



VISIONS OF 1984, BIG BROTHERISM GONE AMUCK

Vilsack, Ease Off on RAT Litigation

If you've ever wondered how the federal government gets away with the things it gets away with, read this.

By Bill Schneider, 5-14-09

Finding somebody who isn't happy with the federal government is easy. Finding somebody who will volunteer most of his or her life to doing something about it is extremely difficult.

One such person is Mary Ellen Barilotti.

Retired from the Santa Barbara, California, county attorney's office and now living in Hood River, Oregon. Barilotti has been fighting on behalf of a small nonprofit group called the Western Slope No-Fee Coalition (WSNFC) against the illegal and abusive implementation of the Federal Lands Recreation Enhancement Act (FLREA) or Recreation Access Tax (RAT) to its many critics.

Ground zero for the fight against the RAT is Mount Evans in Colorado. I've already written extensively about the Mount Evans situation (links at end of this column). I've even been one of the victims, having been turned away while trying to pedal my bicycle up to Mount Evans, but finally relenting and paying the \$3.00 toll for permission to ride on a state highway through federal land.



"We've made Mount Evans a poster child for what's wrong with the fee program," agrees Kitty Benzar, President of the WSNFC, "It's the place they (Forest Service chiefs) have obviously decided to make their stand."

"The thing I would emphasize about this is the immense amount of government legal energy that is being expended in trying to defend the indefensible," Benzar told *NewWest.Net* in an email. "The Forest Service (FS) is so clearly in violation of the fee prohibitions in the FLREA at Mount Evans, but for citizens to get their day in court to prove that, there is a wall of Justice Department attorneys standing in the way. The story of all these attorneys vs. Mary Ellen Barilotti, a retired county attorney working alone and pro bono, is a real David-and-Goliath saga."

"We are essentially arguing that they don't have the power to charge fees where they are charging," Barilotti explained to *NewWest.Net* in a phone interview. "We think the law means something."



Any legal challenge to any policy of a federal agency automatically and regrettably, it seems, means a big fight with Big Brother, and the main strategy for federal lawyers is not winning in court, but instead making sure the public's voice is never heard.

And a nasty, infuriating strategy it is, to say the least, but sadly, it usually works.

"We haven't had a day in court yet," Barilotti admitted. "The government doesn't want the merits of the case to be heard. A lot of briefs have been written about why we don't have standing. For a year now, it has been all about standing and that we don't have a right to sue."

She went through the incredible amount of time and work that has gone into the legal battle so far, none of it about the merits of the case, only timely and expensive legal maneuvering to prevent daylight from exposing this injustice. I'll spare you those complicated details, but Barilotti is optimistic the court has started leaning towards allowing the public voice to be heard. "The judge is now saying we may be able to establish a basis to be in court."

How bad is this? A retired attorney working pro bono has to devote her life to fighting a gang of Justice Department lawyers (salaries paid with tax dollars) just to have a day in court to represent the American people. Doesn't exactly sound like Equal Justice Under the Law, even though those words are still engraved above the front door of the U.S. Supreme Court building.

Barilotti filed the first court documents a year ago, May 5, 2008, and since then she has already burned up "thousands of hours" of time and expects this case to take at least another year. She sends her briefs and other documents to three federal attorneys and then they email them to others. "The government is constantly asking for more time and to spread it out," she explains.

I'd like to dig deep into the details of the case, but it's too long and complicated for this forum. If interested in those details, [click here](#) for relevant documents. There is, however, one embarrassment I can't resist exposing.

If you go [here](#), you'll see a court exhibit where Paul Cruz, a FS recreation manager, swears under oath that there are "no developed scenic pullouts or overlooks along the road leading up Mount Evans," even though hundreds of thousands of people who have gone there would quickly disagree. In fact, the overlook on top of Mount Evans (see photo) is probably the most scenic of them all. Cruz had to say that because FLREA specifically disallows charging for overlooks, which the FS is obviously doing on Mount Evans.

