IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARK, a Not-for-Profit Corporation, *et al.*,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant, and

NATIONAL FOREST RECREATION ASSOC., *et al.*,

Intervenor-Defendants

Civ. No. 12-1505

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 56 and for the reasons contained in the incorporated memorandum of law below, the plaintiffs Bark, Gaye Adams, Greg Lewis, Stephen Sample, Scott Silver, and David Wimert now move for summary judgment.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This action challenges the policy of the defendant United States Forest Service in allowing companies, known as "concessionaires," to charge fees to members of the public to use public lands in a way that the agency itself cannot charge, in violation of the Federal Lands Recreation Enhancement Act, 16 U.S.C. §§ 6801-6814 ("REA"), as applied to five different fee areas throughout the western United States. This action also challenges the agency's policy of exempting site-specific decisions to authorize concession permits from the REA's requirement that any new or increased fees be subjected to public notice and a review process by Recreation Resource Advisory Committees ("RRACs") at those same areas.

For the following reasons, summary judgment should be granted to the Plaintiffs, and the challenged policies should be set aside, with instructions to the Forest Service to rectify them.

FACTS AND APPLICABLE LAW

The Federal Lands Recreation Enhancement Act ("REA") and its Legislative History

In 1996, Congress and the President passed legislation as part of a larger appropriations bill to establish the Recreational Fee Demonstration Program (often referred to as "Fee Demo"), which authorized federal land management agencies such as the Forest Service to collect fees at a limited number of recreational sites. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Title I, Sec. 101(C) [title III, Sec. 315], 110 Stat. 1321. Its goal was to "demonstrate the feasibility of user-generated cost recovery for the operation and maintenance of recreation areas or sites and habitat enhancement projects on Federal lands." *Id.* at § 315(a).

The response by the public was overwhelmingly negative, on the grounds that such fees erect barriers to low-income citizens, represent double taxation for access to non-developed areas for which additional fees are not appropriate, undermine the democracy and freedom of free recreation on public lands, and represent a commoditization and commercialization of public lands, encouraging a feedback loop of fees and developments (often run by private contractors) on previously

undeveloped lands. *See Adams v. U.S. Forest Service*, 671 F.3d 1138, 1141 (9th Cir 2012).

Prior to the final extension of the Fee Demo program in 2003 (which had been reauthorized periodically since 1996 in annual appropriations bills), an amendment was introduced in the House Committee on Resources by Representative DeFazio to limit the Fee Demo program to National Parks, and eliminate it for Forest Service and other lands. As stated by Representative DeFazio:

> [There are] those of us who feel very strongly that levying these fees indiscriminately across the Forest Service and the BLM [Bureau of Land Management], to nondeveloped areas in particular, is of great concern. Basically, if you want to drive your car around a park and go hunting or go fishing or just walk with the kids or the dog, you have to buy a pass for nondeveloped sites, and a lot of us have strong concerns about that.

2004149 Cong. Rec. H7025-06 at H7033 (2003 WL 21673066) (daily ed. July 7, 2003). In response to Representative DeFazio's concerns, the chairman of the committee, Representative Pombo (who unlike Representative DeFazio was a supporter of the Fee Demo program generally), stated:

> That is something that we are going to change. There is going to be very strict guidelines that come out of an authorization that goes to these agencies so that this does not happen in the future. I will say I oppose doing the amendment at this point in time, but I

> will tell the gentleman from Oregon (Mr. DEFAZIO) that in the future, if we cannot authorize this program and change the way that it is being run, that I would join him in eliminating the program all together . . ..

Id. at H7034.

Representative DeFazio's amendment did not pass. However, the following year, in light of the continued negative public reaction to the Fee Demo program, Congress refused to reauthorize it and instead passed the Federal Lands Recreation Enhancement Act ("REA"), the statute at issue in this case. 16 U.S.C. §§ 6801-6814. The REA states in relevant part:

> *Except as limited by subsection (d) of this section,* the Secretary may charge a standard amenity recreation fee for Federal recreational lands and waters under the jurisdiction of the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service, but only at the following:
>
> **(1)** A National Conservation Area.
>
> **(2)** A National Volcanic Monument.
>
> **(3)** A destination visitor or interpretive center that provides a broad range of interpretive services, programs, and media.
>
> **(4)** An area–
>
> **(A)** that 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.

