

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

BARK, *et al.*,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant,

NATIONAL FOREST RECREATION  
ASSOCIATION, 38067 Millwood Drive  
Woodlake, CA 93286; RECREATION  
RESOURCE MANAGEMENT, INC., 11811 N.  
Tatum Blvd #4095, Phoenix, AZ 85028; CLM  
SERVICES CORPORATION, 675 Gilman  
Street, Palo Alto, CA 94301-2528, ROCKY  
MOUNTAIN RECREATION COMPANY,  
25574 Rye Canyon Road, Unit B, Valencia, CA  
91355; and DIANNE HUNN, 955 E Movie  
Ranch Road, Duck Creek Village, UT 84762,

Defendant-Intervenors.

Case No.: **1:12-cv-1505-RC**

**DEFENDANT-INTERVENORS' CROSS-  
MOTION FOR SUMMARY JUDGMENT  
AND MEMORANDUM IN SUPPORT  
AND OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

Kevin R. Garden  
DC Bar No. 426745  
THE GARDEN LAW FIRM, P.C.  
901 N. Pitt Street  
Suite 325  
Alexandria, VA 22314  
Telephone: (703) 535-5565

Counsel for Intervenor-Applicants

Dated: May 13, 2013

**TABLE OF CONTENTS**

- I. Introduction.....1
- II. Facts .....3
- III. Argument .....16
  - A. The concessioners are charging fees for providing goods and services to the plaintiffs. ....16
    - 1. Rose Canyon Lake area .....16
    - 2. Second Crossing area.....21
    - 3. Bagby Hot Springs/Big Eddy areas .....24
    - 4. Rampart Reservoir area.....28
    - 5. Walton Lake area .....31
  - B. Regardless of whether a visitor makes direct use of a good or service, as long as concessioners are providing goods and services by making them available to visitors, they can charge a fee for that effort pursuant to the REA.....35
  - C. The fees at issue are in accordance with the Organic Act and Granger-Thye Act which authorize the Forest Service to administer and regulate the use of the National Forests. ....38
  - D. The fees charged by concessioners do not have to be approved by RRACS. ....39
  - E. Claims One and Two should be dismissed to the extent they seek declaratory judgment as to the alleged “Forest Service policies” because Plaintiffs have not shown that there has been any final agency action as to any such alleged policies.....40
- IV. Conclusion .....41

**TABLE OF AUTHORITIES**

**Cases**

*Adams v. U.S. Forest Service*, 671 F.3d 1138 (9<sup>th</sup> Cir. 2012).....36

*Christensen v. Harris County*, 529 U.S. 576 (2000).....37

*Dalton v. Specter*, 511 U.S. 462 (1994).....40

*Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) .....40

*Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Authority*,  
876 F.2d 960 (D.C. Cir. 1989).....3

*Rogers Indus. Products, Inc. v. HF Rubber Machinery, Inc.*,  
797 F.Supp.2d 851 (2011) .....37

*Scherer v. U.S. Forest Service*, 653 F.3d 1241 (10<sup>th</sup> Cir. 2011) .....37

*United States v. Gonzalez*, 520 U.S. 1 (1997).....3

**Statutes**

16 U.S.C. § 551.....38

16 U.S.C. § 580d.....38

16 U.S.C. § 6802..... *passim*

16 U.S.C. § 6803(a) .....39

16 U.S.C. § 6813(e) ..... *passim*

**Regulations**

36 CFR Part 251 (Subpart B).....38

Pursuant to Federal Rule of Civil Procedure 56 and LCvR 7(h)(2), for the reasons set forth herein, Defendant-intervenors National Forest Recreation Association (“NFRA”), Recreation Resource Management, Inc., CLM Services Corporation, Rocky Mountain Recreation Company, and Dianne Hunn of Aud & Di Campground Services, Inc. hereby respectfully move for summary judgment in this matter and oppose plaintiffs’ motion for summary judgment.

**I. Introduction**

This case hinges on the following stand-alone provision of the Federal Lands Recreation Enhancement Act (“REA”):

Notwithstanding any other provision of this Act, a third party may charge a fee for providing a good or service to a visitor of a unit or area [in the National Forest System] in accordance with any other applicable law or regulation.

16 U.S.C. § 6813(e). This section of the REA essentially provides that, notwithstanding the other provisions of the REA which apply to where and when the Forest Service can charge fees, third party concessioners can continue to charge fees as they have in the past in accordance with applicable laws. Plaintiffs do not like this separate provision for third party concession operations which are used when the Forest Service has insufficient funds or experience to provide certain goods and services to visitors and which operations often allows the agency to provide services it cannot render itself or keep areas otherwise open and available to visitors.<sup>1</sup>

---

<sup>1</sup> The administrative record states:

As appropriated dollars and the Federal workforce shrink, local managers are relying more on the private sector to provide recreation opportunities to the public on the National Forests. Thus, the agency’s ability to offer quality recreation services depends on a vibrant concession program.

However, as they must, plaintiffs admit that defendant–intervenor are third party concessioners which operate on the National Forests. Plaintiffs also cannot dispute that the purpose of defendant–intervenor’s operations is to provide goods and services to visitors to the National Forests. Plaintiffs also do not dispute that the fees charged by defendant-intervenors are in accordance with the other laws applicable to the National Forest System.

The issue boils down to whether 16 U.S.C. § 6813(e) authorizes concessioners to charge fees to plaintiffs in the specific instances at issue. Plaintiffs assert that, even though defendant-intervenors are third-party concessioners charging fees for providing goods or services to visitors to particular areas of the National Forests, plaintiffs were allegedly not *making use* of or benefiting from those goods or services in the particular instances cited and thus should have not been charged any fees. Plaintiffs’ Motion for Summary Judgment And Memorandum In Support at 19 (concessioners are charging fees to plaintiffs “when they do not use facilities and services”)[hereinafter “Mot.”](ECF # 30). Therefore, plaintiffs argue, the fees they were charged were not “for providing a good or service.” Plaintiffs are incorrect because (1) plaintiffs were clearly using and/or benefiting from the goods and services that defendant-intervenors were providing to all visitors for which fees were being charged, and (2), even if plaintiffs were somehow not using and/or benefiting from those goods or services, the mere fact that defendant-intervenors were providing those goods and services by making them available means that the fees are authorized by this particular section of the REA (§ 6813(e)).

---

Operating a concession program is a different way of doing business. Rather than supervising a maintenance crew, the [Forest Service] administers a special use permit. Operating a concession program therefore requires good permit administration. While concession operation of campgrounds may improve services, it also requires users to pay the true cost for those services.

AR-0232.

Notably, none of the cases cited by plaintiffs involves an analysis of § 6813(a) or fees charged by third party concessioners. Instead, all of the cases upon which plaintiffs rely are based on other provisions of the REA which apply to the very different situation where fees are charged by the Forest Service (a non-profit entity funded with tax dollars). However, the section of the REA at issue in this matter focuses on fees charged by third party concessioners (which includes for-profit entities that are not funded with any tax dollars) and explicitly states that it authorizes concessioner fees otherwise authorized by law “notwithstanding any other provision of [the REA]” that may apply to fees charged by the Forest Service. In other words, the REA explicitly recognizes that the rules for when concessioners may charge fees are different than when the Forest Service itself can charge fees. Importantly, the sections of the REA applicable to the Forest Service’s fees do not authorize the Forest Service to charge fees for merely “providing” a good or service to visitors, in contrast to section 6813(e) which applies to concessioners. Therefore, the cases cited by plaintiffs and the other provisions of the REA upon which plaintiffs’ argument is based are clearly inapposite.<sup>2</sup>

## II. Facts

1. The permits at issue require the third party concessioners to provide certain services and goods to all visitors to the areas covered by the permits. *See* AR-0795; 0930; 1565; 2071; 3381.

