No. 10-1418

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID P. SCHERER *et al.*, Plaintiffs/Appellants,

v.

UNITED STATES FOREST SERVICE *et al.*, Defendants/Appellees.

On Appeal from the United States District Court for the District of Colorado, Magistrate Judge Michael E. Hegarty Presiding

APPELLANTS' OPENING BRIEF

Oral Argument Requested

Submitted November 15, 2010

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this Court. However, a case is pending in the Ninth Circuit on a similar briefing schedule which presents a nearly identical legal issue, *Adams v. U.S. Forest Service*, 9th Cir. No. 10-16711.

STATUTES:

OTHER AUTHORITIES:

JURISDICTION

(A) The district court had jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 2201, as Plaintiffs sought review of a final federal agency action and thus presented a federal question. Plaintiffs' cause of action arose under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

(B) The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291, appeal of a final judgment.

(C) Plaintiffs appeal the district court's final Opinion and Order on the Merits, entered July 22, 2010, and the court's Judgment, entered July 23, 2010. This order and judgment disposed of all parties' claims. Plaintiffs filed their notice of appeal on September 10, 2010, making it timely pursuant to Fed. R. App. P. 4(a)(1)(B), as a federal agency is a party to this case and the notice of appeal was filed within 60 days of the district court's final judgment entered July 23, 2010.

ISSUE PRESENTED

May the United States Forest Service charge fees for picnicking, hiking, and camping in undeveloped areas of the Mount Evans High Impact Recreation Area, and for parking and use of scenic overlooks, despite explicit statutory prohibitions on doing so, based on "administrative convenience"?

STATEMENT OF THE CASE AND OF THE FACTS

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, due to agencies such as the Forest Service charging fees for access to undeveloped public land. Resolutions were passed by many state legislatures, counties, and cities, opposing the imposition of fees under the Fee Demo program for simple access to public lands, 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. Aplt. App. 180-198.

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[1] 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.*

[1] "Expanded" amenity fees are for use of a "specialized facility, equipment, or service" and are not at issue here. 16 U.S.C. § 6802(g).

> (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) (emphases and footnote added).

Accordingly, the Forest Service may charge a fee to users of an "area" that contains bathrooms, picnic tables and the other developed amenities listed subsection (f)(4), except that under subsection (d) it may not charge people entering that area to simply travel through it, use scenic pullouts, or park and hike, picnic or camp in undeveloped

areas, nor may the agency charge other users listed in subsection (d) such as people on official government business or members of Indian tribes with tribal hunting rights.

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 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.*

The Mount Evans High Impact Recreation Area and This Lawsuit

In April of 2005, the Forest Service issued "Interim Implementation Guidelines" to implement the REA on Forest Service lands. Aplt. App. 71. They were not subjected to notice and comment. *See id.* Among other things, the Guidelines created the authority to establish High Impact Recreation Areas ("HIRA"s), defined as

> a clearly delineated, contiguous area with specific, tightly defined boundaries and clearly defined access points (such that visitors can easily identify the fee area boundaries on the ground or on a map/sign); that supports or sustains concentrated recreation use; and that provides opportunities for outdoor recreation that are directly associated with a natural or cultural feature, place. or activity (i.e., waterway, canyon, travel corridor, geographic attraction - the recreation attraction).

Aplt. App. 79.

In September of that year, the Forest Service designated the Mount Evans HIRA, through issuance of the Mount Evans REA Implementation Plan. Aplt. App. 105. This is the "final agency action" challenged in this case. Aplt. App. 267-270. The Mount Evans HIRA "encompasses the last fifteen miles of Colorado State Highway Five, which runs through the Arapaho National Forest in Colorado." Aplt. App. 259. It is surrounded by the Mount Evans Wilderness Area, and

provides major access points for hiking into the Wilderness Area. *See* maps at Aplt. App. 128-129.

The Forest Service charges a "'standard amenity recreation fee' for 'recreational use' of the HIRA, in the amount of $10.00 per vehicle or $3.00 for pedestrians," including for those visitors who simply enter by foot, bicycle or automobile to picnic, hike, or camp in undeveloped areas, including the adjacent Wilderness Area, without using any of the developed amenities in the HIRA. Aplt. App. 259-260; Aplt. App. 107 ("All visitors, age 16 or older, who use designated road corridors for travel or for parking must pay a standard amenity fee."); Aplt. App. 111-112; Aplt. App. 133-135 (pictures showing examples of unimproved highway pullouts for which fees are charged).

The Forest Service charged these access fees for Mount Evans pursuant to the now-defunct Fee Demo program, prior to creating the Mount Evans HIRA under the REA. *See* Aplt. App. 66-70. The only management changes were adding some picnic tables and: "To meet the requirements of the REA for not charging an entrance fee, the Mount Evans staff . . . delet[ed] the words 'entrance fee' from all signs, maps [etc.]." Aplt. App. 108.

There was a factual dispute below as to whether the Forest Service charges those using scenic pullouts when they stay in their vehicle or park and stay within "close proximity." Aplt. App. 281 n.8. However, the Forest Service's support for their argument that they do not was based purely on an extra-record declaration, while the administrative record shows that only those engaged in non-stop travel can avoid paying a fee. *Compare id.*[2] *with* Aplt. App. 131-132 (signs stating fee required for parked vehicles); Aplt. App. 115 (Fee Station Operations Manual expressing no exemption for those parking at scenic

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[2] The district court based its acceptance of the Forest Service's representation that it does not charge for scenic overlooks on "docket #113 at 33." *Id.* That refers to the PDF page number of Forest Service's brief on the merits, which was actually replaced with an identical document at docket #115 due to a docketing error. *See* Aplt. App. 15 # 116; Aplt. App. 240. The Forest Service there relies on its Statement of Facts ¶ 14, which is located at PDF pages 14-15 (internal document pages 6-7) of its brief. Aplt. App. 221-222. That in turn relies on an extra-record declaration of Paul E. Cruz appended to the administrative record by the Forest Service. *See* Aplt. App. 65 (final entry); Aplt. App. 139. To the extent the Court wishes to consider extra-record evidence, it has been plaintiffs' experience that while the Forest Service represented in court that its policy is to not charge for stopping at scenic overlooks, the on-the-ground reality at Mount Evans is quite different, experience that the signage in the record supports, and which contradicts Mr. Cruz's declaration. Aplt. App. 202-203 (Declaration of plaintiff David P. Scherer). Mr. Cruz's explanation does not even make sense, as the signage upon which he relies is the same as just discussed that allows no exception for using scenic pullouts.

overlooks); Aplt. App. 116 (Fee Collector Greeting Instructions, stating only those traveling "nonstop" are exempt from fees); Aplt. App. 117 (operation document stating same).

The 15 miles of Mount Evans HIRA corridor includes one site, the Dos Chappell Nature Center at Mount Goliath, which plaintiffs concede contains most of the required amenities and/or constitutes a "visitor or interpretive center" (*see* 16 U.S.C. § 6802(f)(3)) under the REA that warrants charging a fee for using that site. *See* Aplt. App. 106,109. It also includes a second site, the Summit Lake Mountain Park owned by the City and County of Denver, for which the Forest Service charges fees pursuant to a cooperative agreement with the City and County. Aplt. App. 122. While the city's Mountain Park contains developed (but non-federal) amenities, the parking area there also provides access to a scenic overlook (Chicago Lakes Overlook), and two designated trailheads that both lead into the Mount Evans Wilderness Area, as well as general access to other undeveloped federal land. *See* Aplt. App. 129 (map). The Forest Service puts "Notice of Required Fee" envelopes on vehicles parked there which do not display payment passes in order to induce payment, even though the agency has acknowledged that it

"has no authority to write violation notices for this area." Aplt. App. 118; *see also* Aplt App. 123 ¶ 7.

A third destination site on Mount Evans is the scenic overlook and adjacent amenities known as The Summit. Aplt. App. 106. It consists primarily of parking spots with room to stand and look at the view, and next to the parking lot a visitor can walk to an area containing bathrooms, interpretive signs, and a viewing platform with spotting scopes. *See id.* A fourth destination area on Mount Evans, the Mount Goliath Natural Area, contains interpretive signs but is "otherwise protected from human influence . . .." Aplt. App. 105.

Other than these 4 sites, the Mount Evans HIRA largely contains nothing more than the 15 miles of state highway and pullouts maintained by the state, from which visitors access Wilderness and other undeveloped lands, as well as trailheads and scenic overlooks. Aplt. App. 105-106, 109 (Implementation Plan); Aplt. App. 133-135 (photographs); Aplt. App. 50 ¶ 42 (answer).

Plaintiffs are individuals who enter the Mount Evans HIRA to bicycle, hike, and otherwise recreate in undeveloped portions of the HIRA and/or use it to access Wilderness and other undeveloped lands

beyond the HIRA, without using the developed amenities of the HIRA other than the road itself, as well as scenic pullouts and parking areas along the road. Aplt. App. 21-23, 202-203. They have at times reluctantly paid the fees imposed at the HIRA, have been threatened with criminal prosecution for allegedly failing to pay, or have reduced their use of the area due to the fees. *Id.* They brought this suit to challenge the Forest Service's practice of charging for these activities in the Mount Evans HIRA in May of 2008, and after some initial court proceedings that are no longer relevant, filed a Second Amended Complaint in April of 2009. Aplt. App. 17. This complaint contained one claim, alleging *inter alia* that the Forest Service is violating the REA by charging fees for non-amenity recreational activities in the Mount Evans HIRA. Aplt. App. 32-35.

The parties filed briefs on the merits pursuant to the procedures outlined in *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), and the district court issued its final opinion and order on July 22, 2010, ruling for the Forest Service. Aplt. App. 143-288. The district court ruled that despite the explicit prohibitions of the REA against charging fees for parking, picnicking, hiking or camping in

undeveloped areas, the Forest Service may impose fees on those entering the HIRA for those purposes who do not use the developed amenities because "[w]ithout the setting of a geographic area within which the fee may be collected, Defendant Forest Service would be tasked with monitoring each visitor's activities within the HIRA to determine, on a case by case basis, whether the visitor is participating in an activity that implicates a fee." Aplt. App. 280-281.