16 U.S.C. § 6802(f) (emphasis added). The subsection (d) limitations on this fee authority referred to in subsection (f) are:

> (d) Limitations on recreation fees
>
> (1) Prohibition on fees for certain activities or services
>
> *The Secretary shall not charge* any standard amenity recreation fee or expanded amenity recreation fee for Federal recreational lands 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 lands 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 as described in subsection (g)(2)(A) of this section.

(F) For use of overlooks or scenic pullouts.

(G) For travel by private, noncommercial vehicle over any national parkway or any road or highway established as a part of the Federal-aid System, as defined in section 101 of Title 23, which is commonly used by the public as a means of travel between two places either or both of which are outside any unit or area at which recreation fees are charged under this chapter.

(H) For travel by private, noncommercial vehicle, boat, or aircraft over any road or highway, waterway, or airway to any land in which such person has any property right if such land is within any unit or area at which recreation fees are charged under this chapter.

(*I*) For any person who has a right of access for hunting or fishing privileges under a specific provision of law or treaty.

(J) For any person who is engaged in the conduct of official Federal, State, Tribal, or local government business.

(K) For special attention or extra services necessary to

> meet the needs of the disabled.

16 U.S.C. § 6802(d) (emphasis added). Thus, while the Forest Service is authorized to charge visitors an "amenity fee" for use of developed facilities and services, it may not simply charge an "entrance fee" to an area when visitors do not use those developed facilities and services. *See also* 16 U.S.C. § 6802(e)(2) ("Prohibited sites- 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.").

As stated in the House committee report authored by Representative Pombo, the final REA as amended

> clarified where a fee may and may not be charged while also establishing types of fees. *This section was overly prescriptive to alleviate concerns of those who no longer trust certain federal land management agencies with the recreation fee authority. For example, the amendment made clear that the USFS and the BLM will not be permitted to charge solely for parking, scenic pullouts, and other non-developed areas* while the NPS [National Park Service] and the FWS [U.S. Fish and Wildlife Service] may continue to charge an entrance fee.

H.R. Rep. 108-790(I), 108th Cong., 2nd Sess. 2004 (Nov. 19, 2004), 2004 WL 2920863 at *18 (emphasis added). So while supporters in Congress of the predecessor Fee Demo program may have viewed the new REA

restrictions as "overly prescriptive," they nonetheless intentionally passed them into law, acknowledging that some members of Congress at least viewed them as necessary to correct the practice under the Fee Demo program by the Forest Service and other agencies of "charg[ing] solely for parking, scenic pullouts, and other non-developed areas." *Id.*

Despite these provisions, the Forest Service nonetheless established many areas where visitors were required to pay a fee even if they entered to merely park and hike in undeveloped areas without using any facilities. Plaintiffs Adams and Lewis (along with others) challenged one such arrangement in Arizona, and the Ninth Circuit rules that it was illegal, holding that people who enter such areas but do not use the developed amenities cannot be required to pay to do so. *Adams*, 671 F.3d 1138.

The REA further states: "Notwithstanding any other provision of this chapter, a third party may charge a fee *for providing a good or service* to a visitor of a unit or area of the Federal land management agencies in accordance with any other applicable law or regulation." 16 U.S.C. § 6813(e) (emphasis added).

The REA further requires that:

> (a) In general
> As required in this section, the Secretary shall provide the public with opportunities to participate in the development of or changing of a recreation fee established under this chapter.
>
> (b) Advance notice
> The Secretary shall publish a notice in the Federal Register of the establishment of a new recreation fee area for each agency 6 months before establishment. The Secretary shall publish notice of a new recreation fee or a change to an existing recreation fee established under this chapter in local newspapers and publications located near the site at which the recreation fee would be established or changed.
>
> (c) Public involvement
> Before establishing any new recreation fee area, the Secretary shall provide opportunity for public involvement by--
>
> **(1)** establishing guidelines for public involvement;
>
> **(2)** establishing guidelines on how agencies will demonstrate on an annual basis how they have provided information to the public on the use of recreation fee revenues; and
>
> **(3)** publishing the guidelines in paragraphs (1) and (2) in the Federal Register.

