

Larry Bailey (pro se)
181 Ben Bailey Road
London KY.,40744

Certificate of Service

I hereby certify that on 4/15/19 a copy of this brief was sent USPS, to the council for the Defendant at the following address,

s/ Tiffany K. Fleming
Tiffany Konwiczka Fleming
Assistant United States Attorney
260 West Vine Street, Suite 300
Lexington, Kentucky 40507-1612.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
(at London)

LARRY R. BAILEY,	)	
	)	
Plaintiff,	)	Civil Action No. 6: 17-090-DCR
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	**JUDGMENT**
	)	
Defendants.	)	

*** *** *** ***

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and in accordance with the Memorandum Opinion and Order entered this date, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Judgment is entered in favor of the defendants with respect to all claims asserted in this action.

2. This action is **DISMISSED** and **STRICKEN** from the Court's docket.

3. This is a **FINAL** and **APPEALABLE** Judgment and there is no cause for delay.

Dated: April 30, 2019.

Signed By:
Danny C. Reeves
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
(at London)

LARRY R. BAILEY,	)	
	)	
Plaintiff,	)	Civil Action No. 6: 17-090-DCR
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	**MEMORANDUM OPINION AND ORDER**
	)	
Defendants.	)	

*** *** *** ***

This dispute concerns the defendants' alleged failure to provide picnic tables and a security light at the Marsh Branch Boat Ramp ("Marsh Branch"), a recreation site located in the Daniel Boone National Forest. Larry Bailey, who purchased an annual pass to access Marsh Branch, filed a *pro se* Complaint against the United States, the Secretary of the United States Department of Agriculture, the United States Forest Service Chief, the forest supervisor of the Daniel Boone National Forest, and a district ranger. He seeks an injunction forcing the defendants to repair a light and place picnic tables at the Marsh Branch fee site. [Record No. 1, p. 7]

The parties have filed cross-motions for summary judgment. [Record Nos. 62, 65] Because Marsh Branch is an expanded amenity fee site, the defendants are not required to maintain a light or picnic tables there. Accordingly, the defendants' motion for summary judgment will be granted, and Bailey's cross-motion will be denied.

I.

This case has a lengthy history that includes two trips to the United States Court of

The parties agree that the Federal Lands Recreation Enhancement Act ("FREA"), 16 U.S.C. § 6801 *et seq.*, governs the defendants' ability to charge fees and provide amenities at Marsh Branch. Following remand, this Court observed that the FREA does not authorize a private right of action and agency actions pursuant to the FREA are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* This means that judicial review "is limited to the administrative record, which includes materials compiled by the agency at the time its decision was made." [Record No. 36, p. 3] Supplementation of the record is appropriate in limited circumstances, and the parties were advised that they could file motions to supplement under the narrow avenue for doing so under the APA. *See Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997).

Bailey filed numerous motions seeking leave to supplement the record, but he did not show that the agency had deliberately or negligently excluded any documents. Likewise, he did not identify any outside information that constitutes necessary "background information." *See id.* [Record Nos. 37, 51, 54, 69, 72, 76] Accordingly, the Court's review is limited to the administrative record.

II.

Summary judgment ordinarily is proper if the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). However, when a court is reviewing final agency action, the rules governing summary judgment do not apply because of the court's limited role in reviewing the administrative record. *See City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007). The APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). A court reviewing an agency's action under the APA may not resolve factual questions. Instead, it must determine "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Kentuckians for the Commonwealth v. US. Army Corps of Engineers*, 963 F. Supp. 2d 670, 678 (W.D. Ky. 2013).

Thus, the party seeking judicial review must point to specific facts or factual failings in the administrative record indicating that the agency's decision is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. If the plaintiff is unable to do so, the agency decision will stand.

III.

Individuals generally may enter this country's national forests free of charge. *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1242 (10th Cir. 2011) (citing 16 U.S.C. § 6802(e)(2)). However, the Recreation Enhancement Act allows the Secretary of Agriculture to impose amenity fees at certain sites managed by the Forest Service. 16 U.S.C. § 6802. A "standard amenity recreation" fee may be charged at certain areas that provide significant opportunities for outdoor recreation and contain each of the following amenities: designated developed parking; a permanent toilet facility; a permanent trash receptacle; an interpretive sign, exhibit or kiosk; picnic tables; and security services. § 6802(f). The Secretary may charge an "expanded amenity recreation fee" for enumerated services and facilities, which include "use of highly developed boat launches with specialized facilities or services such as mechanical or hydraulic boat lifts or facilities, multi-lane paved ramps, paved parking, restrooms and other improvements such as boarding floats, loading ramps, or fish cleaning stations. § 6802(g)(2)(B).

The parties' dispute boils down to this: Bailey contends that the defendants collect a *standard amenity fee* for access to Marsh Branch and, therefore, are obligated to provide picnic tables and security services in the form of a light. The defendants maintain that Marsh Branch is an *expanded amenity fee site* and therefore they are not required to provide the amenities listed in § 6802(f). Upon review of the administrative record, it is clear the defendants charge an expanded amenity fee for the use of Marsh Branch and have acted within their discretion in declining to provide the requested amenities.

The Recreational Fee Demonstration program, enacted in 1996, required the Forest Service to select up to 100 sites where it would "charge and collect fees for admission to the area or for the use of outdoor recreation sites, facilities, visitor centers, equipment, and services." Pub. L. 104-134, (1996). In response to concerns that fees were being collected from individuals who simply wished to use undeveloped land, Congress passed the FREA, a regime that provided additional guidance regarding fees for access to federal land and services. *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1141 (9th Cir. 2012). The FREA was signed into law on December 8, 2004. Pub. L. 108-447 (2004).