SUMMARY OF ARGUMENT

The REA unequivocally prohibits the Forest Service from charging fees for parking, hiking, picnicking, or camping in undeveloped areas of public lands, traveling through public lands without using the facilities and services, or for visiting scenic overlooks, yet the agency does just that in the Mount Evans HIRA. The agency argues that it can do so for the sake of administrative convenience, since to allow visitors engaged in these activities to not pay would make it more difficult to collect fees for activities that it may charge for, such as use of the Nature Center. However, administrative convenience does not allow a federal agency to violate an explicit

Congressional command, and the Forest Service is plainly violating the REA by collecting fees for these activities in the Mount Evans HIRA.

This case can be decided without consideration of what level of deference to the Forest Service's interpretation of the REA might be applicable if the relevant portions of it were deemed ambiguous, since its language is plain and its meaning clearly discernable and therefore under step one of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), no deference is owed to the agency's interpretation. However, even if the meaning of the relevant portions of the REA were not plain, the Forest Service would deserve little to no deference to its interpretation because its interpretation has been inconsistent, it is biased by the pecuniary incentive, was not subject to public notice and comment, was not the subject of deliberation in a manner normally worthy of deference, and violation of the REA may result in misdemeanor criminal penalties. But even under the most deferential standard applicable, the Forest Service's interpretation cannot be deemed reasonable, as it violates the intent of the REA which is to prohibit the charging of fees for recreation on undeveloped federal lands.

ARGUMENT

I. Standard of Review

"'[I]n reviewing a district court's review of an agency decision, the identical standard of review is employed at both levels; and once appealed, the district court's decision is accorded no particular deference.'" *Exxon Mobil Corp. v. Norton*, 346 F.3d 1244, 1248 (10th Cir. 2003) (citations omitted).

Judicial review of agency action is governed by section 706 of the APA, which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971); *Olenhouse, supra*, 42 F.3d at1573. "These standards require the reviewing court to engage in a 'substantial inquiry.' An agency's decision is entitled to a presumption of regularity, 'but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review.'" *Id.* at

1574 (citing *Citizens to Preserve Overton Park,* 401 U.S. at 413).

Agency action should be set aside "if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.,* 463 U.S. 29, 43 (1983).

"The duty of a court reviewing agency action under the 'arbitrary and capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts and the decision made." *Olenhouse*, 42 F.3d at 1574. "In addition to requiring a reasoned basis for agency action, the 'arbitrary and capricious' standard requires an agency's action to be supported by the facts in the record." *Id.* at 1575.

Where, as here, the Court is asked to determine the legal meaning of a statutory provision, it must first ask whether Congress has "directly spoken" to the issue at hand, and if so, the Court must give effect to that plain intent without affording any deference to a

contrary agency interpretation. *Chevron*, 467 U.S. at 843 ("*Chevron* Step One"). "[A]s the Supreme Court indicated in *Chevron* and has reiterated since then, the reviewing court must 'employ[ ] traditional tools of statutory construction'--including, when appropriate, legislative history--to determine whether Congress 'had an intention on the precise question at issue.'" *Ohio v. U.S. Dep't of Interior*, 880 F.2d 432, 441 (D.C. Cir.1989) (citations omitted).

Only if a court determines that a statutory phrase is ambiguous should it proceed to *Chevron* Step Two, in which it employs various levels of deference to agency interpretations. But only consistent interpretations arrived at through "a formal adjudication or notice-and-comment rulemaking," untainted by other factors such as pecuniary bias or a lack of deliberation on the relevant statutory issue, "warrant *Chevron*-style deference." *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citations omitted). Even in cases where full deference is warranted, courts must not "rubber stamp . . . decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *BATF v. FLRA.*, 464 U.S. 89, 97 (1983).

II. Charging Fees for Undeveloped Recreation in the Mount Evans HIRA Violates the REA[3]

The plain language of the REA prevents the Forest Service from charging for parking, picknicking, hiking, camping, and use of scenic overlooks in the Mount Evans HIRA and adjacent federal lands, yet the Forest Service charges visitors engaged only in these activities, and so is in violation of the law. Even if the language of the REA were not deemed plain, the Forest Service's interpretation of the REA which allows charging fees for these activities cannot be accepted, due to the minimal deference owed to the Forest Service's interpretation here, and the conflict of the agency's interpretation with the language, policy and legislative history of the REA.

A. The Plain Language of the REA Contradicts the Forest Service's Position

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

[3] Pursuant to 10th Cir. R. 28.2(C)(2), this sole issue on appeal was raised at Aplt. App. 143-258, and ruled on at Aplt. App. 259-289.

for parking, undesignated parking, or picnicking along roads or trailsides," "[f]or persons who are . . . walking through . . . horseback riding through, or hiking through Federal recreational lands and waters without using the facilities and services," "[f]or camping at undeveloped sites that do not provide a minimum number of facilities and services as described [below]," or "[f]or use of overlooks or scenic pullouts." 16 U.S.C. § 6802(d). However, the Forest Service does just that in the Mount Evans HIRA, and so is in violation of the REA.

The Forest Service acknowledges that generally it may not charge for subsection (d) uses in HIRAs, including Mount Evans. For instance, subsection (d) states that the Forest Service may not charge "persons who are driving through . . . without using the facilities and services." 16 U.S.C. § 6802(d)(1)(D). And in fact, the Forest Service exempts such users from paying fees in the Mount Evans HIRA, at least if they travel non-stop. Aplt. App. 115-117,131-132. The agency also exempts "local, state or federal employees on official business" as required by 16 U.S.C. § 6802(d)(1)(J) Yet, it charges users such as the plaintiffs who enter the HIRA to visit the scenic overlooks, or to picnic, hike, or camp in the Mount Evans Wilderness Area and other undeveloped areas accessible

from the Mount Evans HIRA.[4]

The Forest Service does so on the grounds of administrative convenience. According to the Forest Service (and as accepted by the district court), acknowledging the "drive through" fee prohibition of subsection (d) is no problem, since such users have no potential to use the developed amenities, while those who leave a parked car, or who entering on foot or bicycle, could potentially do so. It is the Forest Service's argument that if it had to acknowledge all the limitations of subsection (d), the agency would have to engage in more onerous enforcement efforts instead of just being able to charge non-drivers and ticket all unattended vehicles without a payment pass, and therefore it should be exempted from most of the explicit Congressional limitations on charging fees in subsection (d). *See* Aplt. App. 281.

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[4] As noted above, there is some dispute on the extent to which the Forest Service actually tickets those parked at scenic overlooks, and if the agency does not, whether visitors are actually told that when they enter, or whether they are wrongly induced to pay through instructions given at the pay station. *See* note 2 and acc. text, *supra.* However, the Forest Service does not dispute that it charges for anyone who either enters the park without a car, or who enters with a car, parks, and leaves his vehicle to hike and camp in undeveloped areas without using any developed amenities of the HIRA. Accordingly, this factual dispute need not necessarily be resolved to decide this appeal, as the larger legal issue remains presented regardless.

This argument is absolutely contrary to law, and reads an "administrative convenience" clause into the REA which is not found there. As this Court and the Supreme Court have stated, "administrative convenience cannot be countenanced when the . . . regulations contravene the plain language of the statute." *Everhart v. Bowen*, 853 F.2d 1532, 1537 (10th Cir 1988), *rev'd on other grounds Sullivan v. Everhart*, 494 U.S. 83 (1990); *see also California v. Johnson*, 543 U.S. 499, 522 (2005) ("administrative convenience" no excuse for failure of government to comply with law); *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1200 (10th Cir. 2009) (enforcing laws where not authorized "as a matter of administrative convenience . . . raises serious legal concerns"); *19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1076 (10th Cir. 1998) ("administrative convenience" cannot be used by government as grounds to exceed legal authority).

As one court has stated, where another agency within the U.S. Department of Agriculture tried to excuse its noncompliance with an explicit Congressional directive on similar grounds:

> We are troubled that the USDA may have acted more out of concern for administrative convenience and self-interest, rather

> than with an interest in administering the Act according to statutory requirements and Congressional intent. * * * The USDA failed to fulfill its responsibilities in this regard. It put administrative expediency ahead of the intent of Congress . . ..

Amalgamated Sugar Co. LLC v. Vilsack, 563 F.3d 822, 834, 836 (9th Cir. 2009). The Forest Service may consider the REA to be a "tough law," but it is "not at liberty to ignore" it. *See Northwest Envtl. Defense Ctr. v. Brown*, 617 F.3d 1176, 1188 (9th Cir. 2010) (EPA may not ignore mandates of Clean Water Act simply because they are difficult to administer).

The Forest Service's observation of only those subsection (d) fee prohibitions which are administratively convenient "reads into the statute a drastic limitation that nowhere appears in the words Congress chose." *Hercules, Inc. v. EPA*, 938 F.2d 276, 280 (D.C. Cir. 1991). The REA states that the Forest Service "shall not charge" for parking and picnicking, hiking and camping in undeveloped area, and "'[s]hall' means shall" when interpreting a Congressional command, and speaks of no discretion to ignore it. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (agency cannot avoid statutory command based on policy and budget concerns).

Although the language of subsection (d) is plain enough to discern its meaning, the legislative history confirms its plain meaning. As discussed above in the Facts section, Representative Pombo, the committee chair during the passage of the REA who was also supportive of the REA's predecessor Fee Demo program, stated in the House report that the REA

> 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 and the FWS may continue to charge an entrance fee.

H.R. Rep. 108-790(I), *supra,* 2004 WL 2920863 at *18 (emphases added).

In a recent ruling from the District of Arizona, the court agreed with this plain reading of the REA (a.k.a. "FLREA"):

> Under the first step of the *Chevron* test, the Court finds the statutory language completely clear with regard to the extent of the authority conferred to charge a citizen a recreational amenity fee. Congress expressed a manifest intent in the FLREA that a fee not be charged solely to park on the National Forest, or at a site where the six specific listed "amenities" were not found. The FLREA is an extremely comprehensive and precise statutory scheme clearly delineating specific instances in which the public may be charged an amenity fee for use of the National Forests,

> and other public lands, and quite plainly prohibiting the agency from establishing any system which requires the public to pay for parking or simple access to trails or undeveloped camping sites.
>
> * * *
>
> The very plain language of the statute prohibits the Forest Service from charging a fee for entering, *i.e.*, accessing, a National Forest. The statute also clearly and specifically prohibits charging an amenity fee solely for parking a vehicle in an undeveloped parking lot. It is apparent that [the defendant] Mr. Smith would not have received a ticket had he not parked a vehicle, *i.e.*, had a friend delivered him to the trailhead and retrieved him the following day. Accordingly, what Mr. Smith received was actually a ticket for parking, clearly prohibited by the plain language of the statute.

