Adiraja Fairbank
5023 SE Kelly Street
Portland, OR, 97206
<adi@adiraj.org>

ADIRAJA FAIRBANK, IN PRO PER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA Plaintiff, v. ADIRAJA FAIRBANK, Defendant	Violation Number F4561661 **MOTION TO DISMISS**

Defendant hereby moves this court to dismiss the Violation Notice filed against him for the following reasons.

Memorandum of Points and Authorities.

I. INTRODUCTION

Defendant was charged for failure to pay a recreation fee to the U.S. Forest Service. The authority to charge certain recreation fees is contained in the Federal Lands Recreation Enhancement Act ("FLREA"), 16 U.S.C. §§ 6801-6814. Failure to pay a recreation fee is a Class A or Class B misdemeanor. For a first offense, the fine imposed may not exceed $100.

16 U.S.C 6811(d). This is Defendant's first prosecution for this offense. The FLREA allows the Forest Service to charge a standard amenity recreation fee at an area that contains all of the following: designated developed parking, a permanent toilet facility, a permanent trash receptacle, an interpretive sign, exhibit or kiosk, picnic tables and security services. However, the FLREA specifies that the Forest Service may not charge recreation fees solely for parking, for dispersed areas with low or no investment, for walking through recreational lands, or for camping at undeveloped sites that do not provide a minimum number of facilities or services. 16 U.S.C. 6802(d)

After the passage of the FLREA, the Forest Service, without public input or formal rule-making, issued Interim Implementation Guidelines ("Interim Guidelines") and claims to have authority to charge a standard amenity fee for parking and hiking and to criminally charge persons for failure to pay a fee for such activities if the person is located in an area that is referred to as a "high impact recreation area" ("HIRA"). The HIRA in this case is called the Tanner/Wyeth HIRA, in or around the Mark O. Hatfield Wilderness area and the Mount Hood National Forest. No map showing the boundaries of the Tanner/Wyeth HIRA is publicly available.

The Forest Service interpretation of the FLREA is not consistent with the language of the statute. The authorization to charge a standard amenity fee is subject to fee prohibitions. The use of the Tanner/Wyeth HIRA to collect fees effectively ignores the fee prohibitions part of the statute. The Forest Service is not authorized to selectively implement only part of the FLREA.

The statutory language limiting standard amenity fees to locations having all six required amenities, and prohibiting fees solely for parking, for hiking, and for camping at undeveloped sites, is clear and unambiguous, so the Court owes no deference to the Forest

Service's interpretation. Even if the statute's meaning was not clear, the agency's interpretation deserves no deference because: 1) the Interim Guidelines were not subjected to formal rule-making with public input, 2) this is a criminal case, which calls for the Court to construe an ambiguous statute in Defendant's favor, 3) the agency's statement of reasons for not subjecting the Interim Guidelines to notice and comment rule-making under the Administrative Procedure Act ("APA") invoking the "good cause" exception was misleading, 4) the agency has a self-serving financial interest, and 5) the agency exhibited no expertise or thorough consideration in adjusting its recreation fees in response to Congressional passage of the FLREA.

This case is similar to one in Arizona (*United States v. Smith*, 740 F. Supp. 2d 1111 (D. Ariz. 2010), where the court found that the Forest Service's attempt to charge a fee for parking and hiking within a HIRA was ultra vires, and dismissed the citation.

Defendant owed no recreation fee to the Forest Service for parking at a trailhead without all of the required amenities, hiking through the HIRA, and camping at undeveloped sites. The charges against Defendant should be dismissed.

II. FACTS

On July 23rd, 2011, the Defendant parked his car at the trailhead point known as Herman Creek hiker's trailhead. After backpacking into the Mount Hood National Forest and spending two nights there, Defendant returned late in the evening on July 25th to find a violation notice affixed to his windshield. The violation alleged is 36 CFR 261.17 (Failure to pay any recreation fee is prohibited).

The Herman Creek trailhead is located at the east end of the town of Cascade Locks, Oregon, on the Columbia River Gorge. The trailhead has designated parking separate and unconnected to an adjacent campground.

Defendant made no use of any amenities provided at the Herman Creek trailhead. He merely parked in the designated parking area, and hiked in to the Wilderness Area along the Herman Creek trail, and later along the Pacific Crest trail. These are both primitive backcountry trails with no amenities or services. The affidavit attached as **Exhibit A** testifies to defendant's actions.