16 U.S.C. § 6803.

The Forest Service "shall establish a Recreation Resource Advisory Committee [RRAC] in each State or region for Federal recreational lands and waters managed by the Forest Service . . .." 16 U.S.C. § 6803(d)(1)(A). RRACs are required so that they "may make

recommendations to the Secretary regarding a standard amenity recreation fee or an expanded amenity recreation fee, whenever the recommendations relate to public concerns in the State or region covered by the Committee . . .." 16 U.S.C. § 6803(d)(2).

The Challenged Policies and Applications of These Policies to Plaintiffs and the Public

The Forest Service issues special use permits to concessionaires that allow them to charge visitors to certain Forest Service areas even when visitors do not use any facilities or services of the area, but simply wish to enter Forest Service lands to engage in undeveloped recreation.

For instance, at Rose Canyon Lake in the Coronado National Forest in Arizona, the concessionaire requires those entering the site by vehicle to pay an $8.00 parking fee, even if they do not use the facilities and services, and charges individuals $1.00 each if they park at least three miles away and enter on foot, regardless of whether they use any facilities or services. Adams & Lewis Declarations[1]; AR 850-851.[2]

[1] The referenced declarations of Plaintiffs are found at Docket # 29, with the exception of the declaration of Meredith Cocks on behalf of plaintiff Bark, which is submitted with this brief (another declaration of a Bark member, Amy Harwood, was already submitted). While the scheduling order of December 4, 2012 required that standing declarations be submitted by February 15, 2013, that order merely

Plaintiffs Greg Lewis and Gaye Adams have visited Rose Canyon Lake in the Coronado National Forest, which is a Forest Service site operated by Recreation Resource Management, a private company. Even though each time they visited that site they did not use any facilities or services, they were charged $8.00 to enter the area with their car and park within it, or were charged $1.00 each to park three miles down the road and walk into the area. Adams and Lewis Declarations.

At the recreation area called the Second Crossing on the Tonto National Forest near Payson, Arizona, visitors are required by the concessionaire to pay $6 to park to use the area, regardless of whether they use any facilities or services. Sample Declaration; AR 930, 994. Plaintiff Stephen Sample has visited the Tonto National Forest near and North of Payson, Arizona, to hike the trails on the East Verde

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incorporated the recommendation of the parties for their convenience, while plaintiffs ordinarily need not submit standing declarations until they file their opening brief. *Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C. Cir. 2002).

[2] While the Special Use Permit states that those entering by foot will only be charge $1, a fee that should be waived if a visitor does not use the facilities of the area anyway, plaintiffs Lewis and Adams did not have this fee waived when they entered by foot. Adams Dec. ¶ 6, Lewis Dec. ¶ 6. In any event, neither the permit nor Plaintiffs' experience permitted them to park in the site for free or a reduced rate if they did not intend to use any facilities of the site.

River. These areas are identified as First Crossing, Water Wheel, Second Crossing and Third Crossing, which are operated by Recreation Resource Management, a private company. He was required to pay $6.00 to enter the Second Crossing area, even though he did not intend to use any facilities or services, and did not use any. Sample Declaration.

At Rampart Reservoir, west of Colorado Springs, Colorado, in the Pike National Forest, the concessionaire charges visitors $6.00 to park and to recreate without using any facilities or services, unless they have a senior or disabled federal recreation pass, in which case they are charged $3.00. Wimert Declaration; AR 1666-68. Plaintiff David Wimert has visited Rampart Reservoir, west of Colorado Springs, Colorado, in the Pike National Forest, to recreate without using any facilities or services. It is operated by Rocky Mountain Recreation Company, and he was charged $3.00 to enter the area, even though he did not use any facilities or services there. Wimert Declaration.