United States v. Smith, ___ F. Supp. 2d ___, 2010 WL 3809994 at *9-10 (D. Ariz. 2010).[5]

Accordingly, the plain language of the REA, as confirmed by its legislative history, shows that the Forest Service may not charge fees for scenic overlooks, or parking, picnicking, hiking or camping in undeveloped areas in the Mount Evans HIRA and beyond.

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[5] The *Smith* court tried to distinguish its decision from the district court's decision below on the facts, but the factual differences lead to no different result. *See* 2010 WL 3809994 at *11 n.14. Both cases involve whether someone not using the developed amenities in a HIRA needs to pay a fee; the squarely on-point answer provided by *Smith* is "no."

B. Even if the Meaning of the REA were Not Clear, the Forest Service's Interpretation Could Not be Accepted

In this case, "[t]he statute is not at all ambiguous, but instead is exquisitely clear, concerning what the [agency] must do . . .." *See Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837 (9th Cir. 2001) (employing *Chevron* Step One and declining to proceed to Step Two to employ deference in interpreting a statute). Accordingly, the Court need not consider what level of deference would be appropriate under *Chevron* Step Two, or otherwise determine if the Forest Service's interpretation is acceptable, if it agrees with Plaintiffs that the meaning of the relevant sections of the REA is plain.

However, in the event that the Court does proceed to Step Two of *Chevron*, the Forest Service should not receive deference to its interpretation of the REA for several reasons. Further, no matter what level of deference were accorded to the Forest Service, its interpretation simply cannot be reconciled with the language and legislative intent of the REA.

Taking that last point first, even if full *Chevron* deference were employed, charging the public engaged in activities for which fees are prohibited by the REA as a way to simplify enforcement would not

constitute a "reasonable" interpretation of the statute. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002) ("[E]ven if the Secretary were authorized to [act] for her administrative convenience, this particular rule would be an unreasonable choice."). As the Supreme Court has stated, even in cases when full deference is warranted, courts must not "rubber stamp . . . decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *BATF, supra,* 464 U.S. at 97.

Here, the legislative history makes clear that Congress made the REA "overly prescriptive" in order to "ma[k]e clear that the USFS and the BLM will not be permitted to charge solely for parking, scenic pullouts, and other non-developed areas . . .." H.R. Rep. 108-790(I), *supra*, 2004 WL 2920863 at *18. As explained by *United States v. Smith (supra)*:

> [A]lthough Congress did not specifically limit the geographic size of an "area" in the FLREA, elsewhere in the same section of the legislation Congress expressed an intent to prohibit the Forest Service from charging citizens solely for parking at undeveloped parking sites or for casual use of remote sites, such as dispersed camping or hiking. Congress indicated an intent to not charge citizens an amenity fee for use of sites where six specific amenities were not provided. By prohibiting the Forest Service

> from charging the public simply for access and parking, and stating that the Forest Service could only charge an amenity fee at "areas" with amenities, Congress clearly intended to exclude from the definition of an "area" a place without amenities where the result would be that the public would be charged solely to park or for general access or undeveloped camping.

2010 WL 3809994 at *12.

That would be the result even assuming that full *Chevron* deference were warranted, where the agency would only need to show that its interpretation constituted a "reasonable" interpretation of the statute. However, such deference is not warranted, for several reasons. First, the Forest Service has not consistently held the position that it can charge for those entering HIRAs who do not use developed amenities, and "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (citation omitted). As the Forest Service has variously stated in the record: "[The REA] says that if people are driving through they don't have to pay unless they stop to use the facilities. * * * But don't advertise this capability . . .." Aplt. App. 104; "[Those] *who do not park and use the amenities* have not been charged a fee." Aplt. App. 120 (emphasis in original). *See also*

United States v. Wallace, 476 F. Supp. 2d 1129,1133 (D. Ariz. 2007) (observing that, unlike in the Mount Evans HIRA, those visiting the Mount Lemmon HIRA in Arizona can avoid a fee by arriving on bike, horseback or foot, which represents a different interpretations of 16 U.S.C. § 6802(d)(1)(D)) than that presented here by the agency).[6]

A second reason for according little to no deference here is the self-serving pecuniary incentive for the Forest Service's interpretation:

> Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute. We acknowledge that "self-interest alone gives rise to no automatic rebuttal of deference." *See Independent Petroleum Ass'n of America v. DeWitt*, 279 F.3d 1036, 1040 (D.C. Cir. 2002). However, *Chevron* deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, and (2) the construction advanced by the agency is arguably inconsistent with Congressional intent.

Amalgamated Sugar, supra, 563 F.3d at 834 (*citing, inter alia, Chevron*, 467 U.S. at 843 n. 9).

A third reason for according little to no deference is the fact that neither the Mount Evans Implementation Plan, nor the Forest Service's

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[6] The *Wallace* court ultimately ruled similarly to the district court in this case, which plaintiffs obviously disagree with.

Interim Implementation Guidelines that created the concept of HIRAs, were subject to notice and comment rulemaking. *See* Aplt. App. 71-103, 105-109. Accordingly, at most the positions in those documents are entitled to only "power to persuade" deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). *Christensen v. Harris County*, *supra*, U.S. at 587 ("[I]nterpretations contained in policy statements, agency manuals, enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.").

A fourth reason for little to no deference is the lack of relevant legal deliberations contained in either the Implementation Plan or the Interim Guidelines on the issue at hand. As one court put it, "the Handbook address[es] the issue before us only tangentially. The rules and the Handbook, therefore, have no 'power to persuade' us of any particular interpretation" of the statutory phrase. *Northern Cal. River Watch v. Wilcox*, 620 F.2d 1075, 1088 (9th Cir. 2010). The same is true here. The Forest Service argued below that the term "area" in the REA (16 U.S.C. § 6802(f)(4)), upon which the creation of HIRAs in the Guidelines was based, was ambiguous and therefore deference was due to the Forest Service's interpretation of the REA as contained in the

Guidelines. Aplt. App. 231. However, that argument is beside the point, because plaintiffs do not challenge the idea of HIRAs or the creation of the Mount Evans HIRA *per se*. Rather, plaintiffs challenge the practice of charging fees for entering the Mount Evans HIRA when a person only seeks to recreate in the undeveloped portions in the HIRA and beyond without using the developed amenities, and neither the Guidelines nor the Implementation Plan grapple with this issue in any meaningful way. *See U.S. v. Smith, supra*, 2010 WL 3809994 at *11 ("None of the *Skidmore* factors that weigh in favor of persuasion are present in this matter, *i.e.*, there is no indication that the agency thoroughly considered where an amenity fee could or could not be charged, pursuant to the explicit terms of the new statutory scheme.").

A fifth reason for reduced deference is that because the failure to pay a Forest Service recreation fee is punishable as a misdemeanor crime (16 U.S.C. § 6811(d)), "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

The Forest Service's "harsher alternative" reading of the REA accordingly deserves little deference.

With these deference issues in mind, an examination of additional provisions of the REA cited by the Forest Service and relied upon by the district court below shows that they aid the Forest Service's position no better than the directly applicable provisions of the REA discussed above. It is true that the REA states that "areas" where fees can be charged must be "where fees can be efficiently collected," and that this requirement is reiterated in the authority for creating HIRAs in the Guidelines. 16 U.S.C. § 6802(f)(4)(C); Aplt. App. 79 (Interim Guidelines); *see* Aplt. App. 281 (district court opinion). However, no amount of deference[7] could save the plain meaning of that phrase, which is that a *prerequisite of designating a fee area* such as a HIRA must be that fees can be "efficiently collected" there; it cannot be read

[7] No deference to the Forest Service's interpretation of this phrase is warranted for a sixth additional reason beyond the reasons discussed above, namely that the Guidelines simply reiterate this phrase taken from the REA, and "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

to mean that once a fee area is designated, that the agency can charge fees for subsection (d) activities within that area. This phrase comes from subsection (f) which creates the authority to create fee areas, "[e]xcept as limited by subsection (d) of this section." 16 U.S.C. § 6802(f). Accordingly, the limitations of subsection (d) trump the provisions of subsection (f), not the other way around.

In addition to the "efficiently collected" provision, the district court relied on the subsection of the REA which directs that agencies "shall avoid the collection of multiple or layered recreation fees for similar uses, activities, or programs." Aplt. App. 281, *quoting* 16 U.S.C. § 6802(c). This provision does not aid the Forest Service's interpretation. The *full* subsection states: "The Secretary shall establish the minimum number of recreation fees and shall avoid the collection of multiple or layered recreation fees for similar uses, activities, or programs." It is plain that the aim of this subsection is to *limit* the imposition of fees such that an agency may not charge more than one fee for a single activity, if charging for a certain activity is permitted at all. As such, it has no bearing here, and cannot be read to permit charging for subsection (d) activities. If anything, it is yet

another example of the "overly prescriptive" nature of the REA in limiting the discretion of the Forest Service to collect fees.

Finally and as a practical matter, allowing users of all subsection (d) activities to pass the Mount Evans fee station without paying would not create an undue hardship on the Forest Service. The agency could generally trust the members of the public to be honest about their intended activities, and agency staff could tell visitors at the payment station that they do not have to pay unless they will be using the developed amenities. That trust could be enforced with patrols of the developed amenities to look for payment passes, which would require *less* enforcement effort than is now used to check *all* parked cars in the HIRA along State Highway 5 etc. True, this might result in a few scofflaws using developed amenities without paying. However, "[t]hat one who may be guilty goes free is a small price to ensure that all who are innocent live freely." *United States. v. Wogan*, 356 F. Supp. 2d 462, 470 (M.D. Penn. 2005), *citing, inter alia, Silverthorne Lumber v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.).

In fact, such a situation is common on Forest Service lands. For instance, one must buy a permit at a local Forest Service office or

commercial outlet to cut down a Christmas tree on Forest Service lands, and the agency does not erect payment stations for this activity and charge everyone entering the Forest a fee to cut a Christmas tree based on the fear that otherwise it would be too hard to catch people doing so without a permit. Rather, the public is mostly on its honor to buy a permit, and the Forest Service backs this up with random enforcement throughout the Forest even though some Christmas tree cutters undoubtedly fail to get a permit.