Let the Court recognize, from defendant's affidavit, that he hiked through the area designated as Tanner/Wyeth high impact recreation area without using any facilities or services.

The trailhead itself has five of the six amenities that must all be present in order to charge a standard amenity fee under FLREA. There is no interpretive sign, exhibit, or kiosk, but the other amenities are present. The following definition of an interpretive "sign, exhibit, or kiosk" is from the Forest Service's Interim Implementation Guidelines (**Exhibit F**):

> Sign, Exhibit or Kiosk – Each site or area must contain at least one public display designed to develop a visitor's interest, enjoyment, and understanding of the natural or cultural environment. This requirement is in addition to facilities needed to inform visitors of recreation opportunities, facilities, and applicable regulations and restrictions. Messages should be relevant to the setting and the visitor – generic posters and safety information are not adequate. The design, content, and medium should be of professional quality. The information may be incorporated into a bulletin board or presented through other signing or media. In general, single displays should be a minimum of roughly 25 x 30 inches. Consideration should be given to bilingual and accessibility needs.

Attached as **Exhibit B** are pictures of the Herman Creek trailhead, which show clearly that there is no interpretive sign, exhibit, or kiosk per the above definition. The bulletin board with trail information and the self-pay box does not qualify by the Forest Service's own definition: "generic posters and safety information are not adequate." If they argue that the individual postings on the bulletin board shown in **Exhibit B** are interpretive signs based on their content, they still would not meet their definition because they are too small: "single displays should be a minimum of roughly 25 x 30 inches."

Also, let the Court note from the pictures in **Exhibit B**, that the trailhead area where Defendant parked was separate from the paid campground area. In order to access the Herman Creek trail to hike into the designated Wilderness Area, Defendant had only 3 reasonable choices of where to park: the trailhead (where he parked and received the violation), the campground (clearly a fee area), or the Forest Service lodge (which probably said reserved or no public parking). Other than that, Defendant would have had to park in the town of Cascade Locks and walk a mile along the road to get back to the trailhead.

Finally, attached as **Exhibit C** is a letter from the Acting Deputy Chief of the Forest Service to the Regional Forester for Region 6, which includes Oregon, dated November 30, 2011. The letter reports the results of a review of all HIRAs in Region 6 to "better align" them with the tenets of the FLREA. It says that the Washington Office concurs with changes recommended by the Region that include removing the area (HIRA) designation from almost all Region 6 locations, including the Tanner/Wyeth HIRA. Under the recommendations, a fee would no longer be charged for the entire 15,390-acre Tanner/Wyeth HIRA. Instead fees would apply only at standalone sites that meet the FLREA's requirements for Expanded

Amenity Fees (EAF) or Standard Amenity Fees (SAF). The Herman Creek trailhead does not meet the requirements for either an EAF or SAF. Whether the Herman Creek trailhead is within a HIRA, or if it is instead a standalone fee site, the Forest Service in either case has no argument that it should not be subject to the limitations on fees outlined in 16 U.S.C. 6802(d).

This proposed change to dismantle nearly all of the HIRAs in Region 6 (including Oregon) can reasonably be assumed to arise from a realization by the Forest Service that they lack the authority to create HIRAs in the first place.

III. LAW: THE FEDERAL LANDS RECREATION ENHANCEMENT ACT

Prior to the passage of the FLREA, a Recreational Fee Demonstration Program (Fee Demo) was authorized by Congress to determine the feasibility of user-generated fees to be directly spent for the maintenance and enhancement of forest facilities and amenities, (Public Law 104-134). The Fee Demo Program conferred broad authority to the Forest Service to charge access fees, and the Herman Creek Trailhead was designated as a fee area under that authority. The Fee Demo Program began in 1996 and continued with periodic extensions until it was repealed upon passage of the FLREA in December 2004. The Herman Creek Trailhead continued to be a fee area under the FLREA, despite its much more limited authority to assess fees.

The provisions of 16 U.S.C. 6802 that apply in this case are as follows.