At Walton Lake located on the Ochoco National Forest about 50 miles northeast of Bend, Oregon, the concessionaire charges visitors a $5.00 day use fee to recreate in the area, even if they have a Forest

Service-issued Northwest Forest Pass, and/or even if they use no facilities or services. Silver Declaration; AR 3116. In 2012 plaintiff Scott Silver purchased a Northwest Forest Pass, which is supposed to allow him to visit for free any area of the National Forests in Oregon and Washington where a fee is charged. He has visited Walton Lake located on the Ochoco National Forest about 50 miles northeast of Bend, Oregon, which is operated by concessionaire Aud and Di Campground Operations. He was charged $5.00 to enter the area, despite having the Northwest Forest Pass. Silver Declaration.

Further, the special use permits allowing these charges were never subjected to any public notice and comment process, and were not subjected to RRAC review. The Forest Service has taken the position that new fees imposed through the approval of special use permits to concessionaires need not be subjected to the public process and RRAC provisions of the REA. AR 549; *see also e.g.* AR 879 (no fees charged prior to concession permit for Second Crossing area).

In the Mount Hood National Forest in Oregon, the Forest Service recently approved a special use permit covering 28 sites, including the "Big Eddy" day-use area, where visitors have traditionally parked to

swim in the Clackamas River free of charge. AR 2071, 2094. The private operator now charges visitors to use this area, even though it does not contain substantial developed amenities and even when a visitor does not use the minimal amenities present. AR 2133.

Also contained in the Mt. Hood concessionaire permit was a transfer of the popular Bagby Hot Springs site from the Forest Service to a private company who then created a new fee area. AR 2093. Previously, members of the public who arrived by car to enjoy the Hot Springs were charged a $5 parking fee per vehicle. If multiple people arrived in one vehicle, the cost was only $5 total. If people parked in areas other than the designated lot, or hiked in to the hot springs from one of the many trails in the area, they did not have to pay a fee. Under the new special use permit, not only is there still a $5/vehicle parking fee, the concessionaire charges a new fee of $5 per person to soak in Bagby Hot Springs. AR 2094. While the Mt. Hood special use permit was subjected to review under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., it did not undergo public review through the RRAC process of the REA. *See* AR 2846.

STANDING

In order to establish standing under Article III of the Constitution, Plaintiffs must show that: (1) they have suffered an "injury in fact" due to Defendant's allegedly illegal conduct, (2) which can fairly be traced to the challenged conduct of the Defendants, and (3) which can be redressed by a favorable decision. *Defenders of Wildlife v. Gutierrez,* 532 F.3d 913, 923 (D.C. Cir. 2008*)*; *Massachusetts v. EPA,* 549 U.S. 497, 517 (2007); *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000). The Court need only find standing for one plaintiff, and an organizational plaintiff must show that it or one of its members suffers injury in fact from the challenged agency action. *See U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996).

Standing is self-evident for the Plaintiffs who are individually named, as they have suffered economic harm from having to pay the challenged fees when not using any developed amenities, as discussed above and in their declarations. If judgment is entered in their favor, these harms will be stopped in the future and moneys they have paid

will be refunded. *See Sierra Club v. EPA*, 292 F.3d at 899-900 ("In many if not most cases the petitioner's standing to seek review of administrative action is self-evident; no evidence outside the administrative record is necessary for the court to be sure of it. In particular, if the complainant is 'an object of the action (or forgone action) at issue' - as is the case usually in review of a rulemaking and nearly always in review of an adjudication - there should be 'little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'") (citation omitted).

Bark's members have also been harmed by the challenged actions and their harms would be addressed by the requested remedy. As Bark member Amy Harwood explained in her declaration, she was dismayed when the concessionaire staff requested that she, and a hiking group she was leading, pay the $5 per person fee when hiking out of the woods into the Bagby Hot Springs trailhead. This fee for use of undeveloped lands harms both her personally and Bark's mission by decreasing public access to, and enjoyment of, the Bagby Hot Springs area of the Mount Hood National Forest. Harwood Declaration. Likewise, member

Meredith Cocks used to use the undeveloped Big Eddy area on the Clackamas River to picnic and swim free of charge until it was permitted to a concessionaire, and now is harmed by the concessionaire charging a new fee. Cocks Declaration.

Further, Plaintiffs have standing to raise their claim regarding the lack of RRAC process for the concessionaire permits. For a procedural claim such as this, it is enough that the RRAC processes could have resulted in a different outcome that would not have caused their on-the-ground harms discussed above. *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) ("A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.").