But regardless, even if following the law made more work for the Forest Service or caused it to suffer a loss in revenue, that policy choice was made by Congress in enacting the fee prohibitions of REA subsection (d), and the Forest Service is simply not permitted to ignore them for the sake of ease of enforcement.

CONCLUSION AND REQUESTED RELIEF

For these reasons, the district court's judgment should be reversed.

REASON FOR REQUESTING ORAL ARGUMENT

Oral argument is requested. This case addresses a matter of great public interest involving access to federal lands, and will likely create important precedent applicable to areas beyond Mount Evans as well, and so deserves the attention and study that oral argument provides.

Respectfully submitted November 15, 2010

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify that this brief is proportionally spaced, using a 14-point Century Schoolbook font. It contains 7,650 words, which complies with the requirements of Fed. R. App. P. 32(a).

/s/Matt Kenna
Matt Kenna

CERTIFICATE OF SERVICE

I certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on November 15, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I will serve one copy of Appellants' Appendix, and a courtesy paper copy of the brief, on the following counsel of record by First-Class, U.S. Mail on November 16, 2010.

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/s/Matt Kenna
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ADDENDUM:

District Court Order & Judgment Being Reviewed

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

DAVID P. SHERER,
JOHN H. LICHT,
MIKE LOPEZ,
BARBARA BRICKLEY, and
AARON JOHNSON,

Plaintiffs,

v.

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

Defendants.

OPINION AND ORDER ON THE MERITS

Michael E. Hegarty, United States Magistrate Judge.

This case comes before the Court for resolution on the merits of the Plaintiffs' claims. The parties consented to the jurisdiction of a Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Docket #27.) The matter is fully briefed, and oral argument would not materially assist the Court in its adjudication. The Court considers the Plaintiffs' brief (docket #112), the Defendants' response (docket #115), and the Plaintiffs' reply (docket #117), in addition to the Administrative Record as designated (dockets ##83, 108, 120).

The Mt. Evans High-Impact Recreation Area ("HIRA") encompasses the last fifteen miles of Colorado State Highway Five, which runs through the Arapaho National Forest in Colorado. (*See* docket #112 at 7-8.) *See also* Admin. R. at E00593. Pursuant to the Federal Lands Recreation Enhancement Act ("REA"), the United States Forest Service charges a "standard amenity recreation

fee" for "recreational use" of the HIRA, in the amount of $10.00 per vehicle or $3.00 for pedestrians. (Docket #113 at 9.) Admin. R. at E00468-469 (fee schedule dated March 2008). In this lawsuit, Plaintiffs assert that Defendant Forest Service "unlawfully demand[s] standard amenity fees, under threat of criminal enforcement" at Mt. Evans, "in excess of the Service's statutory authority." (*Id*. at 7.) For the reasons stated below and the entire record herein, the Court finds that, pursuant to the Administrative Procedures Act ("APA") standard of review and the plain language of the REA, Defendants did not exceed their statutory authority, nor did the challenged action constitute an arbitrary or capricious exercise of such authority. Accordingly, Defendants are entitled to judgment in their favor on all claims in this case, and judgment for Defendants will enter contemporaneously with this order.

LEGISLATIVE AND STATUTORY BACKGROUND

Congress initiated the Recreation Fee Demonstration program in 1996, which authorized revenue generated by charging fees for the use of and access to federal lands. The Federal Lands Recreation Enhancement Act ("REA"), enacted in 2004, repealed the Recreation Fee Demonstration program and established new guidelines governing the collection of fees "at Federal recreational lands and waters." 16 U.S.C. §§ 6801-6814. *See also Lauran v. U.S. Forest Service*, 141 F. App'x 515, 518 n.1 (9th Cir. 2005). The purpose of the REA "is to improve recreational facilities and visitor opportunities on federal recreational lands by reinvesting receipts from fair and consistent recreational fees and passes . . . ." H.R. Rep. No. 108-780(I), 2004 WL 2920863, at *12 (2004). Congressman Pombo, in a report on the REA submitted to the House of Representatives Committee on Natural Resources, identified a concern with the previous Fee Demonstration Program as "the possibility of creating an unreasonable barrier to public use" by the collection of fees on certain federal lands. *Id*. However, the report indicated that the "agencies have concluded that fees do not present such a barrier to public use," as "recreation fees are such a small part of the overall expense

for a visit to a recreation site that indeed, they play almost no role in the decision-making process." *Id*. at *13. The report represented that "mitigation measures such as providing reasonably priced annual passes and free days have been put in place." *Id*. Congressman Pombo explained how "one of the main purposes of H.R. 3283 [the REA] and the Fee Demo Program is to enhance the visitor experience by investing fees in improving recreation opportunities." *Id*. Congressman Pombo noted that the REA "includes specific restrictions to ensure that any established fee would be for managed recreation purposes that contain substantial federal investment for the visitor." *Id*.

Plaintiffs allege the Defendants have violated, and continue to violate, specific provisions within the REA. (Docket #67 at 10-12.) Section 6802(a) authorizes the Secretary of Agriculture, with respect to the Forest Service, to "establish, modify, charge, and collect recreation fees at Federal recreational lands and waters as provided for in this section." Section 6802(f) articulates criteria for charging a "standard amenity recreation fee," which is the fee in question at the Mt. Evans HIRA. Section 6802(f), in pertinent part, provides that a standard amenity recreation fee may be charged as follows:

> Except as limited by subsection (d) of this section, the Secretary may charge a standard amenity recreation fee for Federal recreational lands . . under the jurisdiction of . . . the Forest Service, but only at the following:
> . . .
> (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.

The limiting provision referred to in Section 6802(f), Section 6802(d)(1), lists certain limitations on fee collection, stating:

> The Secretary shall not charge any standard amenity recreation fee . . . for Federal recreational lands . . . administered by . . . the Forest Service . . . 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.
> . . .

Additionally, Section 6802(e)(2) explicitly bars charging an entrance fee "for Federal recreational lands and waters managed by . . . the Forest Service." Section 6801(3) defines an entrance fee as "the recreation fee authorized to be charged to enter onto lands managed by the National Park Service or the United States Fish and Wildlife Service."

Section 6811 describes the enforcement authority and permissible mechanisms to ensure payment of the recreation fees as authorized by the REA. Section 6811(a) dictates that the Secretary "shall enforce payment of the recreation fees authorized by this chapter." Section 6811(d) provides the penalty for non-payment as "a Class A or Class B misdemeanor, except that in the case of a first offense of nonpayment, the fine imposed may not exceed $100 . . . ."

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs challenge a September 2005 implementation plan issued by Defendant Forest Service, which designated the Mt. Evans recreational area corridor as a HIRA pursuant to the REA.[1]

[1]Plaintiffs initiated this action on May 5, 2008. After filing their first Amended Complaint, this Court adjudicated a Motion to Dismiss filed by Defendants and dismissed the action initially with prejudice for Plaintiffs' failure to properly allege a waiver of sovereign immunity. (Docket

(*See* docket #100 at 1-2.) Plaintiffs, all residents of Colorado, attest to their use of the Mt. Evans HIRA for parking, taking photos, skiing, climbing, picnicking, hiking, and other recreational activities. (Docket #67 at 5-7.) Plaintiffs claim that the Forest Service charges what can be considered an entrance fee, which is prohibited by the REA, in that the Service "continue[s] to charge a fee for motorists entering the HIRA, despite Congress's specific requirement that persons must be allowed, without charge, to travel through the area without stopping to use any amenities." (Docket #112 at 20.) Plaintiffs describe how "the Forest Service charges a fee for all activities except nonstop travel anywhere within the Mt. Evans HIRA, including visitors parked within the state highway right of way, in City- and County-owned Parks, and at overlooks and scenic pullouts." (*Id*. at 23.) Plaintiffs believe that this practice clearly contradicts the limiting language in the REA. (*See id.*)

Citing to the Administrative Record, Plaintiffs allege that Defendant Forest Service threatens criminal prosecution for failure to pay the standard amenity fee. (Docket #112 at 29.) Plaintiffs represent that the Service issues violation notices to visitors who have not paid the fee, and "the notices are authorized charging commission of a misdemeanor and levying a fine." (*Id.*) Plaintiffs believe that because criminal penalties are at issue, *Chevron* deference to agency action is inapplicable. (*Id*. at 13.)

In addition to contesting the charge and collection of a standard amenity fee in the Mt. Evans HIRA generally, Plaintiffs challenge Defendant Forest Service's alleged regulation of conduct on non-federal land within the HIRA. (Docket #112 at 31.) Plaintiffs believe that the REA conveys no such authority, nor does the Property Clause overtly permit "enforc[ing] federal law on non-

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#54.) Upon a Motion for Reconsideration filed by Plaintiffs, the Court adjusted its order to dismissal without prejudice and permitted Plaintiffs to file a Second Amended Complaint on April 23, 2009, which is presently the governing pleading. (*See* dockets ##65, 67.)

federal land." (*See id.* at 33.) This argument applies to the Summit Lake Denver Mountain Park and Echo Lake Denver Mountain Park within the Mt. Evans HIRA. (Docket #67 at 18.)

The REA does not provide for a private right of action, thus, Plaintiffs rely on the judicial review provisions of the Administrative Procedure Act ("APA") in bringing their claims.[2] (Docket #67 at 5; *see also* docket #98.) Plaintiffs contend that this Court reviews the actions of Defendant Forest Service *de novo*. (Docket #112 at 8.) Plaintiffs request the Court to find that Defendant Forest Service exceeded the scope of its legislative authority and to enjoin Defendant "from any further implementation of its policy of charging for all uses except nonstop travel in the Mt. Evans HIRA." (*Id*. at 35.)

