No. 10-16711

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAYE ADAMS *et al.*, Plaintiffs/Appellants,

v.

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

On Appeal from the United States District Court
for the District of Arizona

APPELLANTS' OPENING BRIEF

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JURISDICTION

(A) The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201, as Plaintiffs sought review of a final federal agency action and thus presented a federal question. ER 113,119-121. Plaintiffs' cause of action arose under 5 U.S.C. §§ 701-706. ER 113.

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

(C) Plaintiffs appeal the district court's final Order and Judgment, entered March 9, 2010, as affirmed by the Court's Order entered June 16, 2010, denying Plaintiffs' Motion to Reconsider and Alter Judgment filed pursuant to Fed. R. Civ. P. 59(e). *See* ER 1-16. Plaintiffs filed their notice of appeal on August 6, 2010, making it timely pursuant to Fed. R. App. 4(a)(1)(B), as a federal agency is a party to this case and the notice of appeal was filed within 60 days of the district court's final order of June 16, 2010. *See* ER 17.

(D) This appeal is from a final order and judgment that disposes of all parties' claims.

ISSUE PRESENTED

May the U.S. Forest Service charge fees for parking in order to picnic, hike or camp in undeveloped areas of the Mt. Lemmon High Impact Recreation Area, despite an explicit statutory prohibition on doing so, merely on the basis of alleged administrative convenience for the Forest Service?

REPRODUCTION OF RELEVANT STATUTORY PROVISIONS

Relevant sections of the Federal Lands Recreation Enhancement Act, 16 U.S.C. §§ 6801-6814, are set out at pages 5-7 below.

STATEMENT OF THE CASE AND OF THE FACTS

The Federal Lands Recreation Enhancement Act and its Legislative History

In 1996, Congress and the President passed language as part of a larger appropriations bill to establish the Recreational Fee Demonstration Program (often referred to as "Fee Demo"), which authorized federal land management agencies such as the Forest Service to collect fees at a limited number of recreational sites. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Title I, Sec. 101(C) [title III, Sec. 315], 110 Stat.

1321. Its goal was to "demonstrate the feasibility of user-generated cost recovery for the operation and maintenance of recreation areas or sites and habitat enhancement projects on Federal lands." *Id.* at § 315(a). Pursuant to this authority, the Forest Service began to charge fees for access to the Mt. Lemmon area, on the Coronado National Forest in Arizona. *See* ER 112.

The response by the public to the Fee Demo program was overwhelmingly negative, due to agencies such as the Forest Service charging fees for access to undeveloped public land. For instance, the Board of Supervisors for Pima County, Arizona (within which Mt. Lemmon is located), passed a resolution opposing the imposition of fees for accessing land on Mt. Lemmon under the Fee Demo authorization. ER 21-22. Similar resolutions were passed by many state legislatures, counties, and cities, opposing the imposition of fees under the Fee Demo program for simple access to public lands, on the grounds that such fees erect barriers to low-income citizens, represent double taxation for access to non-developed areas for which additional fees are not appropriate, undermine the democracy and freedom of free recreation on public lands, and represent a commoditization and

commercialization of public lands, encouraging a feedback loop of fees and developments (often run by private contractors) on previously undeveloped lands. ER 23-58.

Prior to the final extension of the Fee Demo program in 2003 (which had been reauthorized periodically since 1996 in annual appropriations bills), an amendment was introduced in the House Resource Committee by Representative DeFazio to limit the Fee Demo program to National Parks, and eliminate it for Forest Service and other lands. As stated by Representative DeFazio:

> [There are] those of us who feel very strongly that levying these fees indiscriminately across the Forest Service and the BLM [Bureau of Land Management], to nondeveloped areas in particular, is of great concern. Basically, if you want to drive your car around a park and go hunting or go fishing or just walk with the kids or the dog, you have to buy a pass for nondeveloped sites, and a lot of us have strong concerns about that.

2004149 Cong. Rec. H7025-06 at H7033 (2003 WL 21673066) (daily ed. July 7, 2003). In response to Representative DeFazio's concerns, the chairman of the committee and a supporter of the Fee Demo program generally, Representative Pombo, stated:

> That is something that we are going to change. There is going to be very strict guidelines that come out of an authorization that goes to these agencies so that this does not happen in the future. I will say I oppose doing the amendment at this point in time, but I

> will tell the gentleman from Oregon (Mr. DEFAZIO) that in the future, if we cannot authorize this program and change the way that it is being run, that I would join him in eliminating the program all together . . ..

Id. at H7034.

Representative DeFazio's amendment did not pass in 2003. However, the following year, in light of the overwhelmingly negative public reaction to the Fee Demo program, Congress refused to reauthorize it and instead passed the Federal Lands Recreation Enhancement Act ("REA"), the statute at issue in this case. 16 U.S.C. §§ 6801-6814. The REA states in relevant part:

> *Except as limited by subsection (d) of this section,* the Secretary may charge a standard amenity recreation fee for Federal recreational lands and waters under the jurisdiction of the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service, but only at the following:
>
> **(1)** A National Conservation Area.
>
> **(2)** A National Volcanic Monument.
>
> **(3)** A destination visitor or interpretive center that provides a broad range of interpretive services, programs, and media.
>
> **(4)** An area--
>
> **(A)** that provides significant opportunities for outdoor recreation;
>
> **(B)** that has substantial Federal investments;

(C) where fees can be efficiently collected; and

(D) that contains all of the following amenities:

(i) Designated developed parking.