As of June 2005, the Secretary had developed interim guidelines and the Forest Service was working to determine whether its current fee sites complied with the FREA. [Administrative Record, hereafter "AR," at 1-28] Each Field Unit was directed to assess whether it should change its fees, remove sites from the fee program, or retain fee sites that met the requirements of FREA. The record demonstrates that Marsh Branch was already considered a highly-developed boat launch and neither its designation nor the applicable fees were changed in light of FREA. [AR 69-75] Further, the Forest Service's "Recreation Fee Pricing Guidance" indicates that boat ramps or launches are expanded-fee sites by default,

stating that "a boat ramp *could* qualify as a Standard Amenity Fee (SAF) site if all requirements are met . . . and with Regional Office concurrence." [AR 121]

There is no support for Bailey's argument that defendants charged both standard and expanded amenity fees for access to Marsh Branch. While expanded amenity fees may be charged "in addition to a standard amenity fee or by itself," § 6802(g)(2), the Forest Service Handbook states that layered recreation fees for similar uses, activities, or programs should be avoided. [AR 46] Consistent with this guidance, the Handbook provides "[i]f the primary use of an area is an activity that could be subject to . . . an expanded amenity recreation fee, charge that type of fee, rather than a standard amenity recreation fee." [AR 49] Additionally, Bailey received a fifty-percent discount by purchasing a "Golden Age Pass," which is not available for standard fee sites and is only available for certain expanded amenity sites and services, including highly developed boat launches. [AR 23, 151]

It is undisputed that Marsh Branch features a boat ramp, multi-lane paved ramps, paved parking, and boarding floats. [Record No. 12, p. 3] Accordingly, the Secretary has acted reasonably by classifying Marsh Branch as an expanded fee site and charging a corresponding fee. A plain reading of the statutory language indicates that when the expanded amenity recreation fee is charged, on its own, the Secretary is not obligated to provide the standard recreation amenities listed under § 6802(f). In short, there is simply nothing to suggest that defendants are required to install a security light despite their decision to do so voluntarily. While Bailey contends that additional discovery is needed on the issue of the picnic tables, it is equally clear that defendants have no obligation to provide them at Marsh Branch.

IV.

Based on the foregoing analysis and discussion, it is hereby

ORDERED as follows:

1. The defendants' motion for summary judgment [Record No. 62] is **GRANTED**.

2. The plaintiff's motion for summary judgment [Record No. 65] is **DENIED**.

Dated: April 30, 2019.

Signed By:
Danny C. Reeves
United States District Judge

larry bailey <workpaydie@yahoo.com> Sep 21 at 1:29 PM
To Fleming, Tiffany (USAKYE)

That's fine with me.

In the meanwhile I have a question to ask, if you can answer. I do not know who has individual responsibility at the Forest Service to keep records or respond to questions. For example; who keeps records of law enforcement activity, who keeps records of how much money is collected and how it is spent, and so on.

You said all requests should be made through you, so can I submit general requests or do I need to find out who is specifically responsible for questions and records and request them from you that way?

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Fleming, Tiffany (USAKYE) <Tiffany.Fleming@usdoj.gov> Sep 21 at 1:57 PM
To larry bailey

My suggestion is that you go through FOIA for requests unless and until it comes time to do it in the context of this case. That is the best way to get information from any agency. As I mentioned, and as I'll include in my filling today, my agency counsel tells me that this case should not go into discovery at all. If and when the court says it does, we'll participate. Otherwise, FOIA is your best bet. You don't have to go through me for that.

Tiffany

› Show original message

Reply Reply to All Forward ••• More

larry bailey <workpaydie@yahoo.com> Sep 21 at 2:02 PM
To Fleming, Tiffany (USAKYE)

Thank you.

› Show original message

Reply Reply to All Forward ••• More

larry bailey <workpaydie@yahoo.com> Oct 11 at 2:20 PM
To Meloche, Douglas - FS

To Mr. Meloche.

I am requesting the documents as part of a legal issue involving the fee designation of the recreation fee areas at Laurel Lake. I was advised by the Attorney for the Forest Service (Tiffany Konwiczka Fleming Assistant U.S. Attorney 260 West Vine St., Suite 300 Lexington, KY 40507 Tel: 859.685.4835 Fax: 859.233.2533) that I would be able to get those records by submitting a FOIA request.

If those records cannot be provided to me at no cost,or any other reason, please advise Tiffany Fleming that I made the request and the reason you would not provide them. Also provide me with a copy of the same email. If you do not contact her please respond back to me so I can verify that I did advise you of the situation and request for you to contact her.

Thanks for your time in this request.

Larry Bailey.

Meloche, Douglas - FS <dmeloche@fs.fed.us> Today at 8:53 AM
To larry bailey
CC Tiffany.Fleming@usdoj.gov, Bonaccorso, Kimberly J -FS, Kipp, Kimberly K -FS, Lee, Alice - FS, Walker, Marie -FS, and 3 more...

Mr. Bailey,

The legal issue you are referring to has **no influence** on the fact we are required to charge fees for processing a request for records under the Freedom of Information Act (FOIA). As a private citizen you are entitled to request records from the Forest Service (FS) under the FOIA. However, under FOIA, those records are not provided for free unless the total cost for processing the request is less than $25.00 or you ask for and are granted a fee waiver.