Defendants assert that Plaintiffs "have confused the standard of review for an appellate court reviewing a district court's decision with the standard of review for a district court reviewing final agency action under the APA." (Docket #113 at 18.) Defendants believe, pursuant to the APA, this Court's standard of review is limited to determining whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." (*Id*. at 17 (citing 5 U.S.C. § 706(2)(A)).) Under this standard, Defendants ask the Court to uphold the Service's designation of "the Mt. Evans HIRA as an area within which the Forest Service can collect a standard amenity recreation fee." (*Id*. at 19.) Defendants disagree with Plaintiffs' contention that the HIRA lacks the nine requisite components for the charging of a fee, as prescribed by the REA. (*Id*.) Defendants suggest that, under the common usage for the term "area," "the Forest Service can properly charge a fee for a geographic region containing the amenities and attributes listed in REA's

[2]After a lengthy process of discussion on the record and an exchange in response to this Court's Order to Show Cause issued September 8, 2009, the Court satisfied itself of subject matter jurisdiction over this lawsuit, as further explained in the analysis section of this order. (*See* docket #97 (Order to Show Cause); dockets ##98, 99 (the parties' responses to the Order to Show Cause); docket #100 (discharge of the Order to Show Cause).)

nine requirements." (*Id*. at 20.)

Defendants contend that even if ambiguity could be read into the REA, their interpretation of the statute is reasonable and entitled to *Chevron* deference. (*Id*. at 25.) In response to Plaintiffs' argument that Defendant Service threatens criminal prosecution for non-payment, Defendants represent that "the Forest Service has not prosecuted anyone for nonpayment of a fee at Mt. Evans." (*Id*. at 26 n.6.) Moreover, Defendants allege that the "rule of lenity" potentially precluding *Chevron* deference is inapplicable to this matter, as Plaintiffs bring a civil claim challenging the agency decision to designate the HIRA in the first instance. (*Id*. at 26.)

Defendants believe the decision to designate the Mt. Evans area as a HIRA was not arbitrary and capricious, as the area contains amenities described in the REA criteria. (*Id*. at 28.) Furthermore, the Mt. Evans HIRA meets the added requirements set forth by the Service in additional Guidelines. (*Id*. at 29.) Regarding the prohibitions the Plaintiffs allege are violated by Defendants, Defendants rebut each contention. (*Id*. at 30-34.) Defendants aver that the designation of the area as a HIRA and allowing collection of the standard amenity fee fulfills the purpose of the REA, in that the fees fund the investment made by the Service back into the operation and maintenance of the HIRA. (*See id*. at 29.)

In response to Plaintiffs' assertion that non-federal lands may not be included within the federal HIRA jurisdiction, Defendant Forest Service identifies the Organic Act, 16 U.S.C. § 551, as authority supporting the two parks' inclusion. (*Id*. at 36.) Defendants argue that it is necessary for the protection of federal interests on federal land to extend the fee collecting authority to the adjacent municipally owned lands. (*Id*. at 37.) Defendants explain how the REA provides authority to Defendant Service to enter into cooperative agreements with non-federal entities, and the Collection Agreement between Defendant Service and the City and County of Denver establishes such cooperative relationship. (*Id*. at 38.)

Plaintiffs submitted a reply in support of their opening brief, asserting that they do not bring a "general challenge to the service's designation of High Impact Recreation Areas." (Docket #117 at 1.) Plaintiffs state they challenge "whether, by designating a HIRA at Mt. Evans the Service can exempt itself from compliance with the explicit provisions defining and delimiting the scope of its fee authority" pursuant to the REA. (*Id*. at 1-2.) Plaintiffs contend that the Fee Station Operations Manual contradicts Defendant Forest Service's representation that "if a visitor says he is not stopping within the HIRA other than to take a picture, there is no charge." (*Id*. at 3.) Plaintiffs reiterate their argument that the REA constitutes a criminal statute, thus the Court should not apply *Chevron* deference to the Service's actions. (*Id*. at 6-7.) Finally, Plaintiffs contest Defendants' allegation that the Organic Act provides authority for fee collection on non-federal land within the Mt. Evans HIRA. (*Id*. at 9.)

STANDARD OF REVIEW

Section 706 of 5 U.S.C. governs judicial review of both formal and informal agency action. *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1573 (10th Cir. 1994). The Court may "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] in excess of statutory jurisdiction, authority, or limitations . . . ." 5 U.S.C. § 706(2). "Agency action, whether it is classified as 'formal' or 'informal,' will be set aside as arbitrary unless it is supported by 'substantial evidence' in the administrative record." *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (citing *Olenhouse*, 42 F.3d at 1575). Review under the arbitrary and capricious standard "is generally based on the full administrative record that was before all decision makers. . . . The district court must have before it the 'whole record' on which the agency acted." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (citations omitted). "The complete administrative record consists of all documents and materials directly or indirectly considered by

the agency." *Bar MK Ranches*, 994 F.2d at 739.

In order to afford appropriate deference, the Court does not review the agency action *de novo*, but reviews "the administrative agency's decision as an appellate body." *Center for Native Ecosystems v. Salazar*, No. 09-cv-01463-AP, 2010 WL 1961740 at *3 (D. Colo. Apr. 14, 2010) (citing *Olenhouse*, 42 F.3d at 1580 (stating, "Reviews of agency action in the district courts must be processed *as appeals*." (emphasis in original)). The Court must review the agency action with a presumption of validity; "the burden is on the petitioner to demonstrate that the action is arbitrary and capricious." *Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 793 (10th Cir. 2010) (citing *Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1221 (10th Cir. 2009)). "Agency action is arbitrary and capricious if the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,' or if the agency action 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id*. (citation omitted). The Court is not to substitute its judgment for that of the agency, as "the court must rely upon the reasoning set forth in the administrative record and disregard post hoc rationalizations of counsel." *Sorenson Commc'ns, Inc.*, 567 F.3d at 1221 (citing *Olenhouse*, 42 F.3d at 1580).

ANALYSIS

Plaintiffs identified the September 2005 REA implementation plan produced by Defendant Forest Service as the contested final agency action in this matter.[3] (*See* docket #98.) According to Plaintiffs, the 2005 plan "declared that the Mt. Evans recreational area corridor is a High Impact

[3]Defendants agreed to the designation of Mt. Evans as an area at which a standard amenity recreation fee could be collected, "which decision is embodied in the September 2005 document entitled 'Implementation Plan,'" as the final agency action challenged by Plaintiffs. (Docket #99 at 2.)

Recreational Area where fees could be collected without regard to the restrictions contained in the REA." (*Id*. at 1-2.) The Court construes Plaintiffs' challenge in essentially three parts. First, Plaintiffs dispute Defendants' characterization of the Mt. Evans area as an area in which fees can be collected because not all parts of the Mt. Evans HIRA include the nine requirements articulated in the REA. Second, Plaintiffs believe that Defendants' designation of the Mt. Evans area as a HIRA impermissibly disregards the limitations on fee collection listed in the REA. Third, Plaintiffs object to the inclusion of non-federal land subject to the federal amenity fee within the Mt. Evans HIRA.

The Court begins by satisfying itself of subject matter jurisdiction over this suit and by explaining the principles of statutory construction and interpretation applied in this order. The Court then addresses each of the Plaintiffs' arguments.

I. Subject Matter Jurisdiction

In order to invoke the APA's review provisions, satisfy the APA's standing requirement, and demonstrate the dispute is ripe for review, the agency in question must have taken final action. Section 704 of the APA provides that an agency action is subject to judicial review when it is either: (1) "made reviewable by statute," or (2) a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. If the plaintiff does not identify "any other statute which provides for judicial review of the official conduct it challenges, . . . any attempt to obtain judicial review directly under section 704 of the APA must be preceded by final agency action." *Pennaco Energy, Inc.*, 377 F.3d at 1155; *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001) (citing *e.g., Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 243 (10th Cir. 1991) (also identifying "final agency action" as a factor for determining ripeness)). "Whether federal conduct constitutes final agency action within the meaning of the APA is a legal question." *Pennaco Energy, Inc.*, 377 F.3d at 1155. Plaintiffs bear the burden of "identifying specific conduct

and explaining how it is 'final agency action.'"[4] *Cherry v. U.S. Dep't of Agr.*, 13 F. App'x 886, 890 (10th Cir. 2001) (citing *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000)).

The parties agree that the September 2005 implementation plan constitutes the final agency action challenged by Plaintiffs, however, "[a]ny federal court must, *sua sponte*, satisfy itself of its power to adjudicate in every case and at every stage of the proceeding." *Harris v. Ill.-Cali. Express, Inc.*, 687 F.2d 1361, 1366 (10th Cir. 1982). For an agency action, even if informal, to be final for the purposes of subject matter jurisdiction, the action must "mark the 'consummation' of the agency's decisionmaking process . . . [and] must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Pennaco Energy, Inc.*, 377 F.3d at 1155 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

The Court concludes that the September 2005 implementation plan marked the consummation of Defendant Forest Service's decision to designate the Mt. Evans recreation area as an area in which fees could be collected pursuant to the REA. In its evaluation of subject matter jurisdiction, the Court considered whether the implementation plan could be considered "final" due to the subsequent Operations Manuals and stated Forest Service policies that modified certain material conclusions included within the implementation plan. The Court finds that, similar to the Tenth Circuit's determination in *Pennaco Energy, Inc.*, the plan represents Defendant Forest

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[4]"Agency action" within the APA "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, ... it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Pennaco Energy, Inc., 377 F.3d at 1155 (citation omitted).

Service's "definitive statement of its position" as to the continuance of fee collection within the Mt. Evans area. 377 F.3d at 1155. Even though the plan recognized that picnic tables were not yet installed within the area, and the plan prescribed collection of fees for the use of road corridors through the area, the Court, as further described below, deems these issues moot in light of the subsequently issued documents as provided for in the administrative record. That these issues are moot does not implicate mootness of the Plaintiffs' entire case. Plaintiffs bring claims relating to multiple provisions of the REA, and many of the presented issues can be reduced to the Defendants' statutory interpretation of the term "area" within the meaning of the REA, which is the premise for the HIRA classification of Mt. Evans stated in the implementation plan.

The second requirement for a final action is satisfied both by the obligation to pay a recreation fee and by the legal consequences to non-payment, as codified in the REA's enforcement provision. Thus, the Court accepts the September 2005 implementation plan as final agency action and therefore satisfies itself of subject matter jurisdiction.

II. Statutory Construction and Interpretation pursuant to *Chevron*

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). Pursuant to *Chevron*, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." 467 U.S. at 842. First, the Court must evaluate "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. In the alternative, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*.

at 843.

