

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No: 08-cv-00917-MEH-KMT

DAVID P. SCHERER;  
JOHN H. LICHT;  
AARON JOHNSON;  
MIKE LOPEZ; AND  
BARBARA BRICKLEY,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE;  
GLENN P. CASAMASSA, Forest Supervisor for Arapaho & Roosevelt National Forest;  
and DAVID GAOUILLE, Acting United States Attorney,

Defendants.

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**SECOND AMENDED COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

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## **STATEMENT OF THE CASE**

1. This is a civil action for declaratory and injunctive relief brought by the named Plaintiffs. Plaintiffs seek a determination by this Court that Defendant, United States Forest Service, by and through Glenn P. Casamassa, exceeded the scope of its legislative authority in implementing the Federal Lands Recreation Enhancement Act (REA). Plaintiffs request the Court set aside Agency action which is not in accordance with the law. 5 U.S.C. 706(2)(A)&(C). The area in question is known as the Mt. Evans Recreation Area. As implemented, Plaintiffs assert that the Defendant Forest Service has and is violating several provisions contained in the REA.

## **BACKGROUND**

2. The REA was attached as a rider to the Omnibus Appropriations Reconciliation Bill, and was signed into law on December 8, 2004. 16 U.S.C. 6801 et seq. The Recreational Fee Demonstration Act, enacted by Congress in 1996 (Pub. L. No. 104-134), was immediately repealed by the REA, with the exception that fees could be collected so long as the policy for collecting the fee was consistent with the new provisions of the REA. 16 U.S.C. 6812. The earlier Fee Demonstration Act gave broad authority to charge entrance and use fees for outdoor recreational areas. In 1997, pursuant to its authority under the now-repealed Fee Demonstration Act, the Forest Service began charging an entrance fee to access the Arapaho National Forest by placing an entrance station along State Highway 5, also known as the Mt.

Evans Scenic Byway. Motorists, bicyclists, hikers and other forest visitors were required to pay an entrance fee to enter the Mt. Evans Recreation Area and traverse a 15-mile stretch of the highway to its terminus. There was considerable public pressure to repeal the Fee Demonstration project from, among others, the Colorado State Legislature and several Colorado counties.

3. In enacting the REA in 2004, Congress desired to specify when and for what uses fees could be collected and to provide guidelines to the Service with respect to its enforcement authority. Congress enacted limiting provisions in the REA that were not contained in the Fee Demonstration Act. The last extension of the Fee Demo Project was set to expire in 2005. On October 8, 2003 H.R. 3283 was introduced to continue the fee collection authority. H.R. 3283, 108<sup>th</sup> Cong, 1<sup>st</sup> Sess. 2003. Prior to its enactment, Congressman Richard Pombo offered an amendment to H.R. 3283 that ultimately was enacted as the Federal Lands Recreation Enhancement Act. Pub. L. No. 108-447. Congressman Pombo's amendment made changes in the proposed REA, limiting the Service's authority to charge fees. Those changes are what are at issue in the present case. 16 U.S.C. 6802(d)(1)(A),(B),(C),(D),(E) and (F). Also at issue is the prohibition against entrance fees. 16 U.S.C. 6802(e).

4. The Forest Service continues to adhere to the provisions of the Fee Demonstration Act despite the new limitations placed on it by the REA. The only change made in its policy was in 2007, when pressured by the Colorado Department of Transportation, to waive the fee to

allow vehicles to freely drive along the road. The fee requirement was waived but not eliminated, as the Service can unilaterally choose to reinstate it at any time. The Service installed signs that indicated to visitors that no fee was required as long as the motorist does not park his/her car anywhere along the 15-mile corridor or anywhere within an area the Service has labeled as a High Impact Recreation Area (hereinafter "HIRA"). The area encompasses the last 15 miles of the State Highway 5 corridor. The corridor provides scenic pullouts and undeveloped parking areas that provide access into the adjacent Mt. Evans Wilderness. The HIRA is essentially the same area where entrance fees were charged under the Fee Demonstration Act.

