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*pro hac vice* application pending  
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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GAYE ADAMS; GREG LEWIS; )  
DANIEL PATTERSON; CHRISTINE )  
M. WALLACE and )  
Others Similarly Situated, )  
Plaintiffs, )

**CLASS ACTION COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

v. )

UNITED STATES FOREST SERVICE; )  
JEANINE DERBY, Forest Supervisor for )  
the Coronado National Forest; and )  
DIANE J. HUMETEWA, United States )  
Attorney, )  
Defendants. )

**28 U.S.C. 1331; 28 U.S.C. 2201;  
5 U.S.C. 702**

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STATEMENT OF THE CASE

1. This is a civil action for declaratory and injunctive relief brought by the named Plaintiffs and others similarly situated. Plaintiffs seek a determination by this Court that Defendant, United States Forest Service, by and through Jeanine Derby, Coronado Forest Supervisor, exceeded the scope of its legislative authority in implementing the Federal Lands Recreation Enhancement Act (REA) on Forest Service lands. The area in question is known as the Mt. Lemmon High Impact Recreation Area (HIRA) which is within the Coronado National Forest. Plaintiffs assert that the Defendant Forest Service has and is violating several provisions contained in the REA. Further, the Service's actions are arbitrary and capricious and violate Plaintiffs' First Amendment and Fifth Amendment rights.

BACKGROUND

2. The REA was attached as a rider to the Omnibus Appropriations Reconciliation Bill, and was signed into law on December 8, 2004. The Recreational Fee Demonstration Act, enacted by Congress in 1996, was immediately repealed by the REA with the exception that fees could be collected so long as the policy for collecting the fee was consistent with the new provisions of the REA. In enacting the REA, Congress desired to specify when and for what uses fees could be collected and to provide guidelines to the Service with respect to its enforcement authority. Pursuant to its authority under the now repealed Fee Demonstration Act, the Forest Service began charging a fee to access Mt. Lemmon by placing a fee station along the Catalina Highway at milepost 5. Motorists were required to pay a fee to traverse along a 28 mile stretch of the highway to its terminus. The Forest Service continues to enforce most of its Fee Demonstration Act policies despite the new limitations placed on it by the REA. The only changes made to its policy were to waive the fee to allow vehicles to freely drive along the road as long as the motorist does not park his/her car anywhere along the 28 mile corridor and to allow motorists to park at scenic pullouts and overlooks. The Forest Service designated the area as a High Impact Recreation Area (HIRA), a designation not specifically authorized by

1 Congress. The Catalina Highway is a paved road which provides the only reasonable access to  
2 recreate in dispersed areas.

3 3. The enforcement provisions of the REA state that a fee violation offense shall be  
4 prosecuted as either a Class A or Class B misdemeanor, both of which authorize the potential for  
5 incarceration. In addition, persons who lend their vehicle to a friend or family member are  
6 conclusively presumed to be guilty of a crime if a pass was not properly displayed by the  
7 borrower of the car, thereby subjecting the owner of the car to fines and imprisonment.

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9 JURISDICTION

10 4. This Court has jurisdiction pursuant to 28 U.S.C. 1331 (Federal Question  
11 Jurisdiction), 28 U.S.C. 2201 (Declaratory Judgment Act), 5 U.S.C. 702 (Administrative  
12 Procedures Act) and Rule 57 of Federal Rules of Civil Procedure.

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14 VENUE

15 5. 28 U.S.C. 1391(e) provides that in a civil action in which each defendant is an officer  
16 or employee of the United States or any agency thereof acting in his official capacity, or under  
17 color of legal authority, or any agency of the United States, the action may be brought in any  
18 judicial district in which Plaintiffs in action reside. Plaintiffs are legal residents of the District of  
19 Arizona and Defendant U.S. Forest Service is an agency which operates within the District.

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21 PARTIES

22 PLAINTIFFS

23 6. Plaintiff Gaye Adams resides in Tucson full time. She is actively involved in the  
24 Arizona No Fee Coalition. She frequently travels along the Catalina Highway to trailheads to  
25 hike into dispersed areas and to camp at undeveloped campsites. She provides opportunities to  
26 disadvantaged children and adults to access wilderness experiences.