Plaintiffs assert that the Court should not evaluate Defendants' application of the REA under *Chevron* deference because the REA carries criminal penalties; instead, the Court should evaluate Defendants' application of the REA pursuant to the rule of lenity. Plaintiffs cite to *Crandon v. United States*, 494 U.S. 152, 177 (1990), *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1031 (10th Cir. 2003), and *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) for their proposition that "courts have expressly rejected the applicability of *Chevron* deference in criminal cases." (Docket #112 at 13.)

Plaintiffs rely on Justice Scalia's concurrence in *Crandon*, not on the order of the Court. Justice Scalia opined that "the law in question, a criminal statute, is not administered by any agency but by the courts. It is entirely reasonable . . . that federal officials should make available to their employees legal advice regarding its interpretation . . . but that is not the sort of specific responsibility for administering the law that triggers *Chevron*." *Crandon*, 494 U.S. at 177. Notably, the statute at issue in *Crandon* is codified in Title 18 of the United States Code, governing crimes and criminal procedure. *See id.* at 157-58. Similarly, the Tenth Circuit in *Seneca-Cayuga Tribe of Oklahoma* evaluated the Johnson Act, which is "a federal criminal statute enforced by the United States Department of Justice" and thus not owed deference to construction by the National Indian Gaming Commission. 327 F.3d at 1031. In *McGoff*, the D.C. Circuit considered an appeal of a criminal prosecution under a comprehensive regulatory scheme that lacked a statute of limitations. The *McGoff* Court explained how "the law of crimes must be clear. There is less room in a statute's regime for flexibility, a characteristic so familiar . . . in the interpretation of statutes entrusted to agencies for administration." 831 F.2d at 1077.

Here, the Court finds disingenuous Plaintiffs' characterization of the REA as a "criminal statute" subject to the rule of lenity. The rule of lenity "instructs courts to interpret ambiguous

criminal statues favorably to the accused." *United States v. Ruiz-Gea*, 340 F.3d 1181, 1188 (10th Cir. 2003) (citation omitted). "But the rule of lenity is applied only when all other techniques for statutory construction leave the court in equipoise." *Id*. (citing *Muscarello v. United States*, 524 U.S. 125, 138 (1998)). The penalties provided for in the REA are more comparable to those discussed by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, rather than the criminal matters evaluated in *Crandon*, *Seneca-Cayuga Tribe of Oklahoma*, and *McGoff*. *See Babbitt*, 515 U.S. 687 (1995). *Babbitt* concerned a challenge to a regulation promulgated under the Endangered Species Act and was brought against the Secretary of the Interior and the Fish and Wildlife Service. In *Babbitt*, the Supreme Court explained that they "have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." 515 U.S. at 704 n.18. The *Babbitt* Court analyzed how the rule of lenity turns on the adequacy of notice of criminal penalty. In that case, because the regulation "existed for two decades and [gave] a fair warning of its consequences," the regulation was not subject to the rule of lenity. *Id*.

Congress entrusted specific responsibility for administering the REA to the Secretary of Agriculture. 16 U.S.C. § 6802(a). Part of administering the REA includes explicit instruction to enforce payment of the recreation fees authorized by the REA. 16 U.S.C. § 6811(a). As stated, the REA repealed the Recreational Fee Demonstration Program, enacted in 1996, which previously provided authority for the collection of admission and special recreation use fees. *See* 16 U.S.C. § 6812(b). Therefore, collection of fees on federal lands under certain circumstances has been known to the public since at least the implementation of the Fee Demonstration program in 1997, and the challenged 2005 implementation plan corroborates this conclusion through its representation that fees have been collected at Mt. Evans since July 1997. *See* Admin R. at E00129.

In a Briefing Paper dated February 13, 2008, Defendant Forest Service explains, "[s]ince 1997, people driving to the top of Mount Evans and back *who do not park and use the amenities* have not been charged a fee, although they are required to obtain a pass." Admin. R. at E00459 (emphasis in original). Additionally, a July 2, 2007 Memorandum of Understanding between the Colorado Department of Transportation and Defendant Forest Service indicates that, "[p]rior to opening of the Mount Evans Road to traffic, the Forest Service [posted] signage at the entrance to the fee area consistent with the Forest Service's National Guidelines for Recreation Fee Signs for High-Impact Recreation Areas." *Id*. at E00589. The sign states, "PARKED VEHICLES MUST DISPLAY A VALID RECREATION PASS NEXT 15 MILES." *Id*. at E00592, E00598. This sign replaced a sign instructing visitors that "a pass is required to travel beyond this point." *Id*. at E00459.

The Court concludes it is not novel, unforeseen, or unusual to expect a consequence to non-payment of a fee required for the recreational use of federal land in an area in which fees have been collected since 1997, nor is the REA's enforcement language difficult to understand. The Court finds there is no ambiguity in the plain language of Section 6811 within the REA, and, as further explained below, *Chevron* provides ample instruction for statutory construction and interpretation in this matter. The Court thus rejects Plaintiffs' assertion that it should apply the rule of lenity to Defendants' interpretation of the REA.

III. The Mt. Evans HIRA is properly designated as an area in which fees can be collected pursuant to the nine requirements delineated in the REA.

Plaintiffs dispute Defendants' characterization of the Mt. Evans area as an area in which fees can be collected because not all sites within the Mt. Evans HIRA include each of the nine requirements articulated in the REA. Section 6802(f) of the REA, in pertinent part, provides that a standard amenity recreation fee may be charged as follows:

> Except as limited by subsection (d) of this section, the Secretary may charge a standard amenity recreation fee for Federal recreational lands . . under the jurisdiction of . . . the Forest Service, but only at the following:
> . . .
> (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.

The final agency action challenged by Plaintiffs, the September 2005 REA implementation plan, explains its purpose as fulfilling a request "to determine what changes in the Mount Evans recreation fee system are needed to comply with REA." Admin. R. at E00129. The plan identifies "Interim Implementation Guidelines" as its internal authority for designating the Mt. Evans area as a HIRA. *Id*. The plan recognizes REA's nine requirements and asserts that the Mt. Evans HIRA "provides significant recreation opportunities for scenic viewing, wildlife watching, photography, hiking, picnicking, hunting, nature study and research. The Mt. Evans HIRA has a single point of entry and exit, which makes fee collection very efficient." *Id*. Additionally, in support of the requisite fee-efficiency, "the Mount Evans area currently has one Information/Fee booth conveniently located at the access point to the area." *Id*. at E00130. Regarding substantial federal investment, the plan describes how components of the Mt. Evans HIRA contain certain facilities and trail systems maintained by federal funding, and that Defendant Forest Service "interpreters and volunteers provid[e] scheduled programs and hikes on topics . . . at the Dos Chappell Nature Center, Upper Goliath Trailhead, Summit Lake, and Mount Evans summit." *Id*. Defendant Forest Service "safety/courtesy patrols and an emergency call phone located at the beginning of the corridor" intended for visitor safety satisfy the amenity requirement for security services. *Id*.

A chart appended to the plan demonstrates which sites within the Mt. Evans area contain certain amenities. Admin. R. at E00133. To summarize the chart, designated developed parking areas, permanent restrooms, and permanent trash receptacles are provided at three developed sites, and four developed sites include interpretive signs, exhibits or kiosks. *Id*. at E00131. Picnic tables are the only missing requirement. In the "Implementation Actions" section of the plan, Defendant Forest Service writes that it "will provide picnic tables, prior to or early in the 2006 operating season to complete the full range of amenities available in this concentrated recreation use area of Mount Evans." *Id*. at E00132. A 2006 Mt. Evans Recreation Enhancement Project Summary represents that "[o]ne picnic table was placed at the Upper Goliath trailhead and one placed on [Forest Service] land at Summit Lake." *Id*. at E00238.

The plan represents that all but one (the picnic tables) of the six standard amenities were provided for at the time the plan was authored, in September 2005. Defendant Forest Service plainly stated, "[i]t is recognized that while not every individual site within the Mount Evans area provides all of the required amenities, there are substantial amenity investments at various sites conveniently located at reasonable access distances through the area." *Id*. at E00130-31.

Pursuant to *Chevron*, the Court must first evaluate "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. In the alternative, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843.

In accordance with *Chevron* analysis, the Court finds that Congress has directly spoken to the circumstances within which a standard amenity fee may be collected pursuant to the REA, with one exception. The nine delineated requirements are clearly stated in Section 6802(f)(4)(A - D) of

the REA, and Defendants meet each requirement as described in the 2005 implementation plan and the 2006 project summary. However, as alluded to by Defendant Forest Service in the implementation plan, the term "area" lacks distinct parameters. The Court believes the term "area," undefined by the statute, constitutes the crux of this dispute.

Plaintiffs assert that "following the enactment of the REA, the Service exercised considerable discretion by defining and designating standard amenity fee areas called HIRAs, which are not specifically mentioned in the REA, and giving no weight to or explanation for bypassing the limiting language at 16 U.S.C. 6802(d) and (e)."[5] (Docket #112 at 18.) Plaintiffs contend that "the Service has documented only four sites along a 15 mile stretch of highway where any amenities are in place. . . . None of the sites has all of the six amenities required for charging a standard amenity fee." (*Id.* at 7; docket #117 at 4.) Plaintiffs speculate that the term "standard amenity" intends to make clear "that the fee [is] not for general recreation and travel on federal lands, but for the use and enjoyment of sites that contain specific required amenities." (*Id.* at 22.)

Defendants argue that "the term area denotes a geographical region. Instead of imposing quantitative measurements to limit fee areas, REA describes the bounds of the geographic regions in terms of amenities and other attributes." (Docket #113 at 20.) Defendants thus believe that "the Forest Service can properly charge a fee for a geographic region containing the amenities and attributes listed in REA's nine requirements." (*Id.*) Defendants represent that the standard amenity fee collected at Mt. Evans "is charged for the use of the aggregated amenities in the HIRA." (*Id.* at 23.) Defendants believe the collection of a standard amenity fee at Mt. Evans is "consistent with the structure, text, and legislative history of the statute," because the HIRA system at Mt. Evans is "a valid - and perhaps the only valid - way of reconciling REA's provisions and reality to collect

[5]The Court evaluates Plaintiffs' concerns regarding the REA's limiting language in the following section of this order.

standard amenity recreation fees in an effective manner." (*Id*. at 25, 26.)