5. Unlike a parking ticket, the enforcement provisions of the REA state that a fee violation offense shall be prosecuted as either a Class A or Class B misdemeanor both of which, after the first offense, authorize the potential for incarceration. 16 U.S.C. 6811. In addition, persons who lend their vehicle to a friend or family member are conclusively presumed to be guilty of a crime if the borrower of the car did not properly display a pass, thereby subjecting the owner of the car to fines and imprisonment.

### **JURISDICTION**

6. This Court has jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. 706(2) (scope of review), as well as 28 U.S.C. 1331 (federal question), and 28 U.S.C. 1346 (United States as defendant). An actual justiciable controversy exists between

Plaintiffs and Defendants. Plaintiffs have a right to bring this action pursuant to the Administrative Procedure Act, 5 U.S.C. 701-706. The relief requested is proper under 28 U.S.C. 2201 (declaratory judgment), 28 U.S.C. 2202, (injunctive relief), and 5 U.S.C. 705 and 706. The Administrative Procedures Act (5 U.S.C. 702) provides the necessary waiver of sovereign immunity, notwithstanding the unavailability of administrative remedies.

### **VENUE**

7. 28 U.S.C. 1391(e) provides that in a civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity, or under color of legal authority, or any agency of the United States, the action may be brought in any judicial district in which Plaintiffs in action reside. Plaintiffs are legal residents of the District of Colorado and Defendant U.S. Department of Agriculture is an agency that operates within the District.

### **PARTIES**

#### **Plaintiffs**

8. Plaintiff David P. Scherer resides in Colorado full time. He frequently visits a private residence less than 15 miles from the fee station located at the lower terminus of State Highway 5. He is an avid skier, hiker and bicyclist. He has been a frequent visitor to Mt. Evans. He has an extensive background in outdoor recreation, and has traveled independently all over the world. Prior to the current enforcement of the REA, the Plaintiff's activities at

Mt. Evans included bicycling to State Highway 5 and then to the Mt. Evans summit; hiking on trails in the wilderness; enjoying the scenery at various pullouts along State Highway 5; parking at Summit Lake Denver Mountain Park to access trails; and skiing within the Mt. Evans Wilderness. Plaintiff Scherer has reluctantly paid the fees demanded of him by the Service. In 2007 a notice of non-compliance was placed on Mr. Scherer's car when it was parked at the Summit Lake Denver Mountain Park.

9. Plaintiff John H. Licht is a practicing attorney who has lived in the Denver area since 1973. He has been up the Mt. Evans Highway dozens of times to cross country ski, hike around Summit Lake, look at and photograph alpine wildflowers, glissade the snowfields and walk on the trails. Plaintiff Licht has reluctantly paid the fees demanded of him by the Service.

10. Plaintiff Aaron Johnson is an experienced mountain climber, mountain guide and trainer. He is the administrator of Summitpost.org, a well-used website providing mountaineering information. He has on frequent occasions used State Highway 5 to access the Wilderness and climb Mt. Evans. He has parked at Summit Lake Denver Mountain Park and other undesignated undeveloped parking areas in order to hike the trails and climb.

11. Plaintiff Mike Lopez is an avid outdoor enthusiast and a business owner in Clear Creek County, Colorado. His business caters to outdoor recreationists. He has been a businessman and resident of Clear Creek County for the last seventeen years. Plaintiff Lopez was a frequent

visitor to the dispersed areas on Mt. Evans where he would park along the road or at Summit Lake Denver Mountain Park.

12. Plaintiff Barbara Brickley has lived in Colorado since 1967. When Mt. Evans was free, she went up anytime she was in the area. She would frequently take guests up the mountain and stop along the way to take pictures.

### **Defendants**

13. Defendant United States Forest Service is an agency of the Department of Agriculture, acting by and through a chief of the Forest Service, under a delegation of authority from the Secretary of Agriculture.

14. Defendant Glenn P. Casamassa is an officer of the United States, employed by the Department of Agriculture, Forest Service in the official capacity of Forest Supervisor in the Arapaho/Roosevelt National Forest. Defendant Casamassa, in his capacity as Forest Supervisor, is the principal administration official responsible for carrying out the laws of the United States within the jurisdiction of the Arapaho/ Roosevelt National Forest.

