

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

Civil Action No. 11-cv-03267-JLK

DAVID SCHERER and MICHAEL BEAN,

Plaintiffs,

v.

DANIEL JIRON¹, Regional Forester, United States
Forest Service; and UNITED STATES FOREST SERVICE,

Defendants.

DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT

Defendants, by and through undersigned counsel, hereby state as follows:

INTRODUCTION

1. The allegations set forth in the first sentence of this Paragraph constitute Plaintiffs' characterization of their action, to which no response is required. To the extent a response is required, the allegations are denied. The allegations set forth in the second sentence of this Paragraph constitute conclusions of law, to which no response is required. To the extent a response is required, the allegations are denied. Defendants deny that Plaintiffs are entitled to the requested relief.

¹ Mr. Jiron is substituted for Ms. Gustafson pursuant to Federal Rule of Civil Procedure 25(d).

JURISDICTION, CAUSE OF ACTION AND VENUE

2. The allegations set forth in this Paragraph constitute conclusions of law to which no response is required.

3. The allegations set forth in the first sentence of this Paragraph are a characterization of Plaintiffs' action to which no response is required. The allegations set forth in the second sentence of this Paragraph constitute conclusions of law to which no response is required, and purport to characterize the September, 2005 Mt. Evans REA Implementation Plan ("Mt. Evans Implementation Plan"), a document that speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited document. To the extent a response is required, the allegations are denied.

4. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations that Plaintiffs are legal residents of the District of Colorado, and therefore deny them. The remaining allegations contained in this Paragraph constitute conclusions of law, to which no response is required.

PARTIES

5 Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations set forth in this Paragraph, and therefore deny them.

6. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations set forth in this Paragraph, and therefore deny them.

7. Defendants admit that the Rocky Mountain Region of the United States Forest Service approved the Mt. Evans Implementation Plan in September 2005, but aver that the Forest Service's

practices at Mt. Evans have been modified since the issuance of the Mt. Evans Implementation Plan in subsequently published annual operating plans and other documents and that these practices are being further evaluated based on the recent decision in Adams v. Forest Service, No. 10-16711, --- F.3d ---, 2012 WL 400440 (9th Cir. Feb. 9, 2012). The remaining allegations contained in the first sentence of this Paragraph are denied. Defendants aver that as of March 12, 2012, Daniel Jiron is the Regional Forester for the Rocky Mountain Region. The allegations contained in the second sentence of this Paragraph are a characterization of Plaintiffs' action to which no response is required.

8. Admitted.

FACTS

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

9. Defendants admit that Congress passed the Recreational Fee Demonstration Program Statute in 1996 and that it was signed by the President. The remaining allegations set forth in this Paragraph purport to characterize and quote from a statute, the Recreational Fee Demonstration Program Statute, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited statutory provisions.

10. Defendants deny the allegations set forth in the first sentence of this Paragraph. The allegations in the second sentence of this Paragraph purport to characterize unspecified resolutions, which speak for themselves and are the best evidence of their content.

11. The allegations set forth in the first sentence of this Paragraph purport to characterize a

proposed amendment introduced in the House of Representatives, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the proposed amendment. The allegations set forth in the second sentence of this Paragraph purport to characterize the reported testimony of a Member of Congress, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited testimony. The allegations set forth in the third sentence of this Paragraph purport to characterize the reported testimony of a Member of Congress, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited testimony.

12. The allegations set forth in the first sentence of this Paragraph are admitted. With respect to the allegations set forth in the second sentence of Paragraph 12, Defendants admit that the Federal Lands Recreation Enhancement Act (“REA”) was passed in 2004 and aver that it replaced the Fee Demo program. Except as expressly admitted, the allegations set forth in the second sentence of this Paragraph are denied. The allegations set forth in the third and fourth sentences of this Paragraph purport to quote REA, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited statutory provisions. The allegations set forth in the fifth sentence of this Paragraph purport to quote from and characterize REA, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited statutory provisions. In addition, the allegations constitute conclusions of law to which no

response is required. To the extent a response is required, the allegations are denied.

13. The allegations set forth in this Paragraph purport to characterize REA, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited statutory provisions. In addition, the allegations constitute conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

14. The allegations set forth in this Paragraph purport to quote and characterize a passage from a House of Representatives Committee Report, H.R. Rep. 108-790(I), which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited Report.

The Mt. Evans High Impact Recreation Area and the Predecessor Lawsuit

15. Defendants admit the allegations set forth in the first sentence of this Paragraph. With respect to the allegations in the second sentence of this Paragraph, Defendants admit that the Interim Implementation Guidelines (“Guidelines”) were not subject to notice and comment, and deny any requirement to subject them to notice and comment. The remaining allegations in the second sentence are denied. The allegations set forth in the third sentence of this Paragraph purport to quote the Guidelines, which speak for themselves and are the best evidence of their content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the Guidelines.

16. Defendants admit the allegations set forth in the first and third and sentences of this Paragraph. The allegations contained in the second sentence of this Paragraph set forth Plaintiffs’

characterization of their action and conclusions of law to which no response is required. To the extent a response is deemed required, Defendants deny the allegations in the second sentence of this Paragraph and aver that the practices at Mt. Evans have been modified since the issuance of the Mt. Evans Implementation Plan in subsequently published annual operating plans and other documents. With respect to the allegations contained in the fourth sentence of this Paragraph, Defendants deny that the Mt. Evans standard amenity recreation fee area provides “major” access points for hiking into the Mt. Evans Wilderness Area, and aver that there are access points for hiking into the Wilderness Area outside the standard amenity recreation fee area. With respect to the allegations contained in the fifth sentence of this Paragraph, Defendants admit that there are areas along the road for cars to pull off that are maintained for safety reasons and that there is an interpretive site at the summit of Mt. Evans that includes substantial recreational facilities, including a parking lot, four toilets, trash receptacles, interpretive displays, security and observation telescopes. Except as expressly admitted, the allegations are denied.