The Court agrees with Defendants. Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Although "area" is not defined by any term of mileage or any other quantitative measurement (including by site, as referred to by Plaintiffs), "area," within the meaning and purpose of the REA provision for recreation fee authority, is defined by the nine characteristics stated in Section 6802(f). As the nine requirements are present within the Mt. Evans recreation area, Defendants properly characterized the area as an area in which a standard amenity fee may be collected.[6] Accordingly, the Court declines to set aside the final agency action that designated the Mt. Evans area as an area in which fees can be collected and finds such action was not arbitrary, capricious, an abuse of discretion, or in excess of statutory authority.

IV. The designation of the Mt. Evans area as a HIRA does not violate the limiting language of the REA.

Plaintiffs believe that Defendants' designation of the Mt. Evans area as a HIRA, even if concordant with Section 6802(f)'s affirmative requirements, impermissibly disregards the prohibitions on fee collection listed in Section 6802(d) of the REA. Section 6802(d)(1) lists prohibitions on fees as follows:

> The Secretary shall not charge any standard amenity recreation fee . . . for Federal recreational lands . . . administered by . . . the Forest Service . . . 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

[6]To briefly address Plaintiffs' argument regarding the lack of explicit authority to name an area containing the nine requirements a "High Impact Recreation Area," the Court concludes that the name of the area bears no legal meaning on whether the nine requirements are met, and such naming is well within the purview of the Secretary entrusted with the execution of the REA.

> 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.
> . . .

Additionally, Section 6802(e)(2) bars charging an entrance fee "for Federal recreational lands and waters managed by . . . the Forest Service." Section 6801(3) defines an entrance fee as "the recreation fee authorized to be charged to enter onto lands managed by the National Park Service or the United States Fish and Wildlife Service."

Plaintiffs allege "the Forest Service charges a fee for all activities except nonstop travel anywhere within the Mt. Evans HIRA, including visitors parked within the state highway right of way, in City- and County-owned Parks, and at overlooks and scenic pullouts." (Docket #112 at 23.) More specifically, Plaintiffs argue that collection of fees in this manner facially violates the REA provisions codified in Section 6802(d)(1)(A), (B), (E) and (F), as well as the bar on charging an "entrance fee." Regarding Section 6802(d)(1)(C), prohibiting the collection of fees for "dispersed areas with low or no investment," Plaintiffs aver that Defendant Forest Service clearly contradicted this statutory directive in its Interim Guidelines stating that "fees can be charged for dispersed areas if they are located within a HIRA." (Docket #112 at 25 (citing to Admin. R. at E00058).) Plaintiffs assert that Defendant Forest Service "acknowledges that areas adjacent to the HIRA are wilderness and agrees that the Mt. Evans corridor is bounded by the wilderness." (*Id.*) Despite this acknowledgment, Plaintiffs represent that Defendant Forest Service collects a fee from visitors parked along the Mt. Evans corridor who are accessing the dispersed wilderness areas. (*See id.*) As to Section 6802(d)(1)(D) prohibiting the collection of fees from "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," Plaintiffs contend that Defendant Service's "REA transition plan" indicates the fee should be charged for "Use of Road Corridors." (*Id*. at 26-27 (citing to Admin. R. at E00129).)

As a blanket response, Defendants assert that the prohibitions within Section 6802(d)(1) apply to "the use of specified facilities by themselves." (Docket #113 at 30.) Defendants emphasize that the qualifier attached to these provisions, "unless specifically authorized under this section," implicates Section 6802(f), which authorizes the Secretary to set an area conforming with certain criteria in which to collect a standard amenity fee. (*See id*.) Defendants state that the standard amenity fee collected in the Mt. Evans HIRA is administered for the aggregated amenities, facilities, and services present within the HIRA. (*Id*. at 30-31.)

The Court addresses the alleged violations in turn.

A. Section 6802(d)(1)(D)

Plaintiffs contend that, based on the implementation plan's instruction to collect the standard amenity fee for use of "designated road corridors for travel or for parking" through the HIRA, Defendants willingly violate Section 6802(d)(1)(D). (Docket #112 at 26-27 (citing to Admin. R. at E00131).) This section prohibits a fee 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."

Defendants represent that presently, after evaluation and refinement of Defendant Forest Service's policies, "occupied parked vehicles at undeveloped sites or unoccupied parked vehicles where the occupants are in close proximity to the vehicle are considered to be in through-travel status and therefore not subject to the recreation fee." (Docket #113 at 33.) In support of this statement, Defendants explain how, in 2008, two signs were installed "to inform visitors who intend to travel non stop through the HIRA that they do not have to pay a fee." (*Id*. at 14 (signs state

"Travel Non Stop on Road No Charge").) *See also* Admin. R. at E00597. Additionally, the 2006 and 2008 Operations Manuals include instruction that persons meeting the criteria in Section 6802(d)(1)(D) may proceed through the HIRA without purchasing a pass. Admin. R. at E00251 and E00467. Defendants describe the standard greeting given to the public, implemented in May 2007, as letting the public know that travel non-stop through the HIRA will not incur the amenity fee. *Id.* at E00432. Based on these representations, the Court finds that, even if Plaintiffs properly complain about the language in the 2005 implementation plan as violative of Section 6802(d)(1)(D), the dispute is mooted by the current policies and the more recent Operations Manual.[7]

B. Sections 6802(d)(1)(A), (B), and (F); Section 6802(e)

Section 6802(d)(1)(A), (B), and (F), and Section 6802(e) bear similar meaning in the context of this lawsuit. These provisions preclude the charging of a fee solely for parking or picnicking along roads or trailsides, solely for the use of overlooks or scenic pullouts, for general access, or as an entrance fee.

The Court must apply "the traditional canons of statutory construction when interpreting a statute." *Lamb v. Thompson*, 265 F.3d 1038, 1051 (10th Cir. 2001). The Court's duty is "to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Id*. (citation omitted). Applying this principle to the sections of the REA at issue, the Court finds permissible Defendants' construction of these provisions as stand-alone limitations. As the nine requirements are present in the Mt. Evans HIRA, Defendants may charge and collect a standard amenity fee as delineated by the REA within the physical bounds of the Mt. Evans HIRA. Without

[7]Additionally, regarding persons walking through the HIRA, Defendant Forest Service asserts that it is reasonable for it to presume that any visitor away from his or her vehicle within the HIRA is likely somehow utilizing the available amenities. This presumption is consistent with the guiding criteria contained with the REA itself, in that "[t]he amount of the recreation fee shall be commensurate with the benefits and services provided to the visitor." 16 U.S.C. § 6802(b)(1).

the setting of a geographic area within which the fee may be collected, Defendant Forest Service would be tasked with monitoring each visitor's activities within the HIRA to determine, on a case by case basis, whether the visitor is participating in an activity that implicates a fee. (*See* docket #115 at 22-24 (Defendants explaining the same and referring to *United States v. Wallace*, 476 F. Supp. 2d 1129 (D. Ariz. 2007)).) This process would be inconsistent with both the purpose of the REA and the "[s]pecial considerations" identified in the statute, in that the Secretary is obligated to "avoid the collection of multiple or layered recreation fees for similar uses, activities, or programs." 16 U.S.C. § 6802(c).

The Court believes Congress recognized this possibility by its inclusion of "where fees can be efficiently collected" as a criterion within Section 6802(f)(4). Additionally, the Court finds Defendants' reasoning consistent with Section 6802(b), articulating the basis for recreation fees. Congress instructed the Secretary to set the amount of a recreation fee as "commensurate with the benefits and services provided to the visitor," to "consider the aggregate effect of recreation fees on recreation users and recreation service providers," and to "consider the public policy or management objectives served by the recreation fee." 16 U.S.C. § 6802(b)(1), (2), (4). Requiring the Forest Service to check each and every car or visitor for their level of usage within the HIRA would be expensive and burdensome for the Service and intrusive for visitors, which in turn violates the spirit and purpose of the statute.[8] In light of *Chevron* deference, the Court believes Defendants' interpretation of the limitations within the REA as stand-alone is within their statutory authority, is consistent with the purpose of the REA, and is thus not arbitrary or capricious.

[8]In any event, as Defendants inform the Court that "occupied parked vehicles at undeveloped sites or unoccupied parked vehicles where the occupants are in close proximity to the vehicle are considered to be in through-travel status and therefore not subject to the recreation fee," such policy does not implicate potential violations of Sections 6802(d)(1)(A), (B), and (F) or Section 6802(e). (*See* docket #113 at 33.)

C. Section 6802(d)(1)(C) and (E)

Sections 6802(d)(1)(C) and (E) concern the prohibition of fees collected in dispersed areas or for camping at undeveloped sites. Notably, the prohibition of fees collected in dispersed areas is qualified by the phrase "unless specifically authorized under this section." Plaintiffs assert that visitors who park in the HIRA in order to access the dispersed areas or camp at undeveloped sites are improperly charged a fee, as the Forest Service is charging a *de facto* parking fee. Moreover, Plaintiffs argue that the Forest Service "promotes this corridor precisely because it provides convenient wilderness access." (Docket #112 at 25.) Plaintiffs believe that, as the dispersed wilderness within the Mt. Evans HIRA is not "in reasonable reach" of any amenities, charging the standard amenity fee within the HIRA violates Section 6802(d)(1)(C). (*Id*.)

In response, Defendants explain how "the Forest Service is not charging for access to those wilderness areas [or for camping at undeveloped sites], but rather for the use of the required amenities and services within the HIRA." (Docket #113 at 31.) Defendants attest that "there are ways to access the wilderness areas adjacent to the HIRA without paying a fee." (*Id*.) *See also* Admin. R. at E00593 (Mt. Evans Recreation Area map). Additionally, Defendants contend that "Plaintiffs' factual allegations of Forest Service actions are irrelevant to the issue to be decided in this case," namely, whether Defendants exceeded their statutory authority in designating the Mt. Evans area as an area in which a standard amenity fee could be collected, pursuant to the REA. (*See id.* at 33 n.12.)

"Determination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency's authority and discretion, and consideration of whether on the facts, the agency's action can reasonably be said to be within the range." *Olenhouse*, 42 F.3d at 1574 (citation omitted). The Court previously concluded that the designation of the Mt. Evans area as a HIRA pursuant to the REA was proper, as the area includes the nine statutory requirements

and "area" is not otherwise defined by the statute. The Service's policy to not charge the standard amenity fee for travel through the HIRA non-stop or against "occupied parked vehicles at undeveloped sites or unoccupied parked vehicles where the occupants are in close proximity to the vehicle" is consistent with the prohibitions delineated by the REA.