In a previous email I indicated there are three requirements a FOIA request must have to be considered "perfected" or in layman's terms complete for us to process. The third requirement is a statement from the requester requesting a fee waiver or an indication they are willing to pay fees. **You have still not satisfied this requirement.**

I have also asked in previous emails for you to consider narrowing the scope of your request to reduce your cost. The Law Enforcement records alone generate at least four pages per record. As of now, a quick estimate of fees for processing this request is about $468.32 (see attached). This is just an estimate. Requesters in your category (all other) are required to pay for search time and duplication costs. The FS does provide 2 hours of search time and 100 pages of records to requesters in this category for free. The estimate reflects this.

If you feel you are entitled to a fee waiver, I have again attached a fee waiver criteria sheet for you to use as a guide in addressing the fee waiver criteria. Please respond to the six questions in full as they apply to the information you are requesting and your current status as an "all other" requestor. The, send the responses to me so I can begin the fee waiver process.

As requested, I have copied Ms. Fleming on this email. She provided you with correct information, you can request records through the FOIA process. However, your current legal issues do not waive or negate any process requirements under FOIA.

Please contact me directly in the future regarding this FOIA request. At this time, your request will not be processed any further and is on hold. If we do not hear from you by October 26, 2018, on how you would like to proceed (agree to pay fees or ask for a fee waiver), we will assume you are no longer interested in this FOIA request and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.
If you have any questions about the FOIA process and your request, feel free to contact me anytime at the number and email listed below.

Sincerely,
Doug M.

From: larry bailey <workpaydie@yahoo.com>
Sent: Tuesday, December 4, 2018 2:42 PM
To: Fleming, Tiffany (USAKYE) <TFleming1@usa.doj.gov>
Subject: citation

Re: 6:17- cv- 90- DCR-HAI

On 11/30/18 you filed Doc 46, Response to Motion to Strike. On page 2 of that document you have cited 5C Write & Miller section 1380. I do not have access to Treatises with my basic version of Westlaw. I cannot respond to that paragraph unless I gain access to the cited works. I have until Monday to file and I am trying to find the resources but no luck so far. I am requesting that you email that information to me by tomorrow or amend your Response to omit that section.

Larry Bailey

APPENDIX D

No. 18-6311

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 17, 2019
DEBORAH S. HUNT, Clerk

LARRY R. BAILEY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ORDER

Before: NORRIS, SUTTON, and COOK, Circuit Judges.

This matter is before the court upon initial consideration to determine whether this appeal was taken from an appealable order.

Larry R. Bailey has filed a notice of appeal seeking to challenge a magistrate judge's October 16, 2018, order concerning the scope of discovery in this action filed under the Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6802.

An order of a magistrate judge is not directly appealable to a court of appeals unless the magistrate judge is given plenary jurisdiction pursuant to 28 U.S.C. § 636(c)(1). *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 471-72 (6th Cir. 2006). The magistrate judge was not given plenary jurisdiction in this case.

In any event, this court has jurisdiction over appeals from final orders. *See* 28 U.S.C. § 1291. A final order is one that disposes of all issues in dispute as to all parties. The order that Bailey seeks to challenge is not a final decision because it does not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Network Commc'ns v. Mich. Bell Tel. Co.*, 906 F.2d 237, 238 (6th Cir. 1990) (quoting *Lauro Lines S.R.L. v. Chasser*,

490 U.S. 495, 497 (1989)). Finally, the order is not appealable as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Accordingly, it is ordered that the appeal is **DISMISSED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX E

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-6408

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY R. BAILEY,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
UNITED STATES OF AMERICA, et al.,	)	KENTUCKY
	)	
Defendants-Appellees.	)	

O R D E R

Before: MOORE, GIBBONS, and McKEAGUE, Circuit Judges.

Larry R. Bailey, a pro se Kentucky plaintiff, appeals the district court's judgment dismissing his complaint against the Secretary of Agriculture and other individual defendants under the Federal Lands Recreation Enhancement Act (FLREA), 16 U.S.C. § 6802, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Congress has ordered that admission to the country's national forests shall be free. *See* 16 U.S.C. § 6802(e)(2); *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1242 (10th Cir. 2011). But the Act authorizes the Secretary to charge a standard amenity recreation fee for using federal recreational lands and waters if, among other things, the area contains all of the following: designated developed parking; a permanent toilet facility; a permanent trash receptacle; an interpretive sign, exhibit, or kiosk; picnic tables; and security services. *See* 16 U.S.C. § 6802(f)(4). The Secretary is authorized to charge an expanded amenity recreation fee for

"highly developed boat launches," which have "specialized facilities or services such as mechanical or hydraulic boat lifts or facilities, multi-lane paved ramps, paved parking, restrooms and other improvements such as boarding floats, loading ramps, or fish cleaning stations." *Id.* § 6802(g)(2)(B). "[T]he Secretary may charge an expanded amenity recreation fee, either in addition to a standard amenity fee or by itself . . . ." *Id.* § 6802(g)(2).

Bailey possesses an annual recreation pass for the Daniel Boone National Forest in Kentucky that entitles him to access the Marsh Branch Boat Ramp (Marsh Branch). The security light at Marsh Branch was broken, and despite the many complaints that Bailey made to the Forest Service about the light, it remained broken for over a year. Bailey claimed that the area became dangerous at night without the light—once he was approached in the parking lot by two menacing individuals, and there was an increased risk of injury from falls and wild animals.