---

<sup>2</sup> Because the REA at § 6813(e) is clear, plaintiffs’ lengthy discussion of miscellaneous legislative history, purported reactions by selected sections of the public to proposed legislation and other sections of the REA is entirely irrelevant. *See* Mot. at 2-7; *United States v. Gonzalez*, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history”); *Overseas Educ. Ass’n, Inc. v. Federal Labor Relations Authority*, 876 F.2d 960, 975 (D.C. Cir. 1989) (“In short, legislative history contains too many pitfalls to warrant consultation when there are no ambiguities to be resolved”).

2. The permits also require the third party concessioners to maintain the improvements within their permit areas, carry appropriate insurance, and, in addition, pay a fee to the Forest Service. *See* AR-0797; 0803; 0804; 0933; 0936; 0937; 1567; 1569; 1570; 2074; 2076; 2077; 3383; 3385; 3386.

3. In addition, the third party concessioners are entitled to charge a fee to visitors to the permit areas for providing those goods and services. *See* AR-0812; 0945; 1576; 2084; 3391.

#### **A. Rose Canyon Lake area**

4. The permit for the Rose Canyon Lake area states that the concessioner, Recreation Resource Management, Inc., is to “operat[e] and maintain[] Forest Service developed recreation sites located in the Rose Canyon Complex.” AR 0795.

5. The permit requires the concessioner to submit an annual operating plan, stating:

The annual operating plan shall specify the operational requirements governing the sites covered by this permit. At a minimum, the annual operating plan shall enumerate the minimum operating seasons; how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.

AR-0797 (emphasis added).

6. The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.*

7. In addition, the permit requires the concessioner to post rules of conduct “necessary to provide for the safety of the general public.” AR-0813.

8. Pursuant to its specific Operating Plan, the concessioner provides the following goods and services to visitors to the Rose Canyon Lake area:

- Maintain parking lot (painting stripes, cleaning, sealing, etc.)(AR-0831; 0832);
- Repair parking lot (paving potholes, etc.)(AR-0832);
- Sweep and/or blow clear roads, trails, walkways and parking spurs (AR-0831; 0832);
- Inspect the area to ensure that no safety hazards exist (AR-0840);
- Control vehicle use to ensure parking is at designated spots (AR-0833);
- Repair or replace regulatory signs as needed (AR-0832);
- Ensure fire hydrants are functioning properly (AR-0832);
- Mow and trim grass along entrance road, entrance signs, steps and road shoulders (AR-0831; 0832);
- Provide security for visitors, including fire evacuation needs (AR-0840; 0841; 0844-0845);
- Provide immediate first aid support/assistance for medical emergencies by trained staff (AR-0827);
- Provide ability to communicate in emergencies (radios/phones) where no cell service is available (AR-0828);
- Clean and disinfect restrooms for public safety/convenience (AR-0830; 0831);
- Repair restrooms (AR-0830; 0831; 0833);
- Empty bathroom vaults (AR-0833; 0839);
- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-0830);
- Provide toilet paper in restrooms (AR-0830);

- Remove graffiti which would detract from all visitors' experiences (AR-0831; 0832);
- Maintain picnic tables (clean, paint/stain, repair)(AR-0832);
- Empty and maintain dumpsters and garbage cans (AR-0834; 0838);
- Clean up litter in area (AR-0830; 0839);
- Provide information to all visitors through trained staff (camp hosts, etc.) (AR-0848);
- Provide signs for visitors that educate them on the rules, including bear precaution guidelines (AR-0838; 0849);
- Provide signs for visitors that help them appreciate the natural area (AR-0847);
- Provide drinking water dispenser (fountain, sink, etc.)(AR-0837);
- Maintain water lines for drinking water (AR-0839);
- Test drinking water to ensure that it is safe/take corrective action if not (AR-0839); and
- Monitor site and remove public safety hazards (hazardous trees, etc.)(AR-0833; 0837; 0842).

#### **B. Second Crossing area**

9. As with the Rose Canyon Lake area, the permit for the Second Crossing area states that the permit is for “providing a high-quality public service in the operation and maintenance of government-owned recreation facilities located on the Payson Ranger District, Tonto National Forest.” AR-0930.

10. The permit requires the concessioner, Recreation Resource Management, Inc., to submit an annual operating plan, stating:

The annual operating plan shall specify the operational requirements governing the sites covered by this permit. At a minimum, the annual operating plan shall enumerate the minimum operating seasons; how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.

AR-0932 (emphasis added).

11. The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.*

12. Pursuant to its specific Operating Plan, the concessioner provides the following goods and services to visitors to the Second Crossing area and the other use areas covered by its permit:

- Maintain parking lot (painting stripes, cleaning, sealing, etc.) (AR-0974; 0975);
- Mowing and weeding in day use areas, along entrance roads, around signs and on road shoulders (AR-0976);
- Maintain trails (AR-097);
- Provide security for visitors and call for assistance to the local sheriff if and when necessary (AR-0988-89);
- Ensure use areas do not have more people than are permitted (AR-0981);
- Repair parking lot (paving potholes, etc.) (AR-0975; 0977);
- Maintain radio equipment in case needed for communication in an emergency (AR-0982);

- Clean and disinfect restrooms for public safety/convenience (AR-0973);
- Repair restrooms (AR-0974);
- Empty bathroom vaults (AR-0980);
- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-0974; 0980);
- Provide toilet paper in restrooms (AR-0974);
- Remove graffiti which would detract from all visitors' experiences (AR-0977);
- Maintain picnic tables (clean, paint/stain, repair) (AR-0975; 0977);
- Provide garbage cans (AR-0978);
- Empty garbage cans (AR-0973; 0977);
- Clean up litter in area (AR-0973; 0974; 0979);
- Provide and maintain signs for visitors that educate them on the rules (AR-0977; 0978; 0984);
- Provide and maintain signs for visitors that help them appreciate the natural area (AR-0977);
- Monitor sites for purposes of disease control (AR-0984);
- Provide a Fire Management Plan to safely evacuate visitors in the event of a forest fire (AR-0981; 0995; 0997); and
- Monitor site and remove public safety hazards (hazardous trees, etc.) (AR-0973; 0974; 0977; 0980-81; 0984).

### C. Bagby Hot Springs/Big Eddy areas

13. The permit for the Bagby Hot Springs/Big Eddy area contains the same provisions as the permit for the Rose Canyon Lake area, stating that the concessioner is to “operat[e] and maintain[] Forest Service developed recreation sites” in those areas. AR-2072.

14. The permit also requires the concessioner to submit an annual operating plan which must specify “the operational requirements governing the sites covered by this permit” and show “how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.” AR-2073 (emphasis added).