"Agency action is arbitrary and capricious if the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,' or if the agency action 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Copar Pumice Co., Inc.*, 603 F.3d at 793 (citation omitted). After consideration of Plaintiffs' various challenges to the designation of the Mt. Evans area as a HIRA, in light of the prohibitions delineated in the REA, the Court finds that the agency's interpretation of its instruction from Congress embodied in the REA is not counter to the evidence at Mt. Evans nor implausible to the level of imputing doubt on the agency's expertise. The agency is charged with fee implementation under certain circumstances with the purpose of reinvesting the funds into the federal property, and the administrative record demonstrates the agency's adherence to this directive. Accordingly, the Court declines to set aside the final agency action that designated the Mt. Evans area as an area in which fees can be collected and finds such action was not arbitrary, capricious, an abuse of discretion, or in excess of statutory authority.

V. Non-federal land is permissibly included within the Mt. Evans HIRA.

Plaintiffs object to Defendants' alleged enforcement of the standard amenity fee on non-federal land within the Mt. Evans HIRA. The Mt. Evans HIRA includes a State of Colorado-owned and maintained highway (Highway 5) and two parks owned by the City and County of Denver (Echo Lake and Summit Lake). (*See* docket #67 at 14-15; docket #113 at 37.) Plaintiffs believe neither the Property Clause of the United States Constitution nor the REA itself permits Defendants to

enforce the collection of fees in the portions of the Mt. Evans HIRA owned by the state or the city.

Defendants rely on the Organic Act delegating authority to the Secretary of Agriculture and the Property Clause of the United States Constitution in support of their contention that Defendants are authorized "to enforce payment of the fee on adjacent City-owned lands, . . . [as] necessary to protect the government's interest in fairly administering fees for the use of REA-compliant federal lands and facilities." (Docket #113 at 37.) Defendants explain how the Forest Service and the City and County of Denver, as well as the State of Colorado, entered into agreements regarding the collection of federal fees within the HIRA. (*Id*. at 37-38.)

The Property Clause grants broad power to Congress to "make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." U.S. Const., art. IV, § 3, cl. 2. "It is well-established law that this clause grants power to the United States to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." *Grand Lakes Estates Homeowners Ass'n v. Veneman*, 340 F. Supp. 2d 1162, 1166-67, (D. Colo. 2004) (citing *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir.1979)); *see also Kleppe v. New Mexico*, 426 U.S. 529, 538, (1976). This District further recognized that "federal regulation may exceed federal boundaries when necessary for the protection of . . . government forest land or objectives." *Grand Lakes Estates Homeowners Ass'n*, 340 F. Supp. 2d at 1167. The Tenth Circuit agrees that Section 551 of 16 U.S.C. "authorizes the Secretary of Agriculture in the management of the forests to issue rules 'to regulate their occupancy and use.' As long as such rules and regulations tend to protect the lands and faithfully preserve the interest of the people of the whole country in the lands, the courts should enforce such rules and regulations." *United States v. Hymans*, 463 F.2d 615, 617 (10th Cir. 1972) (citation omitted).

As stated, the REA delegates authority to the Secretary of Agriculture, with regard to lands managed by the Forest Service, to "establish, modify, charge, and collect recreation fees at Federal

recreational lands." 16 U.S.C. § 6802(a). Section 6805 of the REA explicitly delegates authority to enter into fee management agreements "with any governmental or nongovernmental entity . . . for the purpose of obtaining fee collection and processing services." This provision also contemplates "cooperative site planning and management provisions" in a "fee management agreement." 16 U.S.C. § 6805(c).

Defendants contracted regarding federal activity within the Mt. Evans HIRA with the State of Colorado in a 1997 agreement (Admin. R. at E00578), renewed the 1997 agreement in 2000 (*id*. at E00584), and expounded upon the agreement in a 2007 Memorandum of Understanding (*id*. at E00587). The same was performed with the City and County of Denver in 1997 (*id*. at E00535, E00539) and included a lease between the city and the Forest Service for the Echo Lake fee station in 1997 (*id*. at E00549). The Forest Service and City and County of Denver also collaborated in a 2002 collection agreement (*id*. at E00555) and a 2007 collection agreement (*id*. at E00564). The 2007 collection agreement provides that Denver agrees to "[p]rovide compliance checks at Summit Lake Park when the Forest Service is not available," indicating the Service would primarily conduct compliance checking at the City-owned property. (*Id*. at E00566.)

The Court finds Defendants' actions regarding the collection of the standard amenity fee at the Mt. Evans HIRA on city- and state-owned property are consistent with and authorized by the Organic Act in Title 16 and by the explicit instruction articulated in Section 6805 of the REA. The intent of Congress is clear in Section 6805, and "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[9] *Chevron*, 467

[9]Moreover, in the House Report accompanying the REA, Congressman Pombo stated that "[t]he public benefits from collaborative efforts that minimize multiple fees, or allow visitors to pay a single fee or coordinate fee arrangements for entrance into adjacent recreation areas operated by different agencies or levels of government." H.R. Rep. No. 108-780(I), 2004 WL 2920863, at *14 (2004).

U.S. at 842-43. Accordingly, the Court rejects Plaintiffs' argument and declines to set aside the final agency action that designated the Mt. Evans area, including the city-owned parks and state-owned highway, as an area in which fees can be collected and finds such action was not arbitrary, capricious, an abuse of discretion, or in excess of statutory authority.

CONCLUSION

In sum, Plaintiffs challenge the 2005 REA implementation plan which initially designated the Mt. Evans area as a "High Impact Recreation Area" in which fees can be collected pursuant to the REA. Plaintiffs believe that the area is improperly defined as a HIRA because not all sites within the Mt. Evans HIRA include each of the nine requirements articulated in the REA and the designation impermissibly disregards the REA's delineated limitations on fee collection. Furthermore, Plaintiffs object to the inclusion of non-federal land subject to the federal amenity fee within the Mt. Evans HIRA.

The Court concluded, after review of the pleadings and the administrative record, that the rule of lenity does not apply in this adjudication and thus, the Court applied the two-part *Chevron* analysis in evaluating Plaintiffs' challenge. As to the subparts of Plaintiffs' claim, the Court finds as follows. The 2005 implementation plan and subsequent 2006 project summary demonstrate that the Mt. Evans area, labeled a HIRA, includes the nine statutory requirements described by the REA. Defendants may therefore charge a standard amenity fee for recreational use of the Mt. Evans HIRA. The agency's interpretation of the term "area" as defined by amenities and not per site or by some other quantitative measurement is a reasonable interpretation of the statutory provision.

Defendants comply with the prohibition against charging a fee for nonstop travel through the Mt. Evans HIRA as demonstrated by the 2008 Operations Manual. Regarding the remaining prohibitions highlighted by Plaintiffs, the Court finds that Defendants' stated policy to not require "occupied parked vehicles at undeveloped sites or unoccupied parked vehicles where the occupants

are in close proximity to the vehicle" to pay the standard amenity fee is consistent with the prohibitions delineated by the REA. In any event, without the setting of a distinct geographic area within which the fee may be collected, Defendant Forest Service would be tasked with monitoring each visitor's activities within the HIRA to determine, on a case by case basis, whether the visitor is participating in an activity that implicates a fee. As the purpose of the REA "is to improve recreational facilities and visitor opportunities on federal recreational lands by reinvesting receipts from fair and consistent recreational fees and passes," the agency's interpretation of the prohibitions as stand-alone limitations is reasonable and consistent with the REA's principles. H.R. Rep. No. 108-780(I), 2004 WL 2920863, at *12 (2004).

The same holds true with Defendants' collaboration with the City and County of Denver regarding the inclusion of the two city-owned parks within the Mt. Evans HIRA. The statute provides explicit instruction to the Secretary to cooperate with other governmental entities in the management of fee collection at federal recreational lands. Congressional intent on this point is clear, thus the Court finds the Defendants' actions regarding the collection of the standard amenity fee at the Mt. Evans HIRA on city- and state-owned property are consistent with and authorized by the REA.

Within the constraints of judicial review of final agency action pursuant to the APA, the Court holds that Defendants reasonably interpreted and implemented the provisions of the REA at the Mt. Evans recreation area, consistent with the statute's purpose of preserving recreational opportunities in natural areas with the reinvestment of recreation fees. The Court recognizes the Plaintiffs' goal of eliminating, or at the least, narrowing the fee collection authority of the Forest Service at Mt. Evans, however the Court believes that seeking redress through a judicial remedy does not and will not successfully serve that interest. The REA replaced earlier legislation regarding the collection of fees on federal recreational lands; perhaps legislative means would be a more

effective route for Plaintiffs to achieve their objectives.

For the reasons stated above and the entire record herein, the Court finds that, pursuant to the Administrative Procedures Act standard of review and the plain language of the REA, Defendants did not exceed their statutory authority, nor did the challenged final agency action constitute an arbitrary or capricious exercise of such authority. Accordingly, Defendants are entitled to judgment in their favor on all claims in this case, and judgment will enter for Defendants contemporaneously with this order.

Dated at Denver, Colorado, this 22nd day of July, 2010.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

DAVID P. SHERER,
JOHN H. LICHT,
MIKE LOPEZ,
BARBARA BRICKLEY, and
AARON JOHNSON,

Plaintiffs,

vs.

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

Defendants.

JUDGMENT

PURSUANT to and in accordance with the Opinion and Order on the Merits entered by the Magistrate Judge Michael E. Hegarty, on July 22, 2010, it is

ORDERED that Defendants are entitled to judgment in their favor on all claims in this case. It is

FURTHER ORDERED that judgment is entered in favor of Defendants, United States Forest Service, Glenn P. Casamassa, and David Gaouette, and against Plaintiffs, David P. Sherer, John H. Licht, Mike Lopez, Barbara Brickley, and Aaron Johnson. It is

FURTHER ORDERED that Defendants shall have their costs upon the filing of a Bill of Costs with the Clerk of the Court within 14 days of entry of this judgment.

DATED at Denver, Colorado, this 23rd day of July, 2010.

FOR THE COURT:

GREGORY C. LANGHAM, CLERK

By: s/ Edward P. Butler
Edward P. Butler
Deputy Clerk