For these reasons, Plaintiffs have standing.

STANDARD OF REVIEW

Under the standards of review set forth in the Administrative Procedure Act ("APA"), the Court must review whether Defendants' agency actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 124 (D. D.C. 2001). The Court considers "whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, [and] whether the facts on which the agency purports to have relied have some basis in the record . . .." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D. D.C. 1995) (citing, *inter alia*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16, (1971).

"Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record . . . even though the Court does not employ the standard of review set forth in Rule 56, Fed. R. Civ. P." *Id.* (citing *Richards v. I.N.S.*, 554 F.2d 1173, 1177 n.228 (D.C. Cir. 1977)).

ARGUMENT

I. The Forest Service is Violating the REA by Permitting Concessionaires to Charge Visitors When They Do Not Use Facilities and Services

As discussed above, the Forest Service has allowed concessionaires to charge visitors, including Plaintiffs, when they simply want to park and used undeveloped Forest Service land without using any developed facilities operated by concessionaires. This practice violates the REA.

The REA states that the Forest Service may charge fees for an area that contains all of several enumerated developed amenities, "[e]xcept as limited by subsection (d) . . .." 16 U.S.C. § 6802(f). Subsection (d) states that the Forest Service "shall not charge" **"**[s]olely for parking, undesignated parking, or picnicking along roads or trailsides," or "[f]or camping at undeveloped sites that do not provide a minimum number of facilities and services . . ..." 16 U.S.C. § 6802(d).

The Ninth Circuit found that at sites run by the Forest Service, this plain language prevents the agency from charging visitors to an area simply because it contains the enumerated facilities, when the visitor will not use them:

> Th[e REA's] list of prohibited fees includes those that are: "[s]olely for parking, undesignated parking, or picnicking along roads or trailsides"; "[f]or persons who are driving through, walking through, boating through, horseback riding through, or hiking through Federal recreational lands and waters without using the facilities and services"; and "[f]or camping at undeveloped sites that do not provide a minimum number of facilities and services as described in 16 U.S.C. § 6802(g)(2)(A)." 16 U.S.C. § 6802(d)(1)(A), (D), & (E). The statute is abundantly clear that a standard amenity recreation fee cannot, under any circumstances, be charged for those activities.
>
> The Forest Service is prohibited from charging an amenity fee "[s]olely for parking." 16 U.S.C. § 6802(d)(1)(A). There is nothing ambiguous about that text. If all a visitor does is park, and he is charged a fee, that fee is imposed "[s]olely for parking."

Adams, 671 F.3d at 1143 (footnote omitted). The Tenth Circuit likewise found in another case that parking and undeveloped recreation are "activities for which no fee is supposed to be charged under [16 U.S.C.] §6802(d)(1)." *Scherer v. U.S. Forest Service*, 653 F.3d 1241, 1243 (10th Cir. 2011). Yet that is precisely what the Forest Service is allowing concessionaires to do.

The Forest Service does this despite that it acknowledges in the record that the REA's fee restrictions apply to concessionaire-run areas. *See, e.g.,* AR 916-917 ("Permit holders may not charge for any of the following: • Solely for parking, undesignated parking, or picnicking along roads or trailsides. • General access, unless specifically

authorized by REA. • Dispersed areas with low or no investment, unless specifically authorized by REA.").

Yet in other forums, the Forest Service has asserted that concessionaire-run areas are not covered by the REA, but instead are authorized by the Granger-Thye Act, 16 U.S.C. § 580d.[3] See Transcript of Testimony of Forest Service Chief Tidwell, S. HRG. 112–380 (March 6, 2012) (at 46): ("[T]he Federal Lands Recreation Enhancement Act exempts activities authorized by other statutes from its requirements (16 U.S.C. sec 6813(e)). As campground and related recreation facility concessions are authorized under the Granger-Thye Act they are exempted from the Federal Lands Recreation Enhancement Act.").