15. Defendant David Gaouette is the Acting United States Attorney responsible for the enforcement of federal laws in the State of Colorado.

### **IRREPARABLE HARM**

16. Plaintiffs have suffered and will continue to suffer irreparable harm in that the Defendant Service threatens to and has prosecuted persons for conduct engaged in by

Plaintiffs. Plaintiffs must pay a fee to the Service to enjoy recreational opportunities at Mt. Evans, if they park anywhere within the HIRA, regardless of whether they are in reasonable reach of any amenities and notwithstanding the statutory fee limitations placed on the Service by Congress. The unlawful charging of a standard amenity fee in areas where the required amenities do not exist or in other areas which Congress has designated as free use areas subjects Plaintiffs and others to either pay money to the Service or face a threat of criminal prosecution.

17. A Notice of Non-Compliance, requiring payment under threat of legal action, was placed on Plaintiff Scherer's vehicle while parked at the Summit Lake Denver Mountain Park. The Defendant Service's threat of criminal prosecution has a chilling effect on Plaintiffs' right to travel and on their use of the forest for walking, riding a bike, or simply enjoying the view. All of the Plaintiffs have curtailed their visits to the area even though their recreational use of the area plays a significant role in enhancing their health, fitness and sense of overall well-being.

18. Plaintiff Scherer has been told by Forest Service staff that he must pay if he parks anywhere in the HIRA. He has asked the staff specific questions with respect to the statutory limitations contained in the REA. The response has been that he is required to pay if he stops his car and exits it, as he is entering the HIRA. He is harmed by not being able to freely park alongside a road and have lunch, to freely access the wilderness, to freely park at



undeveloped undesignated parking sites, or to park on City and State owned property in accordance with City and County ordinances and State laws.

19. Plaintiff Licht has reluctantly paid the fee for his activities within the HIRA. He, among other things, stops along the road to take pictures and skis in dispersed areas where no standard amenities exist. He is harmed by the Service's demand of fees for engaging in activities that Congress has said no fee is authorized for.

20. Plaintiff Johnson recreates in the wilderness to pursue his mountain climbing interests. He has parked in undesignated undeveloped parking sites and at Summit Lake Denver Mountain Park. He does not use State Highway 5 as often as he did. He now chooses other areas in which to mountain climb since he, as well as all the Plaintiffs, are reluctant to pay a fee demanded by the Service for that which the law does not authorize.

21. Plaintiff Mike Lopez also chooses other areas to recreate since he must either pay a fee which he believes is unauthorized or be threatened with criminal penalties. He and other business owners have been economically disadvantaged. Customers have repeatedly told Plaintiff Lopez that they would not return to the area given the requirement to pay a fee to go up State Highway 5.

22. Plaintiff Barbara Brickley has been told by agents of the Service that she is required to pay a fee if she drives anywhere along State Highway 5 and gets out of the car to stretch her legs or to take a picture. When her husband died in 2004 she requested the mortuary to cast

his ashes from a plane over Mt. Evans. She is now reluctant to visit the favorite natural area of herself and her husband. She wishes to be able to freely drive up the highway and park her car and sit for a while to reflect on the beauty of the area and on her marriage.

23. All Plaintiffs have driven to and stopped at the designated Mt. Evans overlook.

24. If the Defendants are permitted to continue their practice of threatening prosecution for conduct they do not have the power to regulate, Plaintiffs may be charged with a crime before a magistrate or other judicial tribunal and suffer the consequences of a criminal prosecution and possible conviction. Convictions for a federal misdemeanor may, among other things, have a negative impact on employment opportunities. To avoid the threat of criminal prosecution Plaintiffs do not travel up State Highway 5 as often as they did in the past. The fee requirement negatively impacts their ability to travel where they wish and enjoy the wilderness experience at Mt. Evans.

25. Plaintiffs have no adequate remedy at law to compel Defendants to cease and desist their unlawful implementation of the REA. Only declaratory and injunctive relief can protect Plaintiffs from Defendant's unlawful demand for standard amenity fees and from the threats and potential prosecution for failure to pay the fee.