The FLREA places the following prohibitions on charging fees:

> (d) Limitations on recreation fees
>
> (1) Prohibition on fees for certain activities or services
>
> The Secretary shall not charge any standard amenity recreation fee or expanded amenity recreation fee for Federal recreational lands and waters

administered by the Bureau of Land Management, the Forest Service, or the Bureau of Reclamation under this chapter for any of the following:

(A) Solely for parking, undesignated parking, or picnicking along roads or trailsides.

(B) For general access unless specifically authorized under this section.

(C) For dispersed areas with low or no investment unless specifically authorized under this section.

(D) For persons who are driving through, walking through, boating through, horseback riding through, or hiking through Federal recreational lands and waters without using the facilities and services.

(E) For camping at undeveloped sites that do not provide a minimum number of facilities and services as described in subsection (g)(2)(A).

There is a provision to ensure that recreation opportunities are available that are not subject to fees:

(4) No restriction on recreation opportunities
Nothing in this chapter shall limit the use of recreation opportunities only to areas designated for collection of recreation fees.

There is also a prohibition on entrance fees:

(e) Entrance fee

(2) Prohibited sites
The Secretary shall not charge an entrance fee for Federal recreational lands and waters managed by the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service.

A standard amenity fee may be charged (subject to the limitations at subsection (d)) where a standard set of amenities, representing substantial Federal investments, are present:

(f) Standard amenity recreation fee
Except as limited by subsection (d), 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.

Insight into Congressional intent in the passage of the legislation can be gained from press releases following the passage of the statute. Chairman Richard W. Pombo (R-CA) of the House Resources Committee, in a press release (attached as **Exhibit D**) following the passage of the FLREA stated:

> "This will put an end to fears that federal land managers cannot be trusted with recreational fee authority because we lay out very specific circumstances under which these fees can be collected and spent."

A statement by Representative Ralph Regula (R-OH) (**Exhibit E**) makes it clear that the intent of Congress in passing this bill was to limit the recreation fee authorization on the land management agencies and define where fees can and cannot be charged:

> "As passed by Congress, H.R. 3283 would limit the recreation fee authorization on the land management agencies. No fees may be charged for the following: solely for parking, picnicking, horseback riding through, general access, dispersed areas with low or no investments, for persons passing through an area, camping at undeveloped sites, overlooks, public roads or highways, private roads, hunting or fishing, and official business. Additionally, *no entrance fees will be charged for any recreational activities on BLM, USFS, or BOR lands*. This is a significant change from the original language. The language included by the Resources Committee is much more restrictive and specific on where fees can and cannot be charged." [emphasis in original]

On April 25, 2005 the Forest Service issued Interim Guidelines (**Exhibit F**) to implement the provisions of the FLREA. It did so without a public comment period or formal rule-making.

In addition to the fees authorized in the FLREA, the Interim Guidelines allow standard amenity fees to be charged for a high impact recreation area (HIRA), a designation not found in the statute. While the HIRA is supposed to contain all the amenities required for charging a standard amenity fee, the boundaries are limited only 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) …" (page 9, **Exhibit F**). This is substantially different language from the FLREA. Importantly, although the fee prohibitions in 16 U.S.C. 6802(d)(1) are mentioned, the Forest Service apparently does not interpret these limitations as applying in HIRAs. However the prohibitions apply on all Forest Service land. There is also no mention of the prohibition on entrance fees in 16 U.S.C. 6802(d)(2). To Defendant's knowledge, there is no published map of the Tanner/Wyeth HIRA that would allow visitors to "easily identify" the fee area boundary.

Under the Interim Guidelines, the Forest Service is granting itself permission to ignore the prohibitions on charging fees for parking, for general access, for dispersed areas with low or no investment, or for hiking through Federal recreational lands without using facilities and services anywhere within the Tanner/Wyeth HIRA.

IV. THE PLAIN LANGUAGE OF THE FLREA DOES NOT ALLOW THE FOREST SERVICE TO CHARGE DEFENDANT A FEE

The United States Supreme Court discussed the importance of using the plain language of a statute in *Chevron USA Inc v. Natural Resources Defense Council Inc,* 467 U.S. 837 (1984).

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question 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."

The most applicable part of the law to this case is 16 U.S.C. 6802 (d) (1) (D), which states a fee cannot be charged to persons who are merely "hiking through Federal recreational lands and waters without using the facilities and services." Based on Defendant's sworn affidavit of his actions on the dates surrounding the citation, and the forthcoming arguments, the Court should hold that he falls into this category of persons under the FLREA.