This later explanation is not ground in the record, so it cannot be accepted if the Forest Service presses it. *American Textiles Mfr.s Inst. v. Donovan*, 452 U.S. 490, 539 (1981) ("[T]he *post hoc* rationalizations of

[3] That statue states: "The Secretary of Agriculture, under such regulations as he may prescribe and at rates and for periods not exceeding thirty years as determined by him, is authorized to permit the use by public and private agencies, corporations, firms, associations, or individuals, of structures or improvements under the administrative control of the Forest Service and land used in connection therewith: *Provided*, That as all or a part of the consideration for permits issued under this section, the Secretary may require the permittees at their

the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action.") (citations omitted); *City of Brookings Mun. Tel. v. FCC*, 822 F.2d 1153, 1156 (D.C. Cir. 1987) ("*Post hoc* rationalizations advanced to remedy inadequacies in the agency's record or its explanation are bootless.") (citations omitted).

Additionally, even if the Court could consider this argument, it is wrong. REA section 6813 states:

> Fees charged by third parties
>
> Notwithstanding any other provision of this chapter, a third party may charge a fee for providing a good or service to a visitor of a unit or area of the Federal land management agencies in accordance with any other applicable law or regulation.

16 U.S.C. § 6813(e). This provision certainly permits the Forest Service to allow concessionaires to operate sites generally, and to "charge a fee for providing a good or service," but it does not allow them to charge a fee when they do not provide a good or service and a visitor simply wishes to park and go hiking on undeveloped federal land.

A "notwithstanding" clause "clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override *conflicting*

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expense to renovate, recondition, improve, and maintain the structures and land to a satisfactory standard."

provisions of any other section." *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added). Thus the question is whether the provision in subsection 6813(e) that permits a concessionaire to charge a fee for a "good or service" conflicts with the REA's provision that a visitor may not be charged merely for parking and undeveloped recreation. It does not, and in fact meshes perfectly well with the REA's allowance of charging for the use of a developed amenity, and disallowance of charging a fee for parking and undeveloped recreation. *See James v. Von Zemenszky*, 284 F.3d 1310, 1317 (Fed. Cir. 2002) (in construing "notwithstanding" clause, the term "conditions in employment" does not encompass "staffing adjustments"); *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 797 (9th Cir. 1996) ("Congress did not intend the phrase 'notwithstanding any other law' to require the agency to disregard all otherwise applicable laws.").

For these reasons, the Forest Service has violated the REA in issuing its concession permits at these sites.

II. The Forest Service's Refusal to Submit its Concessionaire Decisions to RRAC Review Violates the REA

Unlike the claim above, where the record shows that the Forest Service has stated in the record that the strictures of the REA prevent allowing concessionaires to charge for parking and undeveloped recreation, yet issues permits allowing exactly that, the Forest Service has consistently held that it need not subject its decisions to issue concessionaire permits to RRAC review under the REA. This policy violates the REA, and must be set aside.

As set out above, the REA provides that recreation fees must be subject to public notice and comment, and be subject to RRAC review, before being imposed. *See* pp. 9-10, *supra*, citing 16 U.S.C. § 6803. Yet the Forest Service has taken the position that "Recreation RACs do not have the authority to make recommendations on certain aspects of fee programs, including, but not limited to: [] Recreation fee sites operated by a concessionaire or contractor . . .." AR 549. And indeed, none of the concessionaire permits at issue in this case (or any others) have been subjected to a RRAC. *See also* AR 120 ("Unlike most sections of the Act where Recreation Resource Advisory Committees (RAC) will advise the Forest Service on how retained fees are spent, special uses fees are not

subject to a RAC.").

The record shows no justification for exempting concessionaire-run recreation fee sites from the REA's RRAC requirement, and there is none under the REA. Doing so presents a totally unjustified end-run around the REA's goal of citizen input into the imposition of recreation fees on federal land. Nothing in the REA[4] or its legislative history shows that fee areas should be exempted simply because they are to be run by concessionaires. A stated in the legislative history, the REA

> would establish Recreation Advisory Committees (or RACs), which would ensure public participation in the decision making process when it comes to recreation fees and sites. These RACs would be composed of a balanced and broad representation from the recreation community as well as local government. The RACs would make recommendations to the relevant Secretary regarding the establishment, elimination, or adjustment of a fee.