#### **THE STATUTORY LANGUAGE AT ISSUE**

26. 16 U.S.C. 6802(f)(4) authorizes the Service to charge a standard amenity fee on federal lands subject to specific limitations described in 16 U.S.C. 6802(d).

Except as limited by 16 U.S.C. 6802(d), 16 U.S.C. 6802(f)(4) authorizes a fee only for an area that:

- (A) provides significant opportunities for outdoor recreation;
- (B) that has substantial Federal investments;
- (C) where fees can be efficiently collected; and
- (D) That contains all of the following amenities:
  - (I) Designated developed parking.
  - (ii) A permanent toilet facility.
  - (iii) A permanent trash receptacle.
  - (iv) Interpretive sign, exhibit or kiosk.
  - (v) Picnic tables.
  - (vi) Security Services.

27. 16 U.S.C. 6802(d)(1) states:

“PROHIBITION ON FEES FOR CERTAIN ACTIVITIES OR SERVICES ----The Secretary shall not charge any standard amenity recreation fee for Federal recreational land and waters administered by the Bureau of Land Management, the Forest Service, or the Bureau of Reclamation under this chapter for any of the following:

- (A) Solely for parking, undesignated parking, or picnicking along roads or trailsides.
- (B) For general access unless specifically authorized under this section.
- (C) For dispersed areas with low or no investment unless specifically authorized under this section.
- (D) For persons who are driving through, walking through, boating through horseback riding through, or hiking through Federal recreational land and waters without using the facilities and services.
- (E) For camping at undeveloped sites that do not provide a minimum number of facilities and services described in 16 U.S.C.6802 (g)(2)(A).
- (F) For the use of overlooks or scenic pullouts.....”

28. 16 U.S.C. 6802 (e)(2) provides that the Secretary shall not charge an entrance fee for Federal recreational lands and waters managed by the Bureau of Land Management, the

Bureau of Reclamation, or the Forest Service.

29. 16 U.S.C. 6811(c) provides that the registered owner and any occupant of a vehicle charged with a nonpayment violation involving the vehicle shall be jointly liable for penalties imposed under this section, unless the registered owner can show that the vehicle was used without the registered owner's express or implied permission.

30. 16 U.S.C. 6811(d) provides that the failure to pay a recreation fee established under this Act shall be punishable as a Class A or Class B misdemeanor, except that in the case of the first offense of nonpayment, the fine imposed may not exceed \$100, notwithstanding section 3571(e) of Title 18, United States Code.

#### **FACTUAL ALLEGATIONS**

31. Following the enactment of the REA in 2004, Forest Service administrators unilaterally designated the Mt. Evans highway corridor as a HIRA, which is within the Arapaho/Roosevelt National Forest. The HIRA is the same area covered by the Fee Demonstration Act of 1996 which had authorized entrance fees.

32. No rules or regulations were promulgated by the Service when it designated the area as a HIRA.

33. No process for public review or comment was implemented by the Service prior to designating the area as a HIRA nor anytime thereafter.

34. The Forest Service requires motorists, hikers and bicyclists entering the HIRA to pay

a fee at a fee station located on State Highway 5, 0.1 miles from the intersection of State Highway 103 and Highway 5. The fee for a vehicle with 12 or fewer passengers is \$10.00, regardless of the number of passengers. For bicyclists, motorcycles and hikers the fee is \$3.00.

35. In 2007, the Colorado Department of Transportation expressed its opinion to the Service that motorists are entitled to travel freely on state highways. Following the Department of Transportation's intervention, on July 2, 2007 the Service agreed to post a sign at the fee station on State Highway 5 advising visitors there was no charge for non-stop travel on the road. In doing so, the State took no position regarding the collection of user fees by the Service.

36. Prior to 2008, the Service required a fee for anyone entering the HIRA, despite Congressional entrance fee prohibitions, effective in 2005. The Service currently waives but has not eliminated the fee requirement for motorists traveling the highway without stopping.

37. In 2008, pursuant to its agreement with the Colorado Department of Transportation, the Service placed a sign in front of the fee station stating "travel non-stop on road no charge".