15. The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.*; see AR-2122.

16. Pursuant to its specific Operating Plan, the concessioner CLM Services Corporation provides the following goods and services to visitors to the Big Eddy and Bagby Hot Springs areas:

- Maintain parking lot and roads (painting stripes, cleaning, sealing, etc.)(AR-2123; 2175-76);
- Plow roads (AR-2121);
- Road and trail maintenance, including filling potholes (AR-2145);
- Provide security for visitors and ensure laws, regulations and special orders are enforced (AR-2119; 2121; 2138);
- Provide assistance in case an evacuation is necessary, such as in the case of forest fire (AR-2144);

- Promptly address any hazardous materials spills that may occur (AR-2137)
- Ensure visitors and vehicles do not exceed site capacity (AR-2119);
- Provide immediate first aid support/assistance for medical emergencies by trained staff (AR-2136-2137);
- Provide ability to communicate in emergencies (radios/phones) where no cell service is available (AR-2137; 2140);
- Clean and disinfect restrooms for public safety/convenience (AR-2127);
- Clean and repair restrooms (AR-2119; 2120; 2126);
- Empty bathroom vaults (AR-2120);
- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-2118; 2120);
- Provide toilet paper and towels in restrooms (AR-2120);
- Remove graffiti which would detract from all visitors' experiences (AR-2118);
- Maintain picnic tables (clean, paint/stain, repair)(AR-2120);
- Clean up litter in area (AR-2121; 2124);
- Maintain garbage cans (AR-2121; 2124; 2142);
- Provide and maintain signs for visitors that educate them on the rules and where assistance can be found, including rules to protect visitors from bear, mountain lions and other predators (AR-2107; 2119; 2124; 2143; 2145);
- Maintain the water systems and hydrants (AR-2122; 2124; 2142);
- Monitor site and remove public safety hazards (hazardous trees, etc.)(AR-2119; 2121; 2122; 2123; 2143); and

- Monitoring and testing for purposes of disease control (AR-2126; 2142; 2146).

*See generally* AR-2153-2160.

17. In addition, to ensure that all visitors have an opportunity to enjoy the hot springs, the concessioner has the authority to limit the time visitors are in the hot springs when other guests were waiting. AR-2134.

18. The concessioner also ensures that the “no alcohol” rule at Bagby Hot Springs is followed. AR-2139.

19. The concessioner also is authorized to ensure that the “no nudity” rule is adhered to, if instructed by the Forest Service. *Id.*

20. The concessioner also provides the service of ensuring that no one illegally camps in the hot springs area. *Id.*

21. CLM Services Corporation does not charge any fees for hikers who plan to hike through the Bull of the Woods Wilderness and are not using the hot springs site. AR-2134.

#### **D. Rampart Reservoir area**

22. The permit for the Rampart Reservoir area states that “the purpose of this authorization is for the concession operation of federally owned campgrounds and other facilities” and that the “permit is issued for the purpose of operating and maintaining a Forest Service developed recreation site(s) . . .” AR-1565.

23. As with the other permits being challenged, the permit requires the concessioner, Pyramid Enterprises d/b/a Rocky Mountain Recreation Company, to submit an annual operating plan which must specify “the operational requirements governing the sites covered by this permit” and show “how the holder will provide services to the public; protect public health and

safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.” AR-1566 (emphasis added).

24. The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.*

25. Rocky Mountain Recreation Company’s Operating Plan states that it will “ensure that the public has the full spectrum of services” which it is required to provide. AR-1614.

26. Pursuant to its Operating Plan, the concessioner provides the following goods and services to visitors to the Rampart Reservoir area:

- Maintain parking lot (painting stripes, cleaning, sealing, etc.);
- Repair roads parking lot (paving potholes, etc.)(AR-1633);
- Monitor and maintain roads/paths/trails in area (such as grading as needed, refreshing gravel, etc.)(AR-1632; 1633; 1636);
- Inspect the lakeshore for public safety hazards (AR-1632; 1637);
- Provide security for visitors (AR-1657);
- Provide immediate first aid support/assistance for medical emergencies by trained staff (AR-1641; 1658);
- Provide ability to communicate in emergencies (radios/phones) where no cell service is available (AR-1639; 1644-45);
- Clean and disinfect restrooms for public safety/convenience (AR-1625; 1626);
- Repair restrooms (AR-1625);
- Empty bathroom vaults (AR-1615; 1626);

- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-1625);
- Provide toilet paper in restrooms (AR-1625);
- Remove graffiti which would detract from all visitors' experiences (AR-1626; 1637);
- Maintain picnic tables (clean, paint/stain, repair) (AR-1629; 1631);
- Provide garbage cans (AR-1627);
- Empty garbage cans (AR-1627; 1629);
- Clean up litter in area (AR-1629; 1632; 1635; 1636; 1637);
- Provide information to all visitors through trained staff (camp hosts, etc.)(AR-1657);
- Provide and maintain signs for visitors, including speed and traffic signs and signs related to wildlife/predator management and safe practices (AR-1629; 1633; 1652-54);
- Maintain water lines for drinking water (AR-1621);
- Test drinking water to ensure that it is safe/take corrective action if not (AR-1615; 1617; 1621);
- Provide evacuation plans, such as for forest fires (AR-1645; 1651); and
- Monitor site and remove public safety hazards (hazardous trees, etc.)(AR-1614; 1615; 1629; 1636; 1649).

*See generally* AR-1711-1713.

### **E. Walton Lake area**

27. The permit for the Walton Lake area states that “this permit is issued for the purpose of operating and maintaining a Forest Service developed recreation site(s) . . .” AR-3381.

28. As with all the other permits being challenged, the permit requires the concessioner, Dianne Hunn of Aud & Di Campground Services, Inc., to submit an annual operating plan which must specify “the operational requirements governing the sites covered by this permit” and show “how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.” AR-3382 (emphasis added).

29. The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.*

30. Aud and Di Campground Service’s Operating Plan states that it “will provide high quality service to the public in the operation and maintenance” for the developed recreation sites covered by the permit. AR-3434.

31. Pursuant to its Operating Plan, the concessioner provides the following goods and services to visitors to the Walton Lake area:

- Maintain parking lot (painting stripes, cleaning, sealing, etc.) (AR-3454);
- Repair parking lot (paving potholes, etc.)(AR-3454);
- Maintain paths/trails in area (AR-3444; 3446);
- Ensure vehicles are properly parked, do not block roadways, and do not inconvenience other visitors (AR-3455);

- Assist in ensuring security for visitors and communication with authorities in emergencies (AR-3455-56; 3457);
- Provide immediate first aid support/assistance for medical emergencies by trained staff (AR-3437-38);
- Clean and disinfect restrooms for public safety/convenience (AR-3442);
- Repair restrooms (AR-3442; 3444);
- Empty bathroom vaults (AR-3442);
- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-3442);
- Provide toilet paper in restrooms (AR-3442);
- Remove any human waste immediately to prevent unhealthy exposure to any visitors (AR-3444);
- Remove graffiti which would detract from all visitors' experiences (AR-3442; 3444);
- Ensure that all use areas meet the Forest Service's guidelines (AR-3444);
- Maintain picnic tables (clean, paint/stain, repair) (AR-3442);
- Provide garbage bags to all visitors (AR-3446);
- Empty garbage cans (AR-3447);
- Clean up litter in area (AR-3442; 3446; 3447);
- Inspect and maintain signs for visitors, including signs informing visitors how to minimize conflicts with predators (AR-3442; 3447; 3457);
- Maintain water lines for drinking water (AR-3441);

- Test drinking water to ensure that it is safe/take corrective action if not (AR-3441; 3442-43);
- Assist in emergency situations, such as forest fires (AR-3454);
- Monitor site and remove public safety hazards (hazardous trees, etc.)(AR-3440; 3449-50); and
- Monitoring and testing for purposes of disease control, such as hantavirus. (AR-3457).

### **III. Argument**

#### **A. The concessioners are charging fees for providing goods and services to the plaintiffs.**

The section of the REA which applies to concessioners states that they “may charge a fee for providing a good or service to a visitor of a unit or area [in the National Forest System]” in accordance with how they were charging such fees in the past pursuant to applicable law. 16 U.S.C. § 6813(e). As demonstrated below, defendant-intervenor concessioners, as they have done in the past, are properly charging fees for providing goods and services to visitors such as plaintiffs. As also demonstrated below, plaintiffs benefit from these goods and services and therefore it is entirely appropriate and fair for them to pay fees to pay for this benefit.