Frustrated with the Forest Service's lack of action on his complaints about the broken light, Bailey filed suit pro se in the district court against the Secretary and other federal agents under the FLREA. Bailey claimed that the light fixture was a "security service" under the Act that he was entitled to have because the Secretary charged him an amenity fee to access Marsh Branch. Bailey asked the district court for an injunction requiring the Forest Service to repair the light at Marsh Branch and also to place some picnic tables there. Bailey did not seek any monetary relief, such as a refund of the amenity fee that he paid. About two weeks after Bailey filed suit, the Forest Service repaired the light but maintained it had no legal obligation to do so.[1] The Forest Service has not provided picnic tables.[2]

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[1] The fact that the Forest Service repaired the broken light does not render Bailey's suit moot. A broken light is one of those issues that is "capable of repetition, yet evading review." *Kerr ex rel. Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 932 (6th Cir. 2017); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Common sense and our lived experience inform us that lightbulbs break. And here the Forest Service claims it has no duty to replace the broken lightbulb when it breaks. Thus, there is a "reasonable expectation" that the lightbulb will break again and Bailey will seek to have the Forest Service replace it. *Kerr*, 874 F.3d at 932.

[2] The dissent argues that Bailey lacks standing to pursue injunctive relief with respect to the picnic tables because he failed to satisfy the injury-in-fact requirement. As a pro se litigant, Bailey's pleadings must be "held to less stringent standards than formal pleadings drafted by lawyers and should . . . be liberally construed." *Kraus v. Taylor*, 715 F.3d 589, 597 (6th Cir. 2013) (omission in original) (internal quotation marks omitted). In his complaint, Bailey states that a picnic table is a required amenity when charging the standard amenity recreation fee, that he has paid the standard amenity recreation fee, and that he requests the district court enjoin the U.S. Forest

The district court concluded that Marsh Branch was a "highly developed boat launch" as a matter of law, based on Bailey's concession that the area contained multi-lane paved ramps, paved parking, boarding floats, and a boat ramp. The district court concluded therefore that the defendants were entitled to dismissal of Bailey's complaint because the statute controlling highly developed boat launches, § 6802(g)(2)(B), does not require the Secretary to provide the standard amenities listed in § 6802(f). The district court concluded that it did not have jurisdiction to consider a claim that Bailey raised for the first time in his briefing that there was an implied contract for the Secretary to provide the listed amenities. The district court dismissed Bailey's complaint and denied his motion for reconsideration. Bailey appealed.

The district court erred in granting the defendants' motion to dismiss because it is not possible to determine the type of fee that users of Marsh Branch are paying from the complaint itself or from "matters of public record, orders, items appearing in the record of the case, [or] exhibits attached to the complaint." *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001) (emphasis omitted) (quoting *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (6th Cir. 1997)). The fact that Marsh Branch has some of the features of a highly developed boat launch is not conclusive proof that the Secretary is charging users only an expanded amenity fee. It is equally possible that the fee for Marsh Branch is both a standard amenity recreation fee and an expanded amenity recreation fee. *See* 16 U.S.C. § 6802(g)(2). And the physical pass attached to the complaint itself provides no elucidation either: It announces only that it is a "recreation fee pass." Furthermore, in their motion to dismiss, the defendants point to no statute, regulation, or

---

Service to provide the two deficient amenities: the security services and picnic tables. The implicit connection between these discrete points is that Bailey has suffered a "concrete and particularized" injury-in-fact from the lack of the picnic table, as well as the security light. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Bailey does not explicitly plead that he would sit at the picnic tables if some were provided, but by seeking injunctive relief, rather than monetary damages, he expresses a clear preference for the provision of the actual tables. Remanding this case so that Bailey can amend his complaint to add the explicit statement that he would utilize the picnic table for which he has allegedly paid, but cannot use because the U.S. Forest Service has not provided one, elevates form pleading over the substance of Bailey's pro se complaint. Construing Bailey's complaint liberally, as we must do, we conclude that he has standing to seek an injunction with respect to the picnic tables (as well as the broken security light). *See Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999) ("[Plaintiff's] status as pro se litigant affords relief from the standing problem, however. Pro se plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings. Such an approach suggests that [Plaintiff] stated a claim on which he has standing to sue.").

other document entitled to judicial notice that categorizes Marsh Branch as a standard fee, expanded fee, or a standard plus expanded fee area. Thus, drawing all reasonable inferences in Bailey's favor, *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012), Bailey's claim that Marsh Branch must provide the minimum amenities required by the charge of a standard amenity recreation fee is plausible.

On remand to the district court, the parties should be provided an opportunity to develop evidence about the designation of Marsh Branch. If the evidence adduced demonstrates that Bailey paid a standard plus expanded amenity fee, then the defendants are required to provide the six standard amenities enumerated in 16 U.S.C. § 6802(f)(4)(D). Conversely, the evidence may demonstrate that the Forest Service charges only an expanded amenity fee for Marsh Branch and therefore is not required to provide standard amenities. Currently, the record is silent as to what Bailey was charged for his pass. And, if this case proceeds to the summary-judgment stage, Bailey's factual allegations about his possession of a pass for Marsh Branch, his use of the facility, the occasions on which he observed that the security light was inoperative, the instances on which he attempted to use the picnic tables but was unable to do so because of their absence, and his attempts to have the purported problems fixed would need to be in the form of a sworn affidavit, and not an unverified complaint, or supported by other admissible exhibits.

Accordingly, we **REVERSE** the district court's dismissal of Bailey's complaint and **REMAND** for further proceedings consistent with this order.

McKeague, Circuit Judge, dissenting. Larry Bailey lacks standing to continue to pursue the only injunctive relief that he requests—an order requiring the Forest Service to "place picnic tables" and "repair the security light" at the Marsh Branch Boat Ramp. Because the majority sees it differently, I respectfully dissent.

Regarding the picnic tables, Bailey pled *no* facts supporting an injury in fact for which picnic tables would redress. "To satisfy the injury in fact requirement, [Bailey] must point to some harm other than" something akin to "'a bare procedural violation.'" *Hagy v. Demers & Adams*, 882 F.3d 616, 621 (6th Cir. 2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550

(2016)). While Bailey pled facts that gave him standing to seek a security light at the time he filed his complaint, he did not do so for the picnic tables. His complaint does not even so much as suggest that he would use a picnic table if one were provided.