38. The Service also placed a sign approximately 50 feet beyond the fee station stating, "parked vehicles must display a valid recreation pass -- next fifteen miles". The view of the sign is blocked by the fee station.

39. The policy of the Service requires that vehicle operators purchase and display a pass on their cars when parked anywhere within the HIRA which includes parking along and adjacent to State Highway 5 and in parks maintained by the City and County of Denver.

40. The first one mile of State Highway 5 runs through Echo Lake Denver Mountain Park which is owned by the City and County of Denver.

41. There are numerous undesignated scenic pullouts at various elevations maintained by the State of Colorado along the 15-mile stretch of State Highway 5. These pullouts are located at Milepost 1.0, Milepost 3.4, Milepost 3.8, Milepost 4.5, Milepost 5.7, Milepost 6.2, Milepost 6.8, Milepost 8.9, Milepost 9.2, Milepost 10.4, Milepost 11.1, Milepost 13.3, Milepost 13.9, and Milepost 14.3. This list is not inclusive.

42. There are none of the required federal amenities located at the above-described State-maintained pullouts where Plaintiffs can park, enjoy the view, hike into the adjacent wilderness or have picnics.

43. The Forest Service maintains a designated overlook at the upper terminus of State Highway 5.

44. State Highway 5 provides the only vehicular access to the designated overlook. Persons traveling along the highway to the overlook have received “notice to pay” warnings.

45. There are undesignated parking areas along State Highway 5 which provide access for hikers to hike into the wilderness along both established and undeveloped trails.

46. When no pass is displayed on a vehicle or when the Fee Enforcement Officer does not see a pass, vehicle operators are initially given warning notices (Notices of Non-Compliance) left on the vehicle, advising that the failure to pay may result in legal action against them. The Notice of Non-Compliance warns them that they are in violation of 16 C.F.R. 261.17.

47. There are two parks owned by the City and County of Denver that are located wholly or partially within the HIRA. The Echo Lake Denver Mountain Park is located at the bottom of State Highway 5 and the Summit Lake Denver Mountain Park is located at milepost 9 at an elevation of 12,880 feet.

48. The Service requires all vehicle operators parked within Summit Lake Denver Mountain Park to adhere to the Service's fee requirements or risk federal prosecution. Vehicle operators parked within the HIRA but within the boundaries of Echo Lake Denver Mountain Park are also required to pay a fee to the Forest Service.

49. Neither Summit Lake Denver Mountain Park nor Echo Lake Denver Mountain Park have the required standard amenities within the HIRA to justify paying a fee to the federal government, even assuming the Forest Service has criminal jurisdiction on City-owned property.

50. The Summit Lake Denver Mountain Park provides direct access to dispersed wilderness areas within federal lands.

51. A fee sharing agreement pertaining to Summit Lake Denver Mountain Park was

entered into on June 8, 2007 between the City and County of Denver and the Forest Service. It provides that the Forest Service will be responsible for enforcement of their own laws and regulations on lands for which they have jurisdiction. It further provides that the Forest Service will not issue notices on behalf of DENVER. There is no fee sharing agreement with the City and County of Denver for Echo Lake Denver Mountain Park, nor any Denver City or County ordinance requiring the payment of a fee.

52. The Mt. Evans HIRA does not contain areas where all the amenities required by Congress are available to justify the payment of a fee.

53. Defendants rely on the authority of the REA to require motorists who drive along Colorado State Highway 5 to purchase and display the Pass when parked along the State Highway or when parked at various pullouts, scenic overlooks and vista areas.

54. Defendants rely on the authority of the REA to charge hikers and bicyclists a fee to bike and walk along Colorado State Highway 5.

55. Defendant's agents routinely patrol all areas within the HIRA to ensure compliance and issue Notices of Non-Compliance when passes are not displayed on cars within the HIRA.

### **CAUSE OF ACTION**

#### **VIOLATION OF THE FEDERAL LANDS RECREATION ENHANCEMENT ACT**

56. Paragraphs 1 through 55 are incorporated herein by reference the same as though



pleaded in full.