##### **1. Rose Canyon Lake area**

One of plaintiffs’ challenges is to the fees charged by Recreation Resource Management at the Rose Canyon Lake site. Complaint at ¶¶ 6, 21. The plaintiffs “visited that site” and “enter[ed] the area with their car and park[ed] within it.” *Id.* at ¶ 6. Plaintiffs allege that, even though they used the parking lot and area, “they did not use any facilities or services.” *Id.* (emphasis added). However, given the language of the REA, the issue is whether the

concessioner, Recreation Resource Management, was charging fees “for providing a good or service” to visitors to the Rose Canyon Lake area. 16 U.S.C. § 6813(e). As demonstrated below, the concessioner was charging fees “for providing” many goods and services to visitors to that area, including plaintiffs.

The permit for the Rose Canyon Lake area states that the concessioner is to “operat[e] and maintain[] Forest Service developed recreation sites located in the Rose Canyon Complex.”

AR 0795. The permit requires the concessioner to submit an annual operating plan, stating:

The annual operating plan shall specify the operational requirements governing the sites covered by this permit. At a minimum, the annual operating plan shall enumerate the minimum operating seasons; how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.

AR-0797 (emphasis added). The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.* In addition, the permit requires the concessioner to post rules of conduct “necessary to provide for the safety of the general public.” AR-0813. Pursuant to its specific Operating Plan, the concessioner provides the following goods and services to visitors to the Rose Canyon Lake area:

- Maintain parking lot (painting stripes, cleaning, sealing, etc.)(AR-0831; 0832);
- Repair parking lot (paving potholes, etc.)(AR-0832);
- Sweep and/or blow clear roads, trails, walkways and parking spurs (AR-0831; 0832);
- Inspect the area to ensure that no safety hazards exist (AR-0840);
- Control vehicle use to ensure parking is at designated spots (AR-0833);
- Repair or replace regulatory signs as needed (AR-0832);
- Ensure fire hydrants are functioning properly (AR-0832);

- Mow and trim grass along entrance road, entrance signs, steps and road shoulders (AR-0831; 0832);
- Provide security for visitors, including fire evacuation needs (AR-0840; 0841; 0844-0845);
- Provide immediate first aid support/assistance for medical emergencies by trained staff (AR-0827);
- Provide ability to communicate in emergencies (radios/phones) where no cell service is available (AR-0828);
- Clean and disinfect restrooms for public safety/convenience (AR-0830; 0831);
- Repair restrooms (AR-0830; 0831; 0833);
- Empty bathroom vaults (AR-0833; 0839);
- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-0830);
- Provide toilet paper in restrooms (AR-0830);
- Remove graffiti which would detract from all visitors' experiences (AR-0831; 0832);
- Maintain picnic tables (clean, paint/stain, repair)(AR-0832);
- Empty and maintain dumpsters and garbage cans (AR-0834; 0838);
- Clean up litter in area (AR-0830; 0839) ;
- Provide information to all visitors through trained staff (camp hosts, etc.) (AR-0848);
- Provide signs for visitors that educate them on the rules, including bear precaution guidelines (AR-0838; 0849);
- Provide signs for visitors that help them appreciate the natural area (AR-0847);
- Provide drinking water dispenser (fountain, sink, etc.)(AR-0837);
- Maintain water lines for drinking water (AR-0839);

- Test drinking water to ensure that it is safe/take corrective action if not (AR-0839);  
and
- Monitor site and remove public safety hazards (hazardous trees, etc.)(AR-0833; 0837; 0842).

By visiting the area and parking their car in the parking lot, plaintiffs directly benefited from the following goods and services for which the fee is charged at Rose Canyon Lake: maintenance and repair of the parking lots; sweeping and/or blowing clear the roads, trails, walkways and parking spurs; inspecting the area to ensure that no safety hazards exist; controlling vehicle use to ensure parking is at designated spots; repairing or replacing regulatory signs as needed; mowing and trimming of grass along entrance road, entrance signs, steps and road shoulders; and providing signs for visitors that educate them on the rules, including bear precaution guidelines.

In fact, plaintiffs admit that they parked at the Rose Canyon Lake site. Complaint at ¶ 6. Thus, they clearly benefited from the goods and services provided by the concessioner related to their being able to park at that site. While, pursuant to other provisions of the REA, the Forest Service is not able to charge fees “solely for parking” (16 U.S.C. § 6802(d)(A)), the REA explicitly states that the provisions which apply to concessioners’ fees are entirely separate from the provisions which apply to the Forest Service’s fees. 16 U.S.C. § 6813(e)(“Notwithstanding any other provisions of this Act,” concessioners may charge fees for “providing a good or service to a visitor”). This distinction is logical because, unlike the Forest Service, concessioners are private businesses that must recoup their costs in ensuring that goods and services are available to visitors. Consistent with this logic, the provisions of the REA which apply to Forest Service fees focus on the actions of the visitors (*i.e.*, whether they park and do not actually use other

services), but the provisions which apply to concessioners focus on the actions of the concessioners (*i.e.*, whether they are providing services and goods and incurring the associated costs).

In addition, plaintiffs also, at a minimum, indirectly benefited from the following goods and services which are provided by the concessioner and made available to all visitors at all times to ensure enjoyable, convenient and safe experiences. The particular services related to safety are only actually used if and when the need should arise. Fortunately, these goods and services are not always actually used, but nonetheless are always made available in the event they are needed. Thus, the cost for these services is always incurred by concessioners. These goods and services include: ensuring hydrants are functioning properly; providing security for visitors, including fire evacuation needs; providing immediate first aid support/assistance for medical emergencies by trained staff; providing ability to communicate in emergencies (radios/phones) where no cell service is available; cleaning and disinfecting restrooms for public safety/convenience<sup>3</sup>; repairing restrooms; emptying bathroom vaults; applying odor treatment so bathrooms do not impact all visitors' experience; providing toilet paper in restrooms; removing graffiti which would detract from all visitors' experiences; maintaining picnic tables; providing information to all visitors through trained staff; providing signs for visitors that educate them on the rules, including bear precaution guidelines; providing signs for visitors that help them appreciate the natural area; providing drinking water dispensers; maintaining the water lines for

---

<sup>3</sup> Plaintiffs assert that they did not use any restrooms during their visits to the Rose Canyon Lake Area. However, it is extremely unlikely that, should that need arise while visiting the area, plaintiffs would notify the concessioner, pay the fee and then use the restrooms. This assertion demonstrates the practical difficulty in plaintiffs' assertion that fees should only be collected if and when a visitor makes specific use of a specific facility, service or improvement.

drinking water; testing the drinking water to ensure that it is safe/take corrective action if not; and monitoring the site and removing public safety hazards such as hazardous trees.

## 2. Second Crossing area

Another of plaintiffs' challenges is to the fees also charged by Recreation Resource Management at the Second Crossing site on the Tonto National Forest. Complaint at ¶ 7. A plaintiff was required "to pay \$6 to park" at that site. *Id.* at ¶ 22. This plaintiff also alleges that, even though he drove his car to and parked at the area to hike on the trails in that area, he allegedly did not "use" any facilities or services. *Id.* (emphasis added); Mot. at 11. However, as with the other areas, given the language of the REA, the issue is whether the concessioner was charging fees "for providing a good or service" to visitors to the Second Crossing area. 16 U.S.C. § 6813(e). As demonstrated below, the concessioner was charging fees "for providing" many goods and services to visitors to the Second Crossing area, including plaintiff.

As with the Rose Canyon Lake area, the permit for the Second Crossing area states that the permit is for "providing a high-quality public service in the operation and maintenance of government-owned recreation facilities located on the Payson Ranger District, Tonto National Forest." AR-0930. The permit requires the concessioner to submit an annual operating plan, stating:

The annual operating plan shall specify the operational requirements governing the sites covered by this permit. At a minimum, the annual operating plan shall enumerate the minimum operating seasons; how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.