Regarding the light, the Forest Service replaced it, rendering Bailey's requested relief moot. The majority nevertheless reasons that an exception applies—"the fact that the Forest Service repaired the broken light does not render Bailey's suit moot" because "[a] broken light is one of those issues that 'is capable of repetition, yet evading review.'" Maj. Op. at 2 n.1 (quoting *Kerr ex rel. Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 932 (6th Cir. 2017)). I disagree. "For the exception to apply . . . there must be a *reasonable* expectation," *Kerr for Kerr*, 971 F.3d at 932 (emphasis added), that (1) the light will break *and* that (2) the Forest Service will refuse to fix it for such a time to constitute an outright denial of "security services" under the statute, triggering another suit between the same parties. Even assuming this *particular light* constitutes a *required* "*service*" under the FLREA—a questionable proposition, to say the least—I do not think an expectation that the Forest Service will refuse to repair a light it just replaced is "reasonable." True to form, a governmental agency was slow to fix something; but the Forest Service has provided a "new" light that remains "in good working order." In my view, drawing this case out any further is unnecessary.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
at London

LARRY R. BAILEY,	)	
Plaintiff,	)	
v.	)	Civil Action No. 6:17-cv-90-DCR
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

REPORT OF PARTIES' PLANNING MEETING

* * * * *

Pursuant to Fed.R.Civ.P. 26, a meeting was held on September 20, 2018, and was attended by Plaintiff Larry Bailey and counsel for the United States, Tiffany K. Fleming. This report is submitted jointly by the parties.

I. ANSWER

The parties agree that the Defendant will have until October 19, 2018, to Answer or otherwise respond to the Plaintiff's Complaint.

II. PRE-DISCOVERY DISCLOSURES

The parties agreed to exchange the information required by Fed.R.Civ.P. 26(a)(1) by October 26, 2018.

III. DISCOVERY PLAN

The parties jointly propose to the Court the following discovery plan:

A. No expert discovery is anticipated. Accordingly, the parties anticipate that

discovery for this matter is likely to be completed on or around December 31, 2018.

B. Maximum of 25 interrogatories, including all discrete subparts, by each party to any other party. Responses are due 30 days after service.

C. Maximum of 25 requests for admission, including all discrete subparts, by each party to any other party. Responses due 30 days after service.

D. Maximum of 25 requests for production of documents, including all discrete subparts. Responses due 30 days after service.

E. A maximum number of depositions of the parties is unknown at this time, but each deposition is limited to maximum of 7 hours unless extended by agreement of parties.

F. The parties discussed electronically stored information and determined that disclosure or discovery of electronically stored information should be handled as follows: All electronically stored documents and information shall be maintained. If production or inspection of electronically stored documents or information is requested, the parties will endeavor to agree upon reasonable terms and conditions.

G. Supplementations under Rule 26(e) due January 15, 2019.

H. Motions to amend pleadings and/or join parties shall be filed by January 15, 2019.

I. Parties anticipate this case being ready for pre-trial conference on or after March 29, 2019.

IV. OTHER ITEMS

A. The parties reasonably believe that they will need until February 15, 2019, to file any appropriate dispositive motions and until March 29, 2019, to complete pretrial motions.

B. The parties do not request a conference with the Court before entry of the scheduling order.

C. Settlement potential cannot be evaluated until preliminary discovery is completed. If appropriate, the parties may consider alternative dispute resolution procedures, or as ordered by the Court.

D. Parties should have 14 days after service of final lists of witnesses and exhibits to file objections under Rule 26(a)(3).

E. The case should be scheduled for trial at the convenience of the court. It is anticipated to take no more than two (2) days.

F. The United States submits that this matter should not be referred to a United States Magistrate Judge for all further proceedings, including trial, pursuant to 28 U.S.C. § 636(c). Plaintiff is amenable to referral.

G. Supplements and/or corrections of disclosures will be made by all parties as provided in Rule 26.

Respectfully submitted,

ROBERT M. DUNCAN, JR.
UNITED STATES ATTORNEY

s/ *Tiffany K. Fleming*
Tiffany Konwiczka Fleming
Assistant United States Attorney
260 West Vine Street, Suite 300
Lexington, Kentucky 40507-1612
(859) 685-4835

Have seen and agreed:

Larry Bailey
181 Ben Bailey Road
London, KY 40744
Plaintiff, *pro se*

Fleming, Tiffany (USAKYE) <Tiffany.Fleming@usdoj.gov> Sep 20 at 3:55 PM
To workpaydie@yahoo.com

Mr. Bailey—as promised, attached is a copy of the draft report. If it looks ok to you, please respond accordingly and I will submit it tomorrow. If not, please let me know what changes you would like to make.

Thanks,

Tiffany

Tiffany Konwiczka Fleming
Assistant U.S. Attorney
260 West Vine St., Suite 300
Lexington, KY 40507
Tel: 859.685.4835
Fax: 859.233.2533

Reply Reply to All Forward More

larry bailey <workpaydie@yahoo.com> Sep 20 at 4:56 PM
To Fleming, Tiffany (USAKYE)

I have read and agree with the document.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

LARRY R. BAILEY, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	)	No. 6:17-CV-90-DCR-HAI ORDER

*** *** *** ***

In this *pro se* civil action, Plaintiff Larry Bailey asks the Court "to force the U.S. Forest Service to provide all amenities, required by statute, at their pass required sites on Laurel Lake." D.E. 1 at 1. Bailey's claims are brought under the Federal Lands Recreation Enhancement Act ("FLREA"). *See* 16 U.S.C. § 6802. The United States and other defendants moved to dismiss Bailey's complaint for failure to state a claim (D.E. 10), which was granted (D.E. 14). On appeal, the United States Court of Appeals for the Sixth Circuit reversed and remanded for further proceedings. *See* D.E. 27.