27 7. Plaintiff Greg Lewis resides in Tucson full time. He has been mountaineering for over  
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1 fifty years. He is also actively involved in the Arizona No Fee Coalition. He frequently travels  
2 along the Catalina Highway to trailhead destinations to hike, backpack and camp in dispersed  
3 areas. He prefers a wilderness setting as it provides him with a deep spiritual experience.

4 8. Plaintiff Daniel Patterson resides in Tucson full time. He is an ecologist and the  
5 Southwest Director of Public Employees for Environmental Responsibility. He traverses the  
6 Catalina Highway to access trails to hike, backpack and camp in dispersed areas. He has recently  
7 been cited for failing to pay a fee to the Forest Service while recreating in an undeveloped area  
8 in the forest.

9 9. Plaintiff Christine M. Wallace resides in Tucson full time. She is a legal secretary, an  
10 avid hiker and camper and frequently travels along the Catalina Highway to access trails to hike  
11 and backpack into dispersed areas.

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13 DEFENDANTS

14 10. Defendant United States Forest Service is an agency of the Department of  
15 Agriculture, acting by and through a chief of the Forest Service, under a delegation of authority  
16 from the Secretary of Agriculture.

17 11. Defendant Jeanine Derby is an officer of the United States, employed by the  
18 Department of Agriculture, Forest Service, in the official capacity of Forest Supervisor in the  
19 Coronado National Forest. Defendant Derby, in her capacity as Forest Supervisor, is the  
20 principal administrative official responsible for carrying out the laws of the United States within  
21 the jurisdiction of the Coronado National Forest.

22 12. Defendant Diane J. Humetawa is the United States Attorney responsible for the  
23 enforcement of federal laws in the State of Arizona.

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25 CLASS ACTION ALLEGATIONS

26 13. The named Plaintiffs bring this action as a class action pursuant to Rule 23(b)(1) and  
27 (2) of the Federal Rules of Civil Procedure.

1 14. Plaintiffs filed this complaint on behalf of themselves and all others similarly situated  
2 and they seek injunctive and declaratory relief for the unconstitutional and unlawful actions and  
3 inactions of Defendants as set forth herein. The named Plaintiffs have paid fees to access Mt.  
4 Lemmon, but assert that such fees were unlawfully charged for the activities they engage in.

5 15. Joinder of all members is impracticable as the class includes thousands of people  
6 from across the nation who visit Mt. Lemmon on an annual basis. The questions of law and fact  
7 are common to all members of the Plaintiff class, i.e. whether or not the Forest Service exceeded  
8 its legislative authority in establishing and implementing a fee requirement to access the Mt.  
9 Lemmon HIRA.

10 16. The claims of the representative party are typical of those of the class in that the  
11 constitutional and statutory violations alleged by the named Plaintiffs and caused by Defendants  
12 are materially the same as those suffered by all other class members.

13 17. The representative party will fairly and adequately protect the interest of the class.  
14 The named Plaintiffs have no interest antagonistic to those of the class.

15 18. The prosecution of separate actions of individual members of the class could create  
16 a risk of inconsistent and varying adjudications with respect to individual members of the class  
17 which could establish incompatible standards of conduct for Defendants.

18 19. Defendants have and continue to require recreational motorists parking in the Mt.  
19 Lemmon HIRA to pay a fee to do so.

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21 IRREPARABLE HARM

22 20. Plaintiffs have suffered and will continue to suffer irreparable harm in that the  
23 Defendant Service threatens to and has prosecuted persons for conduct engaged in by Plaintiffs.  
24 The Defendant Service's threat of criminal prosecution has a chilling effect on Plaintiffs' right to  
25 travel and on his/her use of the forest for hiking, dispersed camping or simply enjoying the view.  
26 Plaintiff Patterson has been charged for failure to pay a fee even though he was recreating in an  
27 undeveloped area of the forest. Plaintiff Wallace experienced a protracted legal criminal case  
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1 after being cited for failure to pay a fee on two occasions in September, 2005. She received a  
2 favorable ruling from the Magistrate Judge who was reversed on an appeal taken by the Forest  
3 Service. While the Forest Service prevailed on appeal, it dismissed at trial one of the citations  
4 that provided a clear legal basis for challenging the HIRA designation, thus precluding an appeal  
5 to resolve the legal questions. If the Defendants are permitted to continue their practice of  
6 threatening prosecution for conduct it does not have the power to regulate, Plaintiffs and others  
7 similarly situated may be charged with a crime before a magistrate or other judicial tribunal and  
8 suffer the consequences of a criminal prosecution and possible conviction.