AR-0932 (emphasis added). The permit also requires the concessioner to "perform a condition survey of the water system each year before it is opened" and correct all deficiencies "to the satisfaction of the Forest Service prior to opening the system." *Id.*

Pursuant to its specific Operating Plan, the concessioner provides the following goods and services to visitors to the Second Crossing area and the other use areas covered by its permit:

- Maintain parking lot (painting stripes, cleaning, sealing, etc.) (AR-0974; 0975);
- Mowing and weeding in day use areas, along entrance roads, around signs and on road shoulders (AR-0976);
- Maintain trails (AR-097);
- Provide security for visitors and call for assistance to the local sheriff if and when necessary (AR-0988-89);
- Ensure use areas do not have more people than are permitted (AR-0981);
- Repair parking lot (paving potholes, etc.) (AR-0975; 0977);
- Maintain radio equipment in case needed for communication in an emergency (AR-0982);
- Clean and disinfect restrooms for public safety/convenience (AR-0973);
- Repair restrooms (AR-0974);
- Empty bathroom vaults (AR-0980);
- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-0974; 0980);
- Provide toilet paper in restrooms (AR-0974);
- Remove graffiti which would detract from all visitors' experiences (AR-0977);
- Maintain picnic tables (clean, paint/stain, repair) (AR-0975; 0977);
- Provide garbage cans (AR-0978);
- Empty garbage cans (AR-0973; 0977);
- Clean up litter in area (AR-0973; 0974; 0979);

- Provide and maintain signs for visitors that educate them on the rules (AR-0977; 0978; 0984);
- Provide and maintain signs for visitors that help them appreciate the natural area (AR-0977);
- Monitor sites for purposes of disease control (AR-0984);
- Provide a Fire Management Plan to safely evacuate visitors in the event of a forest fire (AR-0981; 0995; 0997); and
- Monitor site and remove public safety hazards (hazardous trees, etc.) (AR-0973; 0974; 0977; 0980-81; 0984).

By visiting the area and parking their car in the area, plaintiffs directly benefited from the following goods and services for which the fee is charged at Second Crossing: maintenance and repair of the parking lots; sweeping and/or blowing clear the roads, trails, walkways and parking spurs; inspecting the area to ensure that no safety hazards exist; controlling vehicle use to ensure use limits are not exceeded; repairing or replacing regulatory signs as needed; mowing and trimming of grass along entrance road, entrance signs, steps and road shoulders; and providing signs for visitors that educate them on the rules, including bear precaution guidelines.

In fact, as with the other sites, plaintiffs admit that they parked at the Second Crossing site. Complaint at ¶ 22. Thus, as with the other sites, plaintiffs clearly benefited from the goods and services provided by the concessioner related to their being able to park at that site. In addition, plaintiffs also, at a minimum, indirectly benefited from the following goods and services which are provided by the concessioner and made available to all visitors at all times to ensure enjoyable, convenient and safe experiences: providing security for visitors, including fire evacuation needs; providing ability to communicate in emergencies (radios/phones) where no

cell service is available; cleaning and disinfecting restrooms for public safety/convenience; repairing restrooms; emptying bathroom vaults; applying odor treatment so bathrooms do not impact all visitors' experience; providing toilet paper in restrooms; removing graffiti which would detract from all visitors' experiences; maintaining picnic tables; providing signs for visitors that educate them on the rules; providing signs for visitors that help them appreciate the natural area; and monitoring the site and removing public safety hazards such as hazardous trees.

### 3. Bagby Hot Springs/Big Eddy areas

Another of plaintiffs' challenges is to the fees charged by CLM Services Corporation which is the concessioner at the Bagby Hot Springs/Big Eddy areas. Complaint at ¶¶ 5, 26-27. The plaintiffs "parked" at those sites and "soaked in Bagby Hot Springs." *Id.* at ¶¶ 26-27. Plaintiffs allege that, even though they used the parking lot and area, they did not "use" any facilities or services. *Id.* (emphasis added). However, as with the other areas, given the language of the REA, the issue is whether the concessioner was charging fees "for providing a good or service" to visitors to the Rose Canyon Lake area. 16 U.S.C. § 6813(e). As demonstrated below, the concessioner was charging fees "for providing" many goods and services to visitors to the Bagby Hot Springs and the Big Eddy areas, including plaintiffs.

The permit for the Bagby Hot Springs/Big Eddy area contains the same provisions as the permit for the Rose Canyon Lake area, stating that the concessioner is to "operat[e] and maintain[] Forest Service developed recreation sites" in those areas. AR-2072. The permit also requires the concessioner to submit an annual operating plan which must specify "the operational requirements governing the sites covered by this permit" and show "how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit." AR-2073 (emphasis

added). The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.*; see AR-2122.

Pursuant to its specific Operating Plan, the concessioner CLM Services Corporation provides the following goods and services to visitors to the Big Eddy and Bagby Hot Springs areas:

- Maintain parking lot and roads (painting stripes, cleaning, sealing, etc.)(AR-2123; 2175-76);
- Plow roads (AR-2121);
- Road and trail maintenance, including filling potholes (AR-2145);
- Provide security for visitors and ensure laws, regulations and special orders are enforced (AR-2119; 2121; 2138);
- Provide assistance in case an evacuation is necessary, such as in the case of forest fire (AR-2144);
- Promptly address any hazardous materials spills that may occur (AR-2137)
- Ensure visitors and vehicles do not exceed site capacity (AR-2119);
- Provide immediate first aid support/assistance for medical emergencies by trained staff (AR-2136-2137);
- Provide ability to communicate in emergencies (radios/phones) where no cell service is available (AR-2137; 2140);
- Clean and disinfect restrooms for public safety/convenience (AR-2127);
- Clean and repair restrooms (AR-2119; 2120; 2126);
- Empty bathroom vaults (AR-2120);

- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-2118; 2120);
- Provide toilet paper and towels in restrooms (AR-2120);
- Remove graffiti which would detract from all visitors' experiences (AR-2118);
- Maintain picnic tables (clean, paint/stain, repair)(AR-2120);
- Clean up litter in area (AR-2121; 2124);
- Maintain garbage cans (AR-2121; 2124; 2142);
- Provide and maintain signs for visitors that educate them on the rules and where assistance can be found, including rules to protect visitors from bear, mountain lions and other predators (AR-2107; 2119; 2124; 2143; 2145);
- Maintain the water systems and hydrants (AR-2122; 2124; 2142);
- Monitor site and remove public safety hazards (hazardous trees, etc.)(AR-2119; 2121; 2122; 2123; 2143); and
- Monitoring and testing for purposes of disease control (AR-2126; 2142; 2146).

*See generally* AR-2153-2160.

In addition, to ensure that all visitors have an opportunity to enjoy the hot springs, the concessioner has the authority to limit the time visitors are in the hot springs when other guests were waiting. AR-2134. The concessioner also ensures that the “no alcohol” rule at Bagby Hot Springs is followed. AR-2139. The concessioner also is authorized to ensure that the “no nudity” rule is adhered to, if instructed by the Forest Service. *Id.* The concessioner also provides the service of ensuring that no one illegally camps in the hot springs area. *Id.* Notably,

CLM Services Corporation does not charge any fees for hikers who plan to hike through the Bull of the Woods Wilderness and are not using the hot springs site. AR-2134.<sup>4</sup>

By driving and parking their car in the areas, and/or visiting and soaking in the hot springs themselves at Bagby Hot Springs, plaintiffs directly benefited from many of the goods and services which are provided at the Big Eddy and Bagby Hot Springs areas and for which the fee is charged. *See* Complaint at ¶¶ 5, 26, 27. For example, the plaintiffs benefited from the following services: maintenance of parking lots, roads and trails in the area; plowing of roads; security for visitors; ensuring laws, regulations and special orders are enforced such as the no alcohol ban; ensuring visitors and vehicles do not exceed site capacity; application of odor treatment so bathrooms do not impact all visitors' experience; removal of graffiti which would detract from all visitors' experiences; cleaning up litter in area; maintaining garbage cans; and providing and maintaining signs for visitors that educate them on the rules and where assistance can be found, including rules to protect visitors from bear, mountain lions and other predators.