This matter has been referred to the undersigned "to conduct all further proceedings until the time of trial, including preparing proposed findings of fact and recommendations on any dispositive motions." D.E. 29. Following the referral order, the Court entered an order for the parties to meet and file a report containing a proposed discovery plan. D.E. 30.

The defendants now move the Court for an order "directing the parties to proceed pursuant to record review of final agency action under the Administrative Procedure Act." D.E. 31 at 1.

Bailey filed a response to that motion, asking that "the original Order for Meeting and Report be enforced." D.E. 32 at 1.[1]

By way of background, "Bailey possesses an annual recreation pass for the Daniel Boone National Forest in Kentucky that entitles him to access the Marsh Branch Boat Ramp." D.E. 27 at 2. Through his suit, Bailey asks that the Forest Service maintain a security light and provide a picnic table at Marsh Branch. *See* D.E. 32 at 1. Whether the Forest Service must provide those amenities depends on the type of fee it charges for that area's use. *See* D.E. 27 at 4 (discussing consequences of different designations). Here, the defendants maintain that Marsh Branch is an expanded amenity recreation fee site, *see* D.E. 34 at 3,[2] but Bailey disputes that characterization, *see* D.E. 32 at 1.

On appeal, the Sixth Circuit explained that "it is not possible to determine the type of fee that users of Marsh Branch are paying" from either the complaint or materials that could be considered with a motion to dismiss. *See* D.E. 27 at 3. The Sixth Circuit further instructed that, "[o]n remand to the district court, the parties should be provided an opportunity to develop evidence about the designation of Marsh Branch." *Id.* at 4. Finally, the majority opinion stated that remand was necessary "for further proceedings consistent with this order." *Id.*

Although not specifically referred to in the defendants' motion, authority exists subjecting plaintiff's FLREA claims to the Administrative Procedure Act. In *Southern Forest Watch, Inc. v. Jewell*, No. 3:13-CV-116, 2015 WL 1457978 (E.D. Tenn. March 30, 2015), the district court granted summary judgment to the Secretary of the Interior on plaintiffs' claim that a camping fee violated the FLREA. In doing so, the court stated, "[b]ecause the FLREA does not supply a

[1] The Clerk docketed Bailey's response as a separate motion. *See* D.E. 33. However, for ease of reference, the Court will cite his filing as D.E. 32.

[2] Defendants' filing was docketed as a reply to the original motion, *see* D.E. 34, and as a response to Bailey's motion, *see* D.E. 35. For ease of reference, the Court will cite the defendants' filing as D.E. 34.

separate standard for judicial review, compliance with the FLREA is reviewed under the [Administrative Procedure Act]." *Jewell*, 2015 WL 1457978, at *11. On appeal, the plaintiffs challenged the district court's denial of a motion to supplement the administrative record. In addressing this portion of the appeal, the Sixth Circuit reviewed the issue based upon the limited ways to supplement an administrative record under the Administrative Procedure Act. *Southern Forest Watch, Inc. v. Jewell*, 817 F.3d 965, 977-978 (6th Cir. 2016). Taken together, these two decisions combine to stand for the proposition that the Administrative Procedure Act and its limited scope of review applies to plaintiff's FLREA claims in this case.

The undersigned finds that *Jewell* requires the application of the Administrative Procedure Act to plaintiff's claims in this case. Thus, judicial review is "'limited to the administrative record, which includes materials compiled by the agency at the time its decision was made.'" *Id.* at 977 (quoting *Latin Ams. For Soc & Econ. Dev. v. Adm'r of the Fed. Highway Admin.*, 756 F.3d 447, 464-65 (6th Cir. 2014)). "'The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Id.* (quoting *Kroger Co. v. Reg'l Airport Auth. of Louisville & Jefferson Cty.*, 286 F.3d 382, 387 (6th Cir. 2002)).

But this limited scope of review seemingly creates conflict with the Sixth Circuit's instruction in this case to provide the parties "an opportunity to develop evidence about the designation of Marsh Branch." D.E. 27 at 4. However, this conflict is easily resolved. First, supplying the administrative record as described by defendants is development of evidence that had not occurred prior to the dismissal of the claims. Second, the Administrative Procedure Act provides a narrow avenue for supplementing the administrative record. As recognized in *Jewell*, "[s]upplementation of the administrative record may be appropriate 'when an agency has

deliberately or negligently excluded certain documents from the record, or when a court needs certain 'background' information to determine whether the agency has considered all relevant factors.'" *Jewell*, 817 F.3d at 977 (quoting *Latin Ams. For Soc. & Econ. Dev.*, 756 F.3d at 465). Moreover, "[t]he burden is on the plaintiff to justify supplementation of the record and plaintiff must make a 'strong showing' of bad faith." *Latin Ams. For Soc. & Econ. Dev.*, 756 F.3d at 465 (quoting *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997)).

Thus, the undersigned finds that applying the Administrative Procedure Act to plaintiff's claims is appropriate and will therefore grant the defendants' motion. However, supplementation of the record will be allowed if supported by the Administrative Procedure Act. This means that, prior to engaging in discovery beyond the administrative record, either party must obtain leave from this Court to serve their intended discovery requests.