When our elected representatives silently slipped FLREA into the law books back in December 2004 as a rider on a must-pass spending bill, some members of Congress were at least concerned enough about potential abuses that they inserted restrictions into the law to prevent federal agencies from charging for access to federal lands, for driving through them, for parking along a road or for simply using federal land for hiking, birding, bicycling, climbing and other outdoor activities. Lawmakers retained the option of charging for

developed “amenities” like campgrounds, picnic areas and visitor centers, but nobody, including WSNFC, has any problems with charging a reasonable fee to use a campground or visitor center, but Barilotti and Benzar believe charging people to drive on a public road through national forest land or to stop to view the scenery is blatantly illegal.



Yet, that is exactly what the FS is doing on Mount Evans and many other places.

In a transparent attempt to usurp the will of Congress, on Mount Evans and 97 more of our most popular and scenic public places, the FS created what the agency calls High Impact Recreation Areas (HIRAs) to sidestep the law. Like the process of “passing” FLREA in the first place, the process of creating HIRAs was behind the scenes without any meaningful public input, let alone a congressional vote.

Barilotti and WSNFC are arguing the obvious. The FLREA prohibited the FS from charging for driving into and parking along public roads through public land, but the FS is doing it anyway by charging a fee to enter the HIRA.

Here’s how it goes. At Mount Evans, you **must stop** at the FS toll booth in the middle of State Highway 3. The attendant doesn’t attempt to explain the law. Instead, he or she just asks for the fee. In the same court document cited above, Cruz says if a traveler “states that he or she is not stopping within the HIRA other than to take a photo at a pull-out or simply take in the view,” the FS won’t charge the fee.

So, according to Cruz, people can drive up to Mount Evans and **stop at pull-outs**, take pictures, and enjoy the view, without paying the fee, but the sign at the toll booth states TRAVEL NON-STOP ON ROAD NO CHARGE.

And then there’s the sign that says PARKED VEHICLES MUST DISPLAY VALID RECREATION PASS.

The end result of the agency’s intentionally misleading approach is, as you can expect, almost everybody pays the fee.

Incidentally, the same issue came up two years ago on Mount Lemon in Arizona, and Barilotti handled that case too, defending Christine Wallace for not paying two tickets she received for using her land without paying, one for parking her car along the road so she could take a hike. This case made it to court, and on the verge of losing this landmark case, the FS dismissed one of the two tickets, the one for parking that could have caused the entire fee program to come crashing down around them.

Based on such responses to litigation from the FS, it's easy to see why Benzar and others who know the law consider the government's position "indefensible," and the FS obviously agrees, which is why the agency has thrown the full force of the federal government at a retired volunteer to make sure the case is never heard. Does that make you see red?

Government agencies facing citizen opposition do this all the time. Government bosses and their lawyers know that volunteerism has limits, so if they make it tough, drag it out, make it expensive, make it frustrating, well, pretty soon, we'll just give up, right?

Unfortunately, yes, most of the time, we do.

Neither Barilotti nor Benzar have any indications that the Obama administration plans to re-direct this Bush administration decision to drag out a mean-spirited fight on fee litigation, and that seems strange to me. For starters, Obama appointed Ken Salazar as Secretary of the Interior, and last year, Salazar was one of the four western senators to sponsor a bill to repeal FLREA.

But the FS is not in the Interior Department. It's a step-child in the Department of Agriculture, now directed by Tom Vilsack.

This case is a leftover from the policy of commercialization and privatization of federal lands so aggressively implemented by the Bush administration, and its top gunslinger, Mark Rey, who has been characterized as Public Lands Enemy No. 1. Just last week, Vilsack appointed Homer Lee Wilkes, a relative unknown from Mississippi, to fill Rey's position. As I write this, Wilkes is awaiting confirmation, so Vilsack is probably waiting for him to get his feet on the ground before taking up this issue.

That's fair enough, but in the meantime, Secretary Vilsack, call off the legal guard dogs and agree to let citizens have a day in court. Does that sound unreasonable?

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