As with the other areas, plaintiffs also, at a minimum, indirectly benefited from many of the goods and services provided by the concessioner at these areas and made available to all visitors at all times to ensure enjoyable, convenient and safe experiences. These goods and services included: providing assistance in case an evacuation is necessary, such as in the case of forest fire; promptly addressing any hazardous materials spills that may occur; providing immediate first aid support/assistance for medical emergencies by trained staff; providing the

---

<sup>4</sup> One of plaintiffs' declarations alleges that a plaintiff, Ms. Harwood, was charged to hike through the area from the Bull of the Woods Wilderness and was not using the hot springs. *See* ECF #29-2 (Declaration of Amy Harwood at ¶¶ 9-11). Because the permit does not authorize the concessioner to charge in such instances, Ms. Harwood's complaint is not that the permit was improperly approved by the Forest Service, but instead that the concessioner failed to comply with the terms of its permit. This complaint is not a proper subject matter for an APA action. However, no such incident was ever reported to the Forest Service or brought to CLM Service Corporation's attention. Had it, the situation would have been immediately rectified.

ability to communicate in emergencies (radios/phones) where no cell service is available; the cleaning, repair, maintenance and disinfecting of restrooms for public safety/convenience; emptying the bathroom vaults; providing toilet paper in the restrooms; maintaining the picnic tables; maintaining the water systems and hydrants; monitoring the site and removing public safety hazards such as hazardous trees; and monitoring and testing for purposes of disease control. The particular services related to safety are only actually used if and when the need should arise. Fortunately, these goods and services are not always actually used, but nonetheless are always available in the event they are needed. Thus, the cost for these services is always incurred by concessioners.

#### **4. Rampart Reservoir area**

Another of plaintiffs' challenges is to the fees charged by Rocky Mountain Recreation Services at the Rampart Reservoir area. Complaint at ¶¶ 8, 23. A plaintiff "parked" at that site. *Id.* at ¶ 23. Plaintiff alleges that, even though he used the parking lot at the camp site and recreated in the area, he did not "use" any facilities or services. *Id.* (emphasis added); ECF # 29-7 (¶ 6). However, as with the other areas, given the language of the REA, the issue is whether the concessioner was charging fees "for providing a good or service" to visitors to the Rampart Reservoir area. 16 U.S.C. § 6813(e). As demonstrated below, the concessioner was charging fees "for providing" many goods and services to visitors to the Rampart Reservoir area, including plaintiff.

The permit for the Rampart Reservoir area states that "the purpose of this authorization is for the concession operation of federally owned campgrounds and other facilities" and that the "permit is issued for the purpose of operating and maintaining a Forest Service developed recreation site(s) . . ." AR-1565. As with the other permits being challenged, the permit requires

the concessioner to submit an annual operating plan which must specify “the operational requirements governing the sites covered by this permit” and show “how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.” AR-1566 (emphasis added). The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.*

Rocky Mountain Recreation Company’s Operating Plan states that it will “ensure that the public has the full spectrum of services” which it is required to provide. AR-1614. Pursuant to its Operating Plan, the concessioner provides the following goods and services to visitors to the Rampart Reservoir area:

- Maintain parking lot (painting stripes, cleaning, sealing, etc.);
- Repair roads parking lot (paving potholes, etc.)(AR-1633);
- Monitor and maintain roads/paths/trails in area (such as grading as needed, refreshing gravel, etc.)(AR-1632; 1633; 1636);
- Inspect the lakeshore for public safety hazards (AR-1632; 1637);
- Provide security for visitors (AR-1657);
- Provide immediate first aid support/assistance for medical emergencies by trained staff (AR-1641; 1658);
- Provide ability to communicate in emergencies (radios/phones) where no cell service is available (AR-1639; 1644-45);
- Clean and disinfect restrooms for public safety/convenience (AR-1625; 1626);
- Repair restrooms (AR-1625);

- Empty bathroom vaults (AR-1615; 1626);
- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-1625);
- Provide toilet paper in restrooms (AR-1625);
- Remove graffiti which would detract from all visitors' experiences (AR-1626; 1637);
- Maintain picnic tables (clean, paint/stain, repair) (AR-1629; 1631);
- Provide garbage cans (AR-1627);
- Empty garbage cans (AR-1627; 1629);
- Clean up litter in area (AR-1629; 1632; 1635; 1636; 1637);
- Provide information to all visitors through trained staff (camp hosts, etc.) (AR-1657);
- Provide and maintain signs for visitors, including speed and traffic signs and signs related to wildlife/predator management and safe practices (AR-1629; 1633; 1652-54);
- Maintain water lines for drinking water (AR-1621);
- Test drinking water to ensure that it is safe/take corrective action if not (AR-1615; 1617; 1621);
- Provide evacuation plans, such as for forest fires (AR-1645; 1651); and
- Monitor site and remove public safety hazards (hazardous trees, etc.) (AR-1614; 1615; 1629; 1636; 1649).

*See generally* AR-1711-1713.

By driving and parking his car in the area, plaintiff directly benefited from many of the goods and services which are provided at the Rampart Reservoir area and for which the \$3.00 fee is charged. *See* Complaint at ¶ 8. For example, the plaintiff benefited from the following services: maintenance of parking lots, roads and trails in the area; security for visitors; ensuring laws, regulations and special orders are enforced; monitoring the area for public safety hazards;

application of odor treatment so bathrooms do not impact all visitors' experience; removal of graffiti which would detract from all visitors' experiences; cleaning up litter in area; maintaining garbage cans; and providing and maintaining signs for visitors that educate them on the rules and where assistance can be found, including rules to protect visitors from bear and other predators.

As with the other areas, plaintiff also, at a minimum, indirectly benefited from many of the goods and services provided by the concessioner at these areas and made available to all visitors at all times to ensure enjoyable, convenient and safe experiences. These goods and services included: providing assistance in case an evacuation is necessary, such as in the case of forest fire; providing immediate first aid support/assistance for medical emergencies by trained staff; providing the ability to communicate in emergencies (radios/phones) where no cell service is available; the cleaning, repair, maintenance and disinfecting of restrooms for public safety/convenience; emptying the bathroom vaults; providing toilet paper in the restrooms; maintaining the picnic tables; maintaining the water systems and hydrants; monitoring the site and removing public safety hazards such as hazardous trees; and monitoring and testing for purposes of disease control.

## 5. Walton Lake area

The last of plaintiffs' challenges is to the fees charged by Dianne Hunn, operating through Aud and Di Campground Services, Inc., at the Walton Lake area on the Ococho National Forest. Complaint at ¶¶ 9, 24. A plaintiff "parked" at that site. *Id.* at ¶ 23; *see* ECF # 29-6 (¶ 3).<sup>5</sup> As with the other plaintiffs, plaintiff alleges that, even though he used the parking lot and

---

<sup>5</sup> Notably, the plaintiff's declaration demonstrates that he actually expected to pay a fee at this site if he visited it, so he purchased a pass ahead of time that he thought would cover his fee and then discovered that his pass was not valid at this site. ECF # 29-6 (¶¶ 3-7). This expectation is not consistent with plaintiff's present assertion that no fee should be charged at this site. The plaintiff also stated that he would not re-visit this area if his pass were not accepted,

recreated in the area, he did not “use” any facilities or services. *Id.* (emphasis added).