9 21. Plaintiffs have no adequate remedy at law to compel Defendants to cease and desist  
10 their unlawful implementation of the REA. Only Declaratory and Injunctive Relief can protect  
11 Plaintiffs from Defendants' threats and potential prosecution.

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13 THE STATUTORY LANGUAGE AT ISSUE

14 22. 16 U.S.C. 6802(f)(4) authorizes the Service to charge a standard amenity fee on  
15 federal lands subject to specific limitations described in 16 U.S.C. 6802(d).

16 Except as limited by 16 U.S.C. 6802(d), 16 U.S.C. 6802(f) authorizes a fee only for an area  
17 that:

- 18 (A) provides significant opportunities for outdoor recreation;
- 19 (B) that has substantial federal investments;
- 20 (C) where fees can be efficiently collected; and
- 21 (D) that contains all of the following amenities:
  - 22 (i) Designated developed parking.
  - 23 (ii) A permanent toilet facility.
  - 24 (iii) A permanent trash receptacle.
  - 25 (iv) Interpretive sign, exhibit or kiosk.
  - 26 (v) Picnic tables.
  - 27 (vi) Security Services.

28 23. 16 U.S.C. 6802(d)(1) states: PROHIBITION ON FEES FOR CERTAIN  
ACTIVITIES OR SERVICES ----The Secretary shall not charge any standard amenity fee for  
Federal recreation lands and waters administered by the Bureau of Land Management, the  
Forest Service, or the Bureau of Reclamation under this act for any of the following:

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- (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.
- (E) For camping at undeveloped sites that do not provide the minimum number of facilities and services described in 16 U.S.C. 6802(g)(2)(A)
- (F) For the use of overlooks or scenic pullouts.

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24. 16 U.S.C. 6802(e)(2) provides that 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.

25. 16 U.S.C. 6811 (c) provides that the registered owner and any occupant of a vehicle charged with a nonpayment violation involving the vehicle shall be jointly liable for penalties imposed under this section, unless the registered owner can show that the vehicle was used without the registered owner's express or implied permission.

26. 16 U.S.C. 6811(d) provides that the failure to pay a recreation fee established under this Act shall be punishable as a Class A or Class B misdemeanor, except that in the case of the first offense of nonpayment, the fine imposed may not exceed \$100, notwithstanding section 3571(e) of Title 18, United States Code.

FACTUAL ALLEGATIONS

27. Following the enactment of the REA, Forest Service administrators designated the Catalina Highway Corridor as a HIRA. Fees were charged for the same area pursuant to the now repealed Fee Demonstration Program. The HIRA is situated one-half mile on either side of the center line of the Catalina Highway and spans twenty-eight (28) miles in length.

28. The Forest Service requires motorists who park anywhere within the HIRA to pay a \$5.00 fee except when parking at a designated scenic overlook.

1           29. The Forest Service maintains a fee collection station at milepost 5.1 on the Catalina  
2 Highway.

3           30. The Forest Service signs posted along the highway state that a fee is required for all  
4 picnicking, camping, roadside parking, use of trailheads, and use of restrooms.

5           31. The Catalina Highway is maintained by the County of Pima, a political subdivision of  
6 the State of Arizona.

7           32. The policy of the Service requires that vehicle operators purchase and display a pass  
8 on their cars when parked anywhere along or adjacent to the Catalina Highway.