H.R. Rep. 108-790(I), 108th Cong., 2nd Sess. 2004 (Nov. 19, 2004), 2004 WL 2920863. There is nothing to indicate that Congress intended to exempt concessionaire-operated sites from the REA.

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[4] If the Forest Service raises 16 U.S.C. §6813(e) (*see* p. 21-23, *supra*), that would not support their argument. While that section preserves the ability to allow concessionaires to collect monies to run recreation sites, it cannot be read to allow the Forest Service to bypass the RRAC requirements in so doing.

Indeed, it would be strange if it had, given the plain language of the REA and its legislative history showing Congress' strong desire to rein in fees for using public land, through, in part, the public process that RRACs provide. This process could be very important if implemented for concessionaire-operated sites. For instance, a RRAC could recommend that any concessionaire permit be required to allow visitors not using developed amenities to be allowed to park for free, as legally required and discussed above regarding Plaintiffs' first claim. *See* AR 2924. Further, when fees may be charged, such as where a visitor plans to use a developed campground or the facilities at a day-use site, a RRAC could recommend that a concessionaire permit require the concessionaire to fully honor senior and other government-issued access passes.[5] As it is now, concessionaire permits at most day use sites do not require honoring such passes, and concessionaires are allowed to impose terms on pass holders that are different from those specified in REA. *See, e.g.,* Adams Declaration ¶ 7; AR 0072. The public very much opposes this practice of not honoring such passes, and RRAC recommendations could cause it to be changed at many areas.

[5] *See* AR 476 for a description of available passes.

See S. Hrg. 111-391, before the Senate Committee on Energy & Natural Resources, Feb. 24, 2010 ("[B]y far, the comments that [the Forest Service has] received have been not supportive of" allowing concessionaires to not honor passes).

As stated by the Forest Service:

> Recreation RACs are one component of a larger civic engagement process and provide a critical public perspective on the USFS and BLM recreation fee programs. Through their diverse representation, Recreation RACs give the public a formal voice and provide constructive local input into the decision-making process. Members of Recreation RACs can apply a broad understanding of local economic, social, and environmental concerns to their consideration of fee proposals.

AR 483. If concessionaire permits were subject to RRAC review as required by the REA, many problems such as those presented in this suit could be addressed.

For these reasons, the Forest Service's policy of exempting concessionaire passes from RRAC review violates the REA.

CONCLUSION AND REQUESTED RELIEF

The Forest Service's concessionaire permitting decisions that allow concessionaires to charge visitors to areas they operate when visitors do not use any facilities or services violates the REA. So too does the policy exempting concessionaire permits from the RRAC requirements of the REA. For these reasons, the Court should:

1. Declare that the policy of permitting private companies to charge visitors to National Forest areas when the visitors do not use any facilities or services, and the application of this policy to Plaintiffs at the areas known as Rose Canyon Lake, Second Crossing, Rampart Reservoir, Walton Lake, and Big Eddy, violates the REA, 16 U.S.C. §§ 6801-6814;

2. Declare that the policy of imposing new fees for recreation areas through issuance of special use permits to private operators without submitting these permits to public notice and RRAC processes, and the application of this policy to Plaintiffs at the areas known as Rose Canyon Lake, Second Crossing, Rampart Reservoir, Walton Lake, and through approving the Mount Hood Developed Recreation Site Special Use Permit, violates the REA, 16 U.S.C. §§ 6801-6814;

3. Set aside these policies of the Forest Service;

4. Set aside those parts of the Forest Service decisions authorizing special use permits at Rose Canyon Lake, Second Crossing, Rampart Reservoir, Walton Lake, and the Mount Hood Developed Recreation Site Special Use Permit ,which permit private companies to charge visitors to National Forest areas when the visitors do not use any facilities or services;

5. Require the special use permits for Rose Canyon Lake, Second Crossing, Rampart Reservoir, Walton Lake, and the Mount Hood Developed Recreation Site Special Use Permit to go through the public notice and RRAC requirements of the REA;

and,

6. Order the Forest Service to refund Plaintiffs monies they have unlawfully had to pay under the challenged policies.

RESPECTFULLY SUBMITTED March 15, 2012.

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