Accordingly, it is hereby **ORDERED** that the defendants' motion for an order (D.E. 31) is **GRANTED**, and Bailey's motion that the original order for meeting and report be enforced (D.E. 33) is **DENIED**.

Due to an oversight, the Court's order for a meeting and report (D.E. 30) was entered despite that defendants have not filed their answer. Given this posture, **IT IS FURTHER ORDERED** that:

(1) The order at Docket Entry 30 is hereby **WITHDRAWN**;

(2) Defendants **SHALL** file their answer and the administrative record on or before **November 15, 2018**;

(3) Any motion for leave to engage in discovery **SHALL** specifically address the standard for such discovery discussed above and **SHALL** be filed on or before **December 15, 2018**;

(4) Dispositive motions **SHALL** be filed on or before **January 15, 2019**;

(5) All motions (and responses/replies) **SHALL** comply with LR 7.1.

The Court issues this Order resolving a non-dispositive pretrial matter under 28 U.S.C. § 636(b)(1)(A). Any party objecting to this Order should consult the statute and Federal Rule of Civil Procedure 72(a) concerning its right of and the mechanics for reconsideration before the District Court. Any objection shall be made within **14 days** to the District Judge. Failure to object waives a party's right to review

This the 16th day of October, 2018.

Signed By:
Hanly A. Ingram
United States Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
(at London)

LARRY R. BAILEY,	)	
	)	
Plaintiff,	)	Civil Action No. 6: 17-90-DCR
	)	
V.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	**MEMORANDUM ORDER**
	)	
Defendants.	)	

*** *** *** ***

This matter is pending for consideration of the plaintiff's motion to reconsider the decision granting the defendants' motion to dismiss his Complaint. [Record No. 16] The plaintiff contends that the Court erred by concluding that the defendants may charge visitors to park and to generally access the Marsh Branch boat launch ("Marsh Branch"). District courts review motions to reconsider under the same standard as motions to alter or amend under Rule 59(e) of the Federal Rules of Civil Procedure. *Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). To prevail on a motion under Rule 59(e), the movant must show: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009).

A motion under Rule 59(e) is not an opportunity to reargue a case. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Regardless, the plaintiff has rehashed his argument that Marsh Branch is operated as a standard fee area. The contention is based largely on the plaintiff's assertion that the defendants charge visitors a fee

for parking and/or using the area in ways not associated with the boat launch or its amenities. [Record No. 16, p. 3] This issue was not raised in the Complaint. Further, this assertion is belied by the plaintiff's memorandum in which he stated that "anyone who parks there to . . . enjoy the area, in any way, that is not associated with using the expanded amenity facilities or services, are given citations for violating the law." [Record No. 12, p. 2]

As previously explained, the Secretary of the Interior has the authority to charge an expanded amenity recreation fee "when the Secretary . . . determines that the visitor uses a specific or specialized facility, equipment, or service." 16 U.S.C. § 6802(g). *See also So. Forest Watch, Inc. v. Jewell*, No. 3: 13-CV-116, 2015 WL 1457978, at *12 (E.D. Tenn. March 30, 2015). The Secretary has classified Marsh Branch as a "highly-developed boat launch" and, therefore, is permitted to charge an expanded amenity recreation fee. The plaintiff does not dispute that Marsh Branch has specialized facilities which meet the definition of "highly-developed boat launch." § 6802(g)(2)(B). He alleges, at most, that the defendants improperly charge unspecified visitors for parking and general access. *See* § 6082(d). Notably, he has not alleged that *he* was charged solely for parking or for general access to the area. But even if the plaintiff's allegations regarding such fees are true, he has failed to indicate how this conduct converts the boat launch into a standard fee site requiring safety features.

The plaintiff also argues that he should have been given an opportunity to "respond to the Defendant's reply." He contends that he was entitled to 21 days to do so under Rule 12 of the Federal Rules of Civil Procedure. However, Rule 12 governs the deadlines for filing responsive "pleadings," which are distinct from motions. *See* Fed. R. Civ. P. 7. Motion practice is governed by Joint Local Rule of Civil Practice 7.1, and does not provide for a sur-reply.

Based on the foregoing, it is hereby

ORDERED that the plaintiff's motion to reconsider [Record No. 16] is **DENIED**.

This 26th day of September, 2017.

Signed By:
Danny C. Reeves DCR
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
(at London)

LARRY R. BAILEY,	)	
	)	
Plaintiff,	)	Civil No. 6: 17-90-DCR
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	**JUDGMENT**
	)	
Defendants.	)	

*** *** *** ***

Pursuant to the Memorandum Opinion and Order entered this date, and in accordance with Rule 58 of the Federal Rules of Civil Procedure, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Judgment is entered in favor of the defendants with respect to all claims asserted in this action.

2. This action is **DISMISSED**, with prejudice, and **STRICKEN** from the Court's docket.

3. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

This 24th day of July, 2017.

Signed By:
Danny C. Reeves DCR
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
(at London)

LARRY R. BAILEY,	)	
	)	
Plaintiff,	)	Civil No. 6: 17-90-DCR
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	**MEMORANDUM OPINION**
	)	**AND ORDER**
Defendants.	)	

*** *** *** ***

Plaintiff Larry Bailey sued the United States and several of its agents based on his dissatisfaction with the amenities at the Marsh Branch Boat Ramp ("Marsh Branch"), which is operated by the United States Forest Service. Bailey asserts purchased an annual pass to access Marsh Branch but found that the site had neither a working light nor a picnic table. He requests injunctive relief directing the Forest Service to correct the noted deficiencies. He has also requested summary judgment in his favor. [Record No. 1] The defendants in response filed a motion to dismiss or, in the alternative, for summary judgment. [Record No. 10] For the reasons that follow, the defendants' motion will be granted.