The relevant part of the law in this case, 16 U.S.C. 6802 (d) (1) (D), lists several possible modes of transportation for traveling through recreation lands. In this case, defendant used two different forms of transportation: he drove to the trailhead, then hiked the trail. The law does not specifically limit persons to a single mode of transportation, but used the word "or" to separate them. This clearly allows for use of more than one mode of transportation to get through a federal recreation area and still fall into this category of persons.

The law uses the word "through" in reference to the modes of transportation. Persons who are "hiking through," "driving through," etc, are exempt from fees. The word "through" can mean either entering and leaving an area, or entering and staying within its borders. There is no publicly available map of the Tanner/Wyeth HIRA, so defendant cannot be sure whether or not he left it on his hike. By hiking over 30 miles, past the Bull Run watershed area and almost to Mount Hood, he would guess that he most likely left the HIRA. If so, this would satisfy the first definition of "hiking through." However, hiking

within an area is the definition that best harmonizes with the other provisions of 16 U.S.C. 6802 (d) (1), especially part (B), which prohibits fees for general access.

The law clearly states that persons not "using the facilities and services" cannot be charged a fee. The mere presence of facilities cannot be used as a justification to charge all persons – only those who make use of them. Since every part of a statute must be given effect and assumed to have meaning, and since general access was covered earlier in part (B), it may be concluded that Congressional intent in part (D) was to address this very situation, i.e., where facilities are present, but not used by those who are only passing through. Furthermore, congress clearly chose the word "and" in the above quoted phrase to convey that persons must use both the facilities and services provided at a recreation area. Even if the Forest Service successfully argues that defendant used the area's "security services" by parking his car in an area patrolled by law enforcement, that alone would not remove him from this category of persons, since he did not also use any facilities (e.g. the picnic tables or outhouse).

Although subsection (f) of 16 U.S.C. 6802 does allow charging a standard amenity recreation fee, provided that certain requirements are met, subsection (d) of 16 U.S.C. 6802 trumps subsection (f). The first words enacted into law by congress in section (f) read: "Except as limited by subsection (d)."

Section 6802 § (f)(4) allows the Forest Service to charge a standard amenity recreation fee at an area that contains six specific amenities, but these amenities are not all present in proximity to where Defendant parked his car. There was no interpretive sign, exhibit, or kiosk anywhere in the near vicinity of the Herman Creek trailhead. The discussion and definition of such a sign in section **II.** of this motion supports this conclusion.

Since the trailhead where Defendant received his violation notice does not have all the required amenities, this is another reason the Forest Service is not authorized to charge a standard amenity fee at that location.

Furthermore, Section 6802 § (f)(4)(B) requires that an area have "substantial Federal investments" for a standard amenity recreation fee to be charged. From the pictures presented in **Exhibit B**, the investments made in the Herman Creek trailhead appear to be minimal. The investment in an outhouse, two picnic tables and a trash can should not qualify as substantial investments justifying an ongoing fee.

The Forest Service is prohibited from charging a standard amenity fee solely for parking or for general access. Since all of the reasonable parking choices in the vicinity of the Herman Creek Trail would result in a fee, the Forest Service is charging for "general access" to public lands, specifically prohibited by the FLREA, section 6802(d)(1)(B). The nearest alternative parking would have been a mile away, in the town of Cascade Locks. If Defendant had parked there and walked to the trail, or had been dropped off and picked up rather than leaving his vehicle at the trailhead, he would not have been required to pay a standard amenity fee. Therefore the notice issued to his unoccupied vehicle while he was hiking in the Wilderness Area was solely for parking, in violation of 16 U.S.C. 6802(d)(1)(A). *United States v. Smith* addressed this issue:

> "It is apparent that 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*, 740 F. Supp. 2d 1124 (D. Ariz. 2010)

The Forest Service has ignored 6802 § (d)(1) when it charges fees at trailheads; however, the courts have repeatedly insisted that every part of a statute be used in its

implementation: "A statute should be interpreted so as not to leave one part inoperative." *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985). "A court must, if possible, give effect to every clause and word of a statute." *Negonsott v. Samuels*, 507 U.S. 99 (1993).