57. Defendant's policy exceeds the scope of its legislative authority since it developed its policy without following the substantive law that defines and delimits the scope of its authority. It has and continues to violate several provisions of the REA. The REA authorizes a standard amenity fee only in areas where the enumerated amenities exist. 16 U.S.C. 6802(f)(4). The Mt. Evans HIRA is devoid of areas where all the required amenities exist. Even if the Service were to argue that some amenities are spread out throughout the area adjacent to the 15-mile stretch of highway, Congress placed limits on fee collection authority even within areas otherwise subject to a fee. 16 U.S.C. 6802.

58. Congress provided that in no event may the Service charge "solely for parking, undesignated parking, or picnicking along roads or trailsides" on any federal land. 16 U.S.C.6802(d)(1)(A). The Service requires a fee for anyone who parks within the HIRA, thereby unilaterally nullifying any effect of the specific legislative directives authorizing free parking and picnicking along roads and trailsides on all federal land subject to the jurisdiction of the Service.

59. Congress prohibited the Service from charging general access fees or entrance fees. 16 U.S.C.6802(d)(1)(B); 16 U.S.C. 6802(e). The Service charges a fee at the fee station for general access to the HIRA, since it charges persons who stop or park anywhere within the HIRA, despite the absence of the required amenities. This fee may also be construed as an

entrance fee and has been described by the Service as a fee for entering the HIRA.

60. Congress provided for free use of dispersed areas with low or no investment unless specifically authorized by Congress. 16 U.S.C. 6802(d)(1)(C). The areas adjacent to the State Highway 5 corridor are dispersed wilderness areas. By charging persons a fee when parked anywhere within the State Highway corridor, the Service is preventing hikers and skiers from freely accessing the dispersed areas of the Forest to hike and ski in and around the HIRA.

61. The Service charges a fee when persons travel to and park at Summit Lake Denver Mountain Park, a park owned by the City and County of Denver, where the required federal standard amenities are absent. Charging such fees are in violation of the provisions contained in the REA which authorizes fees only when located on federal lands where the required federal amenities are in place. 16 U.S.C. 6802(f)(4).

62. Summit Lake Denver Mountain Park provides direct access into designated wilderness areas. By charging Plaintiffs a fee to travel to and park at Summit Lake (non-federal land), the Service is preventing hikers and skiers from freely accessing the wilderness in violation of 16 U.S.C. 6802(d)(1)(C).

63. The Service charges a standard amenity fee for persons parked along State Highway 5 in an area that traverses one mile within Echo Lake Denver Mountain Park, owned by the City and County of Denver where there are no federal amenities, thereby violating 16 U.S.C. 6802(f)(4).

64. Congress provided that a fee cannot be charged for “persons who are driving through, walking through, boating through, or hiking through Federal recreational lands or waters without using the facilities and services.” 16 U.S.C. 6802(d)(1)(D). The policy of the Service is to charge all hikers and bikers a fee even if they only wish to traverse Highway 5 and the trails located in and around the HIRA. The Service is thereby violating the provisions set forth by Congress. The trails in and around the HIRA do not have the amenities that Congress required as a precondition to the Service’s authority to levy a fee.

65. Congress prohibited the Service from charging a fee for the use of overlooks or scenic pullouts. 16 U.S.C.6802(d)(1)(F). The Service enforces its fee collection policy on persons who travel to and park at pullouts as well as at its designated overlook at the terminus of State Highway 5, thereby violating the explicit mandates of Congress.

#### **NO ADMINISTRATIVE REMEDIES**

66. When implementing the REA, the Service did not allow for public participation or comment.

67. The Service met internally to establish the criteria for designating High Impact Recreational Areas and produced an implementation guideline without providing for or accepting public comment.

68. The Administrative Procedures Act does not provide for an appeal of agency action when such action is taken outside of the procedural rules contained therein.

69. The Court is obligated to require the exhaustion of administrative remedies when a statute or rule requires such exhaustion.

70. The Statutes and Rules authorizing appeals of agency action pertinent to the Forest Service do not afford Plaintiffs or others the opportunity to appeal the final decision of the Service when it designated Mt. Evans as a HIRA.