(ii) A permanent toilet facility.

(iii) A permanent trash receptacle.

(iv) Interpretive sign, exhibit, or kiosk.

(v) Picnic tables.

(vi) Security services.

16 U.S.C. § 6802(f) (emphasis added).

(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) of this section.*

(F) For use of overlooks or scenic pullouts.

(G) For travel by private, noncommercial vehicle over any national parkway or any road or highway established as a part of the Federal-aid System, as defined in section 101 of Title 23, which is commonly used by the public as a means of travel between two places either or both of which are outside any unit or area at which recreation fees are charged under this chapter.

(H) For travel by private, noncommercial vehicle, boat, or aircraft over any road or highway, waterway, or airway to any land in which such person has any property right if such land is within any unit or area at which recreation fees are charged under this chapter.

(*I*) For any person who has a right of access for hunting or fishing privileges under a specific provision of law or treaty.

(J) For any person who is engaged in the conduct of official Federal, State, Tribal, or local government business.

(K) For special attention or extra services necessary to meet the needs of the disabled.

16 U.S.C. § 6802(d) (emphases added).

Accordingly, the Forest Service may charge a fee to users of an "area" that contains bathrooms, picnic tables and the other developed amenities listed subsection (f)(4), except for people entering that area to simply drive through it, use scenic pullouts, park and hike, picnic or camp in undeveloped areas, as well as for other users listed in subsection (d) such as people on official government business or members of Indian tribes with tribal hunting rights.

As stated in the House committee report authored by Representative Pombo, the final REA as amended

> clarified where a fee may and may not be charged while also establishing types of fees. *This section was overly prescriptive to alleviate concerns of those who no longer trust certain federal land management agencies with the recreation fee authority. For example, the amendment made clear that the USFS and the BLM will not be permitted to charge solely for parking, scenic pullouts, and other non-developed areas* while the NPS and the FWS may continue to charge an entrance fee.

H.R. Rep. 108-790(I), 108th Cong., 2ND Sess. 2004 (Nov. 19, 2004), 2004 WL 2920863 at *18 (emphasis added). So while previous Fee Demo supporters in Congress may have viewed the new REA restrictions as "overly prescriptive," they nonetheless passed them into law, acknowledging that some members of Congress at least viewed them as necessary to correct the practice under the Fee Demo program

by the Forest Service and other agencies to "charge solely for parking, scenic pullouts, and other non-developed areas."

The Catalina Mountains (Mt. Lemmon) High Impact Recreation Area

In 2005, the Forest Service issued "Interim Implementation Guidelines" to implement the REA on Forest Service lands. ER 72. Among other things, the Guidelines created the authority to establish High Impact Recreation Areas ("HIRA"s), defined as

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

ER 80.

The Forest Service subsequently designated the Catalina Mountains HIRA, more commonly known as the Mt. Lemmon HIRA, on the Coronado National Forest in southeastern Arizona, continuing to charge the fees it had previously collected there under authority of the Fee Demo program. *See* ER 104 (Forest Service "HIRA Review" document). It includes

> the land adjacent to the final twenty-eight miles of the Catalina Highway leading to the summit of Mt Lemmon. The HIRA is situated a half a mile on either side of the center line of the Congressionally designated, 26-mile Sky Island National Scenic Byway. The Forest Service operates a fee collection station located at milepost five on the Catalina Highway and requires payment of five dollars for a day permit to travel into the HIRA for certain activities. *The signs posted along the highway state that a fee is required for all picnicking, camping, roadside parking, use of trailheads*, and use of restrooms. The fee is waived if a person is traveling nonstop into and out of the HIRA, stopping only at scenic overlooks or vista points, or traveling to a private residence.

United States v. Wallace, 476 F. Supp. 2d 1129, 1130 (D. Ariz. 2007) (emphasis added)[1]; *see also* ER 106-107 ("HIRA Review" document); ER 66-67 (photos of fee signs); ER 19 (map)[2]. The area contains a visitor

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[1] *Wallace* involved the same issue here regarding the Mt. Lemmon HIRA, and came down consistently with the district court below, and was the basis for the issue/claim preclusion ruling of the district court as to plaintiffs Wallace and Patterson. *See* ER 9. Plaintiffs obviously do not agree with the result in *Wallace*, and note that in the time since the court below issued its decision, a different judge in the District of Arizona issued a decision in conflict with it and with *Wallace*, ruling that the REA does *not* permit the Forest Service to charge fees merely for parking in order to recreate in undeveloped areas, creating a conflict within the District. *United States v. Smith,* ___ F. Supp. 2d ___, 2010 WL 3809994 at *9-10 (D. Ariz. 2010). It will be addressed below in the Argument.

[2] ER 19 contains the only map in the judicial record, but a better map created by the Forest Service can be found at www.fs.fed.us/r3/coronado/forest/recreation/scenic_drives/scenic_images/cat_hwy.jpg

center, and various developed picnic and camping areas, but it also contains numerous undeveloped pulloffs and trailheads for accessing undeveloped Forest Service lands, including the adjacent Pusch Ridge Wilderness Area. *Id.*

Procedural History of this Lawsuit

Plaintiffs are individuals who "travel[] along the Catalina Highway [within the Mt. Lemmon HIRA] to trailheads to hike into dispersed areas and