9           33. There are numerous trailheads along and adjacent to the Catalina Highway leading  
10 into the back country that do not contain all the Congressionally-required amenities that would  
11 justify the levy of a standard amenity fee. These trails are, but are not limited to: Bigelow, Box  
12 Camp, Lower Bug Springs, Butterfly, Crystal Springs, Lower Green Mountain, Upper Green  
13 Mountain, Incinerator Ridge, Mint Spring, Mt. Lemmon/Aspen, Palisades, Red Ridge, Sunset,  
14 Aspen Draw and Oracle Ridge.

15           34. There are at least three undeveloped campgrounds located in the HIRA that do not  
16 contain the required amenities that provide the legislative authority to the Service to charge a  
17 standard amenity fee. These campgrounds are: Lizard Rock, Bear Wallow and Bigelow.

18           35. The above-mentioned campgrounds are designated by the Forest Service as a CUA  
19 camping area. The Service defines a CUA area as a primitive site managed for overnight use  
20 with minimal improvements.

21           36. There are four other sites within the HIRA that are designated “CUA other”. They  
22 are Thimble Peak, Manzanita, Hoodoo, and Sycamore Canyon. These sites are defined by the  
23 Forest Service as “primitive site minimal improvements”.

24           37. The Service requires all parked cars located within the HIRA to display a pass.

25           38. When no pass is displayed on a vehicle or when the Fee Enforcement Officer does  
26 not see a pass, vehicle operators are initially given warning notices (Notices of Non-  
27 Compliance), left on the vehicle advising that the failure to pay may result in legal action against  
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1 them.

2 CAUSES OF ACTION

3 FIRST CAUSE OF ACTION

4 VIOLATION OF THE FEDERAL LANDS RECREATION ENHANCEMENT ACT

5 39. Paragraph 1 through 38 are incorporated herein by reference the same as though  
6 pleaded in full.

7 40. Defendants' policy exceeds the scope of its legislative authority since it developed  
8 the policy without following the substantive law that defines and delimits the scope of its  
9 authority. The REA authorizes a standard amenity fee only in areas where the enumerated  
10 amenities exist. (16 U.S.C. 6802(f)(4)) There are numerous areas within the HIRA that do not  
11 contain all of the required amenities. Even if the Service were to argue that some amenities are  
12 spread throughout the area along and adjacent to the 28 mile stretch of highway, Congress  
13 placed limits on fee collection authority even within areas otherwise subject to a fee. 16 U.S.C.  
14 6802(f) authorizes a standard amenity fee "except as limited by subsection(d)".

15 41. Congress provided that in no event may the Service charge "solely for parking,  
16 undesignated parking, or picnicking along roads or trailsides." (16 U.S.C. 6802(d)(1)(A)) With  
17 the exception of scenic overlooks, the Service charges a fee for anyone parked within the HIRA,  
18 thereby unilaterally nullifying any effect of the specific legislative directives authorizing free  
19 parking and picnicking along roads and trailsides. Congress is well aware that persons drive to  
20 National Forests. Hence it legislated that a person was free to drive to the forest, park and have  
21 a picnic at trailsides and along roads when not in designated picnic or camping areas that  
22 provide all of the standard amenities.

23 42. Congress prohibited the Service from charging general access fees or admission fees.  
24 (16 U.S.C. 6802(d)(1)(B); 16 U.S.C. 6802(f)) The Service charges a fee at the fee station for  
25 general access to the HIRA since it requires a fee from for all motorists parked in the HIRA  
26 (except at designated scenic overlooks), regardless of whether or not the motorist is traveling to  
27 a developed site where the required amenities are provided.

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1           43. Congress provided for free use of dispersed areas with low or no investment unless  
2 specifically authorized by Congress. (16 U.S.C. 6802(d)(1)(C)) The areas adjacent to the  
3 Catalina Highway corridor are dispersed back country areas. By charging motorists a fee when  
4 they park everywhere within the HIRA (except designated scenic overlooks), the Service is  
5 precluding hikers from freely accessing the Forest to hike in dispersed areas in and around the  
6 HIRA.