17. Defendants admit that the Forest Service under some circumstances charges a standard amenity recreation fee for services provided in the Mt. Evans standard amenity recreation fee area of \$10.00 per vehicle or \$3.00 for pedestrians and cyclists, but aver that no fee is charged to visitors who travel through the standard amenity recreation fee area without stopping and that the fee is not enforced against visitors who park in the undeveloped pull-offs and remain in close proximity to their vehicle, since they are effectively in through-travel status. Defendants further aver that unlimited visits are available for \$25.00 per season. Except as expressly admitted, the remaining allegations in the first sentence of this Paragraph are denied. The allegations set forth

in the second sentence of this Paragraph purport to characterize REA, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited statutory provisions. In addition, the allegations constitute conclusions of law to which no response is required. To the extent a response is required, Defendants admit that failure to pay a recreation fee is punishable as a Class B misdemeanor under Forest Service regulations and deny the remaining allegations in the second sentence of this Paragraph.

18. The allegations set forth in the first sentence of this Paragraph purport to characterize and quote the Mt. Evans Recreation Fee Demonstration 2004 Project Summary, a document that speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited document. The allegations set forth in the second sentence of this Paragraph purport to characterize and quote the Mt. Evans Implementation Plan, a document that speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited document. Defendants aver that the Forest Service's practices at Mt. Evans have been modified since the issuance of the Mt. Evans Implementation Plan in subsequently published annual operating plans and other documents and that these practices are being further evaluated based on the recent decision in Adams v. Forest Service, No. 10-16711, --- F.3d ---, 2012 WL 400440 (9th Cir. Feb. 9, 2012).

19. Defendants deny the allegations set forth in this Paragraph.

20. The allegations set forth in the first sentence of this Paragraph purport to characterize the

Mt. Evans Implementation Plan, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited document. The allegations in the first sentence also are conclusions of law to which no response is required. The allegations set forth in the second sentence of this Paragraph purport to characterize a 2007 agreement between the Forest Service and the City and County of Denver, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited document. The allegations contained in the third sentence of this Paragraph are admitted. The allegations contained in the fourth sentence of this Paragraph purport to characterize the two cited documents, which speak for themselves and are the best evidence of their content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited documents. In addition, the allegations are conclusions of law, to which no response is required. To the extent a response is required, Defendants admit that the Forest Service puts Notices of Required Fee envelopes on vehicles parked on land owned by the City and County of Denver within the Mt. Evans standard amenity recreation fee area that do not display a fee pass.

21. The allegations set forth in this Paragraph purport to characterize the Mt. Evans Implementation Plan and/or the June 2005 Transition to Fee Demo Spreadsheet, which speak for themselves and are the best evidence of their content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited documents.

22. The allegations set forth in this Paragraph purport to characterize the Mt. Evans Implementation Plan and/or the June 2005 Transition to Fee Demo Spreadsheet, which speak for

themselves and are the best evidence of their content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited documents.

23. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations set forth in the first and second sentences of this Paragraph and therefore deny them.

24. The allegations set forth in the first and second sentences of this Paragraph purport to characterize and quote a reported judicial decision, which speaks for itself and is the best evidence of its content. Defendants deny any allegations inconsistent with the plain language, meaning, and context of the cited authority. The allegations set forth in the third sentence of this Paragraph are a characterization of Plaintiffs' action, to which no response is required.

CLAIM FOR RELIEF

25. The answers set forth above are incorporated by reference.

26. The allegations set forth in this Paragraph are denied. In addition, Defendants aver that the Forest Service's practices at Mt. Evans have been modified since the issuance of the Mt. Evans Implementation Plan in subsequently published annual operating plans and other documents, and that these practices are being further evaluated based on the recent decision in Adams v. Forest Service, No. 10-16711, --- F.3d ---, 2012 WL 400440 (9th Cir. Feb. 9, 2012).

REQUEST FOR RELIEF

This section of the Complaint sets forth Plaintiffs' request for relief, to which no response is required. Defendants deny that Plaintiffs are entitled to the relief sought in their Complaint, or to any relief whatsoever.

Defendants' Affirmative Defenses

1. Plaintiffs have failed to state a claim upon which relief can be granted.
2. Plaintiffs lack standing to assert their claim and/or to obtain the relief prayed for in their Complaint.
3. Plaintiffs' claim is moot or not ripe for adjudication.
4. Plaintiffs' claim has been waived.
5. This Court lacks jurisdiction over Plaintiffs' claim.

Dated this 15th day of March, 2012.

Respectfully Submitted:

JOHN F. WALSH
United States Attorney
STEPHEN D. TAYLOR
Assistant United States Attorney

IGNACIA S. MORENO
Assistant Attorney General

Of Counsel:
ELLEN HORNSTEIN, Esq.
USDA Office of the General Counsel
Natural Resources
and Environment Division
U.S. Department of Agriculture
Stop 1412
Washington, D.C. 20250-1412

By: /s/ Stacey Bosshardt
STACEY BOSSHARDT
United States Department of Justice
Environment & Natural Resources
Division, Natural Resources Section
P.O. Box 663
Washington, D.C. 20004
stacey.bosshardt@usdoj.gov
Telephone: (202) 514-2912
Facsimile: (202) 305-0506

Attorneys for Federal Defendants

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

I hereby certify that on March 15, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Mebarilotti@msn.com
matt@kenna.net

s/ Stacey Bosshardt
Stacey Bosshardt