71. The Statute governing the Forest Service requires a person to exhaust administrative appeal procedures established by the Secretary. 7 U.S.C. 6912(e)

72. No appeal procedures were established by the Service when it made its decision to create HIRAs or at anytime before such decision.

73. Plaintiffs are not eligible applicants to avail themselves of any of the procedures established by the Service. 36 C.F.R.251.81.

74. Plaintiffs are not challenging the approval, revision or amendment of a resource management plan. 36 C.F.R. 217.

75. Plaintiffs are not challenging a resource management plan for a specific project such as a wildlife management project or timber sales. 36 C.F.R. 215.

76. Plaintiffs are not challenging the amendment of a resource management plan to accommodate a hazardous fuels project. 36 C.F.R. 218.

77. Plaintiffs are not challenging decisions made with respect to Occupancy and Use wherein permits are required for such things as mining, grazing or archaeological digs. 36

C.F.R. 251.

78. The Service has not provided for any “optional” appeals not mandated by statutes or rules. In any event, the Court is not authorized to require exhaustion of optional appeals.

79. Since there are no procedures established for Plaintiffs to appeal agency action and to offer comments, testimony or documents to establish an administrative record, no administrative record exists for the Court to review. Final agency action was taken by the Service without any public process. The Court’s review of the validity of agency action is therefore not limited solely to documents in the possession of the Service, as such documents do not establish a reviewable administrative record.

#### **PRAYER FOR RELIEF**

Therefore, for the reasons cited herein above, Plaintiffs pray that this Court:

1. Declare that the Forest Service in Colorado exceeded the scope of its legislative authority when it established the Mt. Evans HIRA wherein fees are charged in areas and for activities Congress said were to be free to the public.
2. Declare that the requirement to pay a fee at the fee station constitutes an entrance fee onto federal recreational lands managed by the Forest Service, in violation of 16 U.S.C. 6802(e)(2).
3. Declare that the requirement to pay a fee at the fee station violates 16 U.S.C. 6802(d)(1)(B), since the Service is prohibited from charging for general access onto Federal

land.

4. Declare that the requirement to pay a fee when Plaintiffs and others travel to and park at Summit Lake Denver Mountain Park and Echo Lake Denver Mountain Park is a violation of 16 U.S.C.6802(f), which authorizes a fee only when Plaintiffs and others are located on Federal lands where all of the required standard amenities are present

5. Declare that the requirement to pay a fee when Plaintiffs and others travel to and park in Summit Lake Denver Mountain Park is a violation of 16 U.S.C. 6802(d)(1)(C) , wherein Plaintiffs and others are entitled to free use of dispersed wilderness areas on Federal land which is directly adjacent to the Park.

6. Declare that the requirement to pay a fee when Plaintiffs and others travel to and park at the designated and undesignated overlooks and scenic pullouts is a violation of 16 U.S.C. 6802(d)(1)(F) which prohibits the Service from charging fees for the use of overlooks or scenic pullouts.

7. Declare that the requirement to pay a fee when Plaintiffs and others are parked along the State Highway 5 or other undesignated parking areas and exit their vehicles to recreate in dispersed areas of the forest is a violation of 16 U.S.C. 6802(d)(1)(A)&(C).

8. Declare that the requirement to pay standard amenity fees applies to Plaintiffs and others who are located only in areas within the HIRA that have all of the required amenities in place, such as day-use picnic areas, or in destination visitor or interpretive centers that

provide a broad range of interpretive services, programs, and media. 16 U.S.C. 6802(f)(4)(D); 16 U.S.C. 6802(f)(3)

9. Enjoin the Service from any further implementation of its policy and from posting signs that mislead the public with respect to their obligation to pay fees.

10. Retain jurisdiction over this matter to ensure that the Service complies with the provisions of the REA.

11. Award Plaintiffs their reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act 28 U.S.C. 2412 or other authority; and grant Plaintiffs such additional and further relief as the Court deems just and equitable.

DATED this 23rd day of April, 2009.

/s/ Mary Ellen Barilotti

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on April 23, 2009, I electronically filed the foregoing Second Amended Complaint for Declaratory and Injunctive Relief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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/s/Mary Ellen Barilotti

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