However, as with the other areas, given the language of the REA, the issue is whether the concessioner was charging fees “for providing a good or service” to visitors to the Walton Lake area. 16 U.S.C. § 6813(e). As demonstrated below, the concessioner was charging fees “for providing” many goods and services to visitors to the Rampart Reservoir area, including plaintiff.

The permit for the Walton Lake area states that “this permit is issued for the purpose of operating and maintaining a Forest Service developed recreation site(s) . . .” AR-3381. As with all the other permits being challenged, the permit requires the concessioner to submit an annual operating plan which must specify “the operational requirements governing the sites covered by this permit” and show “how the holder will provide services to the public; protect public health and safety and the environment; and repair, maintain, or enhance the function of the improvements covered by this permit.” AR-3382 (emphasis added). The permit also requires the concessioner to “perform a condition survey of the water system each year before it is opened” and correct all deficiencies “to the satisfaction of the Forest Service prior to opening the system.” *Id.*

Aud and Di Campground Service’s Operating Plan states that it “will provide high quality service to the public in the operation and maintenance” for the developed recreation sites covered by the permit. AR-3434. Pursuant to its Operating Plan, the concessioner provides the following goods and services to visitors to the Walton Lake area:

- Maintain parking lot (painting stripes, cleaning, sealing, etc.) (AR-3454);

---

further demonstrating that he is willing to pay a fee to visit this site. *Id.* at ¶ 11 (“I will be extremely hesitant [to revisit the area] so long as federally issued recreation passes are not accepted as payment”).

- Repair parking lot (paving potholes, etc.)(AR-3454);
- Maintain paths/trails in area (AR-3444; 3446);
- Ensure vehicles are properly parked, do not block roadways, and do not inconvenience other visitors (AR-3455);
- Assist in ensuring security for visitors and communication with authorities in emergencies (AR-3455-56; 3457);
- Provide immediate first aid support/assistance for medical emergencies by trained staff (AR-3437-38);
- Clean and disinfect restrooms for public safety/convenience (AR-3442);
- Repair restrooms (AR-3442; 3444);
- Empty bathroom vaults (AR-3442);
- Apply odor treatment so bathrooms do not impact all visitors' experience (AR-3442);
- Provide toilet paper in restrooms (AR-3442);
- Remove any human waste immediately to prevent unhealthy exposure to any visitors (AR-3444);
- Remove graffiti which would detract from all visitors' experiences (AR-3442; 3444);
- Ensure that all use areas meet the Forest Service's guidelines (AR-3444);
- Maintain picnic tables (clean, paint/stain, repair) (AR-3442);
- Provide garbage bags to all visitors (AR-3446);
- Empty garbage cans (AR-3447);
- Clean up litter in area (AR-3442; 3446; 3447);
- Inspect and maintain signs for visitors, including signs informing visitors how to minimize conflicts with predators (AR-3442; 3447; 3457);

- Maintain water lines for drinking water (AR-3441);
- Test drinking water to ensure that it is safe/take corrective action if not (AR-3441; 3442-43);
- Assist in emergency situations, such as forest fires (AR-3454);
- Monitor site and remove public safety hazards (hazardous trees, etc.)(AR-3440; 3449-50); and
- Monitoring and testing for purposes of disease control, such as hantavirus. (AR-3457)

By driving and parking his car in the area, plaintiff directly benefited from many of the goods and services which are provided at the Walton Lake area and for which the \$5.00 fee is charged. *See* Complaint at ¶ 9. For example, the plaintiff benefited from the following services: maintenance of parking lots, roads and trails in the area, security for visitors; ensuring laws, regulations and special orders are enforced; monitoring the area for public safety hazards; application of odor treatment so bathrooms do not impact all visitors' experience; removal of graffiti which would detract from all visitors' experiences; cleaning up litter in area; maintaining garbage cans; and providing and maintaining signs for visitors that educate them on the rules and where assistance can be found, including rules to protect visitors from bear and other predators.

As with the other areas, plaintiff also, at a minimum, indirectly benefited from many of the goods and services provided by the concessioner at these areas and made available to all visitors at all times to ensure enjoyable, convenient and safe experiences. These goods and services included: providing assistance in case an evacuation is necessary, such as in the case of forest fire; providing immediate first aid support/assistance for medical emergencies by trained staff; providing the ability to communicate in emergencies (radios/phones) where no cell service is available; the cleaning, repair, maintenance and disinfecting of restrooms for public

safety/convenience; emptying the bathroom vaults; providing toilet paper in the restrooms; maintaining the picnic tables; maintaining the water systems and hydrants; monitoring the site and removing public safety hazards such as hazardous trees; and monitoring and testing for purposes of disease control.

As demonstrated above, the fees being charged by all of the defendant-intervenor concessioners at all of the sites at issue are for “providing a good or service to a visitor of a unit or area.” Therefore, these fees are not prohibited by the REA. 16 U.S.C. § 6813(e).

**B. Regardless of whether a visitor makes direct use of a good or service, as long as concessioners are providing goods and services by making them available to visitors, they can charge a fee for that effort pursuant to the REA.**

Plaintiffs appear to be arguing that the section of the REA which applies to fees charged by concessioner states that, as long as the visitor does not make “direct use” of a good or service, he or she cannot be charged a fee. Mot. at 10 (concessioner fees are improper because they are charged “even when visitors do not use any facilities or services of the area”)(emphasis added). However, this assertion is not correct. The provision of the REA which applies to concessioners differs from the other provisions of the REA and states that, as long as concessioners are “providing” goods or services to visitors, they are allowed to charge fees. The provision of the REA does not use the term “use.” Notably, plaintiffs do not deny that the concessioners are in fact “providing” goods and services.

This language avoids the practical problem of a visitor arriving at an area and claiming that he or she should not be charged any fees because he or she has no present intention to use the bathrooms, picnic tables, or other facilities or services. If this assertion would result in no fee being charged, most visitors would likely make this assertion. Moreover, as demonstrated

above, all visitors benefit from the goods and services which are provided. Sometimes that benefit is direct (such as with use of roads, parking lot and picnic tables). Sometimes that benefit is indirect (such as with the benefits of having a clean and safe area in which to recreate). And sometimes a visitor may have no present intention of using a good or service that is being provided, but then discover later that he or she does in fact need to make direct use of it (such as with bathrooms). But at all times, benefits are being received as a result of the goods and services being provided. In addition, costs are also being incurred by the concessioners in order to provide these goods and services.

The basis for the plaintiffs' argument is a Ninth Circuit court decision which addressed the very different situation of "sites run by the Forest Service" and the separate sections of the REA which apply to those circumstances. Mot. at 19 ("The Ninth Circuit found that at sites run by the Forest Service . . ."). In that case, *Adams v. U.S. Forest Service*, 671 F.3d 1138, 1143 (9<sup>th</sup> Cir. 2012), the Court focused on § 6802 of the REA, noting that that section "prohibited the Forest Service from charging an amenity fee 'solely for parking.'" However, the present case (1) does not involve fees charged by the Forest Service and (2) involves a separate provision of the REA which authorizes fees by third party concessioners for merely "providing" goods or services to visitors. Section 6802, at issue in *Adams*, did not contain any similar terms.