7           44. Congress provided that a fee cannot be charged for “persons who are driving  
8 through, walking through, boating through, horseback riding through, or hiking through Federal  
9 recreational lands and waters without using the facilities and services.” (16 U.S.C.  
10 6802(d)(1)(D)) The policy of the Service requires all persons who park within the HIRA to pay a  
11 standard amenity fee, with the exception of motorists parked at designated scenic pullouts.  
12 Persons parking at trailheads to access back country areas are charged a fee, even though all the  
13 required amenities, a legislative condition precedent for fee authority, are not present at the  
14 Service's designated sites. Plaintiffs cannot be charged for parking and they cannot be charged  
15 for walking through the forest when not using the provided facilities. The policy of the Service  
16 to charge a fee is in clear violation of the statutory provisions limiting its authority.

17           45. Congress explicitly prohibited the Service from charging a standard amenity fee for  
18 camping at undeveloped sites. (16 U.S.C. 6802(d)(1)(E)) The Mt. Lemmon HIRA has at least  
19 three undeveloped sites. The Service threatens persons camping at such sites with criminal  
20 prosecution for failing to pay a fee which Congress stated, in no uncertain terms, it was  
21 prohibited from doing.

22           46. Congress required that the Service “post clear notice” of the standard amenity fee in  
23 each area. (16 U.S.C. 6803(e)(1)) Since the signs are statutorily required, accurate notice to the  
24 public is essential before the Service can collect a fee. The Mt. Lemmon HIRA signs state that a  
25 permit fee must be paid for picnicking, all camping, roadside parking, trailhead use and restroom  
26 use. However, charging a fee for roadside or trailside picnicking is prohibited by the REA. To  
27 charge a fee for “all camping” violates the explicit prohibition on charging for camping at  
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1 undeveloped sites. Congress explicitly prohibited the Service from charging for “roadside  
2 parking”. There is no authorization in the REA to charge for hiking on a trail and charging for  
3 trailside parking is prohibited. Any attempt to collect fees given the completely inaccurate  
4 information provided to the public must be nullified as the posting of such signs is far beyond the  
5 Service's legislative authority.

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7 **SECOND CAUSE OF ACTION**

8 **VIOLATION OF THE FIRST AMENDMENT**

9 47. Paragraphs 1 through 46 are herein incorporated by reference the same as though  
10 pleaded in full.

11 48. The requirement that all motorists must purchase and display a pass on cars parked  
12 within the boundary of the Mt. Lemmon HIRA has a significant chilling effect on Plaintiffs’ right  
13 to freely travel on the Catalina Highway and stop en route to enjoy the scenery, take a break or  
14 have a picnic along the highway.

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16 **THIRD CAUSE OF ACTION**

17 **VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

18 49. Paragraphs 1 through 48 are herein incorporated by reference, the same as though  
19 pleaded in full.

20 50. The REA authorizes the service to conclusively presume that owners of vehicles are  
21 criminally culpable for failing to pay a fee, without any evidence that the owner of the vehicle  
22 was in the HIRA for purposes of triggering a fee requirement. (16 U.S.C. 6811) Irrebuttable  
23 presumptions pertaining to an element of a crime are an unconstitutional violation of Plaintiffs’  
24 Fifth Amendment rights to due process.

25 **PRAYER FOR RELIEF**

26 Therefore, Plaintiffs pray that this Court:  
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1. Declare that the Forest Service in Arizona exceeded the scope of its legislative authority in establishing the Mt. Lemmon HIRA wherein fees are charged for that which Congress has prohibited;

2. Declare that the Service is without jurisdiction to enforce the REA on non-federal land;

3. Enjoin the Defendant Forest Service from further implementation of its policy;

4. Declare that all signs be removed in the HIRA which state a fee is required for that which Congress has prohibited fees and that new signs be posted reflecting that a fee is required for the use of developed picnic and camping sites;

5. Refund monies to Plaintiffs and others similarly situated for improperly charging a fee when they parked in the HIRA;

6. Award Plaintiffs their reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act 28 U.S.C. 2412 or other authority; and grant Plaintiffs such additional and further relief as the Court deems just and equitable.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of May, 2008.

/s/Mary Ellen Barilotti,  
Attorney for Plaintiffs