The Forest Service may claim that it is authorized to charge an amenity fee because the trailhead is located within a HIRA, and that its use of a HIRA makes the collection of fees easier by grouping together individual sites, which together have the set of amenities which qualify under 6802 § (f)(4)(D). But the prohibition on fees for parking, general access, walking, and camping at undeveloped sites has no exceptions. There is no provision in the statute that allows the Service to designate a region within which the prohibition on fees for parking, general access, walking and camping at undeveloped sites does not apply. This is true even if that designated region contains a few local sites where fees are permitted.

In 6802 § (f), a standard amenity recreation fee may be charged *"Except as limited by subsection (d)"*. (emphasis added) This means that "area" in 6802 § (f)(4), where the Forest Service derives its only authority to charge a standard amenity fee, is inextricably limited by the fee prohibitions in 6802 § (d)(1). No matter the label the Forest Service gives its "area", it cannot escape the fee prohibitions.

The *Smith* court addressed the designation of HIRAs:

> Although the Forest Service may create HIRAs, the Forest Service's determination that charging a recreation amenity fee anywhere within the Red Rock HIRA is authorized by the FLREA because the entire HIRA is an "area" where such a fee may be charged is contrary to the clear statutory language of the FLREA. *United States v. Smith*, 740 F. Supp. 2d 1129 (D. Ariz. 2010)

Since the authorization of a standard amenity fee in 6802 § (f) is subject to the fee prohibitions in 6802 § (d), Defendant would not be required to pay a fee even if all six amenities were present at the trailhead, since he was only parking, hiking, and camping in undeveloped areas. *United States v. Smith,* supra, addressed this issue:

> The record before the court reveals numerous recreation sites and locations within the Red Rock HIRA which qualify as "areas" and where charging a recreational fee would not violate the other areas of the FLREA. *Assuming an individual's recreational activities were not exempted from the uses for which no fee may be charged*, requiring a Red Rock Pass for use of those areas would be appropriate.
> (emphasis added) *United States v. Smith*, 740 F. Supp. 2d 1129 (D. Ariz. 2010)

The Forest Service may argue that charging a fee where a vehicle is left at a trailhead, from an owner who has gone hiking, is an administratively convenient method for collecting amenity fees. The courts have found: "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"); *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).

V. THE FOREST SERVICE HAS EXTENDED ITS AUTHORITY WELL BEYOND THAT GIVEN TO IT BY CONGRESS

The definition of a HIRA in the Interim Guidelines (See **Exhibit F**, p. 9-10.) as "a clearly delineated, contiguous area with specific, tightly defined boundaries and clearly defined access points" is significantly different from the "area" in 6802 § (f)(4) which is limited in size by the availability of amenities to the user and by the fee prohibitions in 6802 § (d)(1). The Forest Service interpretation allows an area of virtually unlimited size, except that it cannot be "an entire administrative unit such as a National Forest" and must contain somewhere a recreation site with the required amenities. The "additional criteria" for a HIRA in the Interim Guidelines do not serve to limit the size of the area where fees are charged, but to expand the size of the area where fees can be charged. For example, HIRAs typically "contain rivers, streams, lakes or interpreted scenic corridors", "have regionally or nationally recognized recreation resources that are marketed for their tourism values", or are places where "natural and cultural resources management activities are conducted in the area to maintain or enhance recreation opportunities". None of this language appears in the FLREA, where an "area" is a place with developed parking, a toilet facility, a trash receptacle, a sign, picnic tables and security services.

In *FDA v. Brown & Williamson* 529 U.S. 120 (2000), Justice O'Connor wrote:

> "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. Cf. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986) ('A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration')."

Is it likely that Congress busied itself with specifying amenities such as picnic tables, as a way of delegating authority to the Forest Service to charge fees over vast regions of public lands? As Justice O'Connor wrote:

> "… we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." (*FDA v. Brown & Williamson*, supra)

The Forest Service Interim Guidelines that provide for the collection of fees within the Tanner/Wyeth HIRA constitute an inflation of the Forest Service's fee collection authority far beyond that authorized by the plain language of the FLREA. Under the United States' system of checks and balances, an agency cannot determine the scope of its own authority. The courts must decide when an agency oversteps its authorization from Congress. To do this, the Court should not accord deference to the Forest Service. To quote Justice O'Connor once more,

> "…an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress… we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

VI. EVEN IF THE FLREA IS AMBIGUOUS, THE FOREST SERVICE IS NOT ENTITLED TO DEFERENCE

The Forest Service may argue that its interpretation is entitled to *Chevron* deference. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court called for a two-part analysis to determine whether a court should accord deference to an agency interpretation. A court should first determine whether the statute is ambiguous. If the statute is unambiguous and the agency interpretation is contrary to the statute, the text of the statute prevails. Only if the statute is ambiguous does a court proceed to the second step, and decide whether an agency's interpretation is reasonable.