Furthermore, because § 6802 of the REA explicitly stated that the Forest Service could not charge a fee to a visitor "solely for parking," any such fees were clearly not allowed. However, in the instant situation, the REA explicitly allows fees to be charged by concessioners for providing any goods or services to visitors. Thus, the fees in the instant situations are entirely consistent with the ordinary language in the provisions of the REA which apply to these

situations.<sup>6</sup> Given that a reasonable interpretation of the term “providing” includes simply “making available,” the Forest Service’s interpretation and application of this statutory term is reasonable and entitled to respect. *See www.merriam-webster.com* (“provide” is defined as “to supply or make available”); *see generally Rogers Indus. Products, Inc. v. HF Rubber Machinery, Inc.*, 797 F.Supp.2d 851, 860 (2011)(finding that the ordinary meaning of the term “provide” includes to “make available”); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (persuasive interpretations by agency of statutes are entitled to the court’s “respect”).<sup>7</sup>

Plaintiffs also cite to a statement in one of the prospectuses for one of the permits which stated that the permit holder may not charge fees for certain activities and could charge fees only to the extent the Forest Service could charge such fees. Mot. at 20; AR-0916-0917. However, that statement was not included in the actual permit itself. Nor does that statement necessarily preclude the concessioner from charging fees which are otherwise consistent with § 6813(e), namely fees for “providing a good or service to a visitor of a unit or area [in the National Forest System] in accordance with any other applicable law or regulation.” 16 U.S.C. § 6813(e). As plaintiffs concede, the Forest Service has asserted that situations involving fees charged by third

---

<sup>6</sup> Plaintiffs also cite to a Tenth Circuit decision, *Scherer v. U.S. Forest Service*, 653 F.3d 1241 (10<sup>th</sup> Cir. 2011), which similarly involved the very different situation of fees being charged by the Forest Service and an examination of § 6802 of the REA. Plaintiffs’ current lawsuit is an effort to extend these decisions which focused on fees charged by the Forest Service and separate sections of the REA to the very different situation where fees are charged by third party concessioners. While plaintiffs believe no distinction between the two situations should be made, Congress obviously disagreed given its inclusion of § 6813(e).

<sup>7</sup> The court in the *Adams* case held that the Forest Service could not charge a fee “solely for parking” even if the Forest Service had other services available to a visitor. However, the section of the REA at issue in that instance explicitly prohibited fees “solely for parking” and, unlike the instant matter, that section of the REA did not authorize fees for “providing” other services in the area. The section of the REA at issue in the instant case does in fact authorize fees for merely “providing” goods and services to visitors which, as shown above, includes making them available.

party concessioners are entirely distinct from situations involving fees charged by the Forest Service. Mot. at 21.

As noted above, given that third party private concessioners are compensated for their costs for providing the required services through the fees they charge, Congress has acknowledged that these situations are very distinct from where the Forest Service is charging any fees by establishing a separate section of the REA to address these situations. Section 6813(e) was specifically included to address third party concession operations and Congress stated that its provisions were “notwithstanding” the provisions that applied to fees charged by the Forest Service. If in fact there were no distinctions between situations where fees are charged by the Forest Service and third party concessioners, there would have been no need for § 6813(e) of the REA. The very existence of this separate provision for third party concessioners belies plaintiffs’ argument.

**C. The fees at issue are in accordance with the Organic Act and Granger-Thye Act which authorize the Forest Service to administer and regulate the use of the National Forests.**

The REA requires that any fees charged by concessioners be “in accordance with any other applicable law or regulation.” 16 U.S.C. § 6813(e). The fees at issue are in accordance with the Forest Service’s Organic Act and the Granger-Thye Act which authorize the Forest Service to administer and regulate the use of the National Forests. 16 U.S.C. § 551 (the Secretary of Agriculture may regulate the occupancy and use of the National Forests); 16 U.S.C. § 580d (the Secretary of Agriculture may establish rules for and permit the use of structures and improvements on the National Forests). Every permit being challenged explicitly stated that it was issued “under Section 7 of the Granger-Thye Act, 16 U.S.C. 580d, and 36 CFR Part 251, Subpart B, as amended, and is

subject to their provisions.” AR 0795; 0931; 1565; 2072; 3381; *see* AR-0008-09 (listing various laws which authorize third party concession operations).<sup>8</sup>

Therefore, because the fees are being charged by third parties for providing a good or service to a visitor to the National Forests and those fees are being charged pursuant to and in accordance with other authorities, they are not prohibited by the REA nor are they subject to the provisions of the REA related to fees which are charged by the Forest Service. 16 U.S.C. § 6813(e).

**D. The fees charged by concessioners do not have to be approved by RRACS.**

The plaintiffs incorrectly assert that fees charged by third party concessioners pursuant to other statutory authority must be subject to review by Recreation Resource Advisory Committees (“RRACs”). Mot. at 24. However, only fees established pursuant to the REA must be subject to review by RRACs. 16 U.S.C. § 6803(a)(requiring public participation through RRACs of fees “established under this Act [REA]”). The REA refers to fees that the Forest Service charges and collects. 16 U.S.C. § 6802(a)(the REA authorizes the Forest Service to establish, charge and collect certain fees as provided in the REA). Because the fees at issue were established pursuant to other statutory authority that applies to third party concessioners, such as the Granger-Thye Act, and are charged and collected by those third party concessioners, they are not subject to review by RRACs. 16 U.S.C. § 6813(e)(allowing fees charged by third party concessioners “in accordance with any other applicable law or regulation”).

---

<sup>8</sup> Plaintiffs incorrectly assert that the fact that these permits are authorized by the Granger-Thye Act “is not ground in the record” and therefore cannot be accepted. Mot. at 21. As shown above, the fact that each of these permits is authorized by the Granger-Thye Act is directly set out in the administrative record.

**E. Claims One and Two should be dismissed to the extent they seek declaratory judgment as to the alleged “Forest Service policies” because Plaintiffs have not shown that there has been any final agency action as to any such alleged policies.**

In their motion, plaintiffs challenge “the policy of the defendant United States Forest Service in allowing companies, known as ‘concessionaires,’ to charge fees to member of the public to use public lands in a way that the agency itself cannot charge, in violation of [the REA], as applied to five different areas throughout the western United States.” Mot. at 1 (emphasis added). While the specific final agency actions which led to each of the permits being issued in the five areas have been addressed above, the plaintiffs do not identify any actual policy or final agency action as to an overall policy to issue such permits. Nor does any such final agency action as to any such policy exist in the administrative record. The holding in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990) is equally applicable to plaintiffs’ challenge to a “policy” of making decisions in certain types of situations:

That is not an “agency action” within the meaning of § 702, much less a “final agency action” within the meaning of § 704 [of the APA]. The term “land withdrawal review program” [] does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable “agency action”-much less a “final agency action”-than a “weapons procurement program” of the Department of Defense or a “drug interdiction program” of the Drug Enforcement Administration.

Therefore, because plaintiffs’ action is brought pursuant to the Administrative Procedure Act which requires final agency action in such a situation, the plaintiffs’ challenge to any such alleged policy must be dismissed. *Dalton v. Specter*, 511 U.S. 462, 469 (1994)(“the prerequisite to review under the APA-‘final agency action’-is lacking”).

**IV. Conclusion**

For the reasons set forth above, Recreation Resource Management, Inc., Rocky Mountain Recreation Company, CLM Services Corporation, Dianne Hunn of Aud & Di Campground Services, Inc. and the National Forest Recreation Association respectfully request that their motion for summary judgment be granted and that plaintiffs' motion for summary judgment be denied.

Respectfully submitted,

/s/ Kevin R. Garden  
Kevin R. Garden  
DC Bar No. 426745  
THE GARDEN LAW FIRM, P.C.  
901 N. Pitt Street  
Suite 325  
Alexandria, VA 22314  
Telephone: (703) 535-5565

Counsel for Intervenor-Applicants

Dated: May 13, 2013