I.

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a defendant to seek dismissal of a complaint which fails to state a claim upon which relief can be granted. Under this rule, "[t]he defendant has the burden of showing that the plaintiff has failed to

state a claim for relief." *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). Federal Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). However, to survive a motion to dismiss, the complaint must contain allegations establishing each material element required for recovery under some actionable legal theory. *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) (internal citation and quotation marks omitted).

When reviewing a Rule 12 motion, the Court "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all reasonable inferences in favor of the plaintiff." *DirecTV, Inc.*, 487 F.3d at 476 (citation omitted). While pleadings drafted by *pro se* litigants are held to less stringent standards than those written by lawyers, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the Court, "need not accept as true legal conclusions or unwarranted factual inferences." *DirecTV, Inc.*, 487 F.3d at 467. (citation omitted). Moreover, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the plaintiff must at least "provide the grounds of his entitlement to relief, [which] requires more than labels and conclusions. . . ." *Twombly*, 550 U.S. at 555 (internal citations and quotation marks omitted).

It is also noteworthy that the Court generally may not consider matters presented outside the pleadings without converting the motion into one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d); *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 405 (6th Cir. 2012). However, certain matters beyond the allegations in the complaint,

such as "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001) (citations and internal quotation marks omitted). In the present case, the Court is not required to consider items outside the Complaint and its attachments. Therefore, the motion need not be converted to one seeking summary judgment.

II.

The parties agree that the Federal Lands Recreation Enhancement Act ("FLREA"), 16 U.S.C. § 6801 *et seq.*, governs the Secretary of Agriculture's ability to charge fees and provide amenities at Marsh Branch. The Secretary may charge a "standard amenity recreation fee" for recreational lands which contain all of the following amenities: designated parking; a permanent toilet facility; a permanent trash receptacle; an interpretive sign, exhibit, or kiosk; picnic tables; and security services. § 6802(f)(4)(D). The plaintiff contends that the Secretary charges a standard amenity recreation fee for access to Marsh Branch and, therefore, must provide all of the amenities listed, including a "security light." [*See* Record No. 1, ¶ 15.]

FLREA also provides that an "expanded amenity recreation fee" may be charged when the Secretary determines that the visitor uses a specific or specialized facility, equipment or service. § 6802(g). The Act contemplates an expanded amenity fee for the use of "highly developed boat launches" which include specialized features such as mechanical or hydraulic boat lifts, multi-laned paved ramps and parking, restrooms, and other improvements such as boarding floats, loading ramps, and fish-cleaning stations. §

6802(g)(2)(B). This fee may be charged "in addition to a standard amenity fee or by itself." § 6802(g)(2). Notably, the provision regarding highly-developed boat launches does not require the Secretary to provide safety features, a picnic table, or any other amenities. *See* § 6802(g)(2)(B).

The defendants maintain that Marsh Branch is classified as a highly-developed boat launch. The plaintiff concedes that Marsh Branch features multi-lane paved ramps, paved parking, boarding floats and, of course, the boat ramp itself.[1] [Record No. 12, p. 3] A plain reading of the statute language demonstrates that when the expanded amenity recreation fee is charged, on its own, the Secretary is not obligated to provide the standard recreation amenities listed under § 6802(f). While some expanded amenity sites have safety features and picnic tables, highly-developed boat launches do not fall within that category.[2]

The plaintiff raises arguments in his response that fall outside of the claims raised in his Complaint. Essentially, he contends that citizens park at Marsh Branch for purposes other than utilizing the boat ramp and the defendants charge them a fee. The plaintiff argues that this amounts to a standard amenity fee. [Record No. 12, p. 3] However, the defendants are permitted to charge for a fee for access to the boat ramp. If individuals who

[1] Accordingly, it is not necessary to consider the affidavit of Dan Olsen, the Acting Forest Supervisor at the Daniel Boone National Forest. [Record No. 10-2] Olsen declared that Marsh Branch, which is within the Daniel Boone National Forest, is classified as a highly-developed boat launch.

[2] For example, developed campgrounds must have a majority of amenities listed in the statute, which include picnic tables and "reasonable visitor protection." § 6802(g)(2)(A).

park there choose to engage in other activities as the plaintiff suggests, this does not relieve them of paying the required fee. Further, the plaintiff does not allege that he ever parked at Marsh Branch for any purpose other than using the boat ramp.

The plaintiff also raises an implied-contract theory for the first time in his response. [Record No. 12, p. 6] However, the Contract Disputes Act of 1978 governs contracts claims against the United States. *See* 41 U.S.C. §§ 7101-7109. Although it does not appear that the plaintiff has provided a colorable basis for this claim, the Court of Federal Claims has exclusive jurisdiction for judicial review over claims under the Act. §7107. To the extent the plaintiff's claims are contractual in nature, the Court does not have jurisdiction to consider them. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1136 (6th Cir. 1996).

Finally, the defendants report that, despite the lack of a legal obligation to do so, the light in question has been replaced. [Record No. 10-1, p. 6] The plaintiff contends that this development does not render the issue moot because there is a "reasonable expectation" and a "demonstrated possibility" that the same controversy will recur. *See, e.g., Murphy v. Hunt,* 455 U.S. at 478, 482 (1982). Taking the allegations of the plaintiff's Complaint as true, and assuming *arguendo* that the same controversy is likely to recur, the plaintiff is not entitled to relief for the reasons explained above.

Based on the foregoing, it is hereby

ORDERED that the defendant's Motion to Dismiss [Record No. 10] is **GRANTED**.

This 24th day of July, 2017.

Signed By:
Danny C. Reeves DCR
United States District Judge