As discussed above, the language of the statute is clear and unambiguous as to the circumstances under which the Forest Service is authorized or prohibited from charging a fee.

In *United States v. Smith*, supra, the court agreed that the statutory language is not ambiguous:

> 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.
>
> *United States v. Smith*, 740 F. Supp. 2d 1123 (D. Ariz. 2010)

The Forest Service may claim that the term "area" in 6802 § (f)(4) is not defined. This issue was also addressed in *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.
>
> *United States v. Smith*, 740 F. Supp. 2d 1126 (D. Ariz. 2010)

Even if the Court should determine that the language of the FLREA is ambiguous, there are reasons why the Court should withhold deference from the Forest Service's interpretation of the statute.

In *Christensen v. Harris County*, 529 U.S. 576 (2000) and *United States v. Mead Corp.*, 533 U.S. 218 (2001), the court narrowed Chevron-style deference to apply when an

agency's statutory interpretation is the result of formal rule-making with a public comment period or formal adjudication. Interpretive rulings such as the Interim Guidelines do not qualify for *Chevron* deference. Also, courts have refused to show *Chevron* deference to interpretations of statutes that carry criminal penalties. *Crandon v. United States*, 494 U.S. 152, 177 (1990); *Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Commission*, 327 F.3d 1019, 1031 (10th Cir. 2003); *United States v. McGoff*, 813 F.2d 1071, 1077 (D.C. Cir. 1987).

Courts sometimes give consideration to agency interpretations under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The amount of consideration depends on

> "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors giving it power to persuade, if lacking power to control."

Ignoring the fee prohibitions in the FLREA serves the financial self-interest of the agency. The money from recreation fees goes straight into the Forest Service budget, not the U.S. Treasury.

> 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 Co. LLC v. Vilsack*, 563 F.3d 822, 834, 836 (9th Cir. 2009) (citing, inter alia, *Chevron*, 467 U.S. at 843 n. 9).

The Forest Service began with a flawed, unreasonable interpretation of the statute, so any attempt at rule-making is not going to give a good result. But to evaluate "the thoroughness evident in its consideration, the validity of its reasoning" and "those factors

giving it power to persuade", consideration should be given to the route the agency took to implement the statute.

The Forest Service invoked the "good cause" exception to the rule-making requirements of § 553 of the APA. Under § 553(b)(B), the requirements for notice and comment rule-making do not apply:

> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

In its statement of reasons (in the Federal Register: November 22, 2005, Vol. 70, No. 224, attached as **Exhibit G**) the Forest Service states,

> "These minor and purely technical changes are dictated by enactment of FLREA. Since the Department has no discretion in implementing these changes, public notice and comment are unnecessary pursuant to 5 U.S.C. 553(b)(B)."

Since the High Impact Recreation Area is nowhere mentioned or described in the FLREA, it is simply not true that the Forest Service had no discretion in writing the Interim Guidelines. The decision to continue collecting fees in the former Fee Demo area with no changes in locations where fees are collected, after Congress passed legislation that allows fees to be collected only in locations with specified amenities, and prohibits fees for general access and for passing through without using facilities and services, was a major policy decision that is hardly "minor and purely technical."

The Forest Service has not engaged in good faith in the notice-and-comment formal rule-making procedures required by the APA. Under § 553 procedures for notice-and-comment rule-making, agencies are required to give the public advance notice of the contents of proposed rules, and to offer the public an opportunity to express their views on the proposals. The agency gathers the public comments and attempts to incorporate them

into the rule-making. For the public participants there is generally access to an administrative appeal process for unresolved issues, and as a final step, standing to sue if unresolved issues still remain. In exchange for undergoing this rigorous rule-making process, the courts will generally accord the resulting rules a considerable amount of deference in any subsequent litigation.

The Court's opinion in *United States v. Smith*, supra, notes that:

> The agency's assertion that the changes to the legal system authorized by the FLREA were "minor, purely technical, and nondiscretionary," is belied by the fact that it was necessary to alter the Code of Federal Regulations to remove the crime of failing to pay for use of a site or facility, i.e., former section 261.15, and replace it with a section creating the much broader crime of failing to pay a recreation fee, i.e., section 261.17. *United States v. Smith*, 740 F. Supp. 2d 1129 (D. Ariz. 2010)

The Forest Service elected to evade the formal rule-making process with its misleading statement of reasons after invoking the "good cause" exception. Why would any agency elect to undergo the strenuous public notice-and-comment procedure, with exposure to possible appeals and litigation, if it could simply claim that its "guidelines," however substantial, were "minor and technical," and that it had "no discretion," and achieve the same result? Defendant requests this Court withhold deference to the Interim Guidelines at this HIRA to protect the integrity of the APA rule-making procedure.

A final reason that the Court need not give deference to the Forest Service interpretation is that there is no indication that the agency demonstrated any expertise or thorough consideration in implementing the FLREA in the Mount Hood National Forest. The recreation fees in place for the Fee Demo Program were simply continued following passage of the FLREA, despite the considerable change in statutory language and Congressional intent in the new legislation.

VII. IN A CRIMINAL CASE, AMBIGUITIES IN A STATUTE SHOULD BE RESOLVED IN FAVOR OF A DEFENDANT

Courts have refused to show Chevron-style deference to interpretations of criminal provisions. Courts are the proper administrators of federal criminal statutes. *Crandon v. United States*, 494 U.S.152, 177 (1990). Likewise, *Skidmore* deference is not authorized as it conflicts with statutory construction principles governing the interpretation of criminal statutes, i.e., that such statutes be strictly construed and the rule of lenity applies to the interpretation of ambiguous statutes. The rule of law requires that criminal law be clear, which in turn implies there is no room for interpretive flexibility commonly associated with deference to administrative agencies' interpretations of statutes. See *United States v. McGoff*, 831 F.2d 1071 at 1077 (1987).

The rule of lenity precludes deference to an administrative agency's construction of a criminal statute because such deference results in ambiguity being resolved against a criminal defendant. Where the words of a statute are susceptible to more than one possible interpretation, then the rule of lenity resolves the matter. *Whalen v. United States*, 445 U.S. 684, 689 (1980). Where text, structure and history fail to establish that the government's position is unambiguously correct, the courts are to apply the rule of lenity to resolve the ambiguity against the government. *Hughey v. United States*, 495 U.S. 411, 422 (1990); *U.S. v. Granderson*, 511 U.S. 39, 54 (1994); *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

VIII. CONCLUSION

By defendant's sworn affidavit on his actions on the dates surrounding the citation he was issued, he falls into the category of persons listed in 6802 § (d)(1)(D). Namely, those persons merely passing through a recreation area without using the facilities and services. Therefore, the law does not allow the Forest Service to charge a fee in this case, and the citation was issued to defendant unlawfully.

As a secondary argument, the Herman Creek Trailhead does not provide access to all of the amenities specified in 6802 § (f)(4)(D), which are necessary before a standard amenity fee can be charged. This is another reason the citation was issued to defendant unlawfully.

As a final argument, the Herman Creek Trailhead does not contain "substantial Federal investments" to justify charging an ongoing fee, as required by 6802 § (f)(4)(B).

For the reasons cited herein, the charges against Defendant should be dismissed.

Respectfully submitted, DATED: February 7, 2012

_____

ADIRAJA FAIRBANK

In Pro Per

LIST OF EXHIBITS

Exhibit A: Affidavit on defendant's actions the day of citation

Exhibit B: Pictures of Herman Creek campground and trailhead, where citation was issued

Exhibit C: Forest Service letter regarding recommended changes to Region 6, which includes Oregon

Exhibit D: Press Release from Congressmen Pombo and Walden

Exhibit E: Statement from Congressman Regula

Exhibit F: Forest Service Interim Implementation Guidelines

Exhibit G: Forest Service Notice in the Federal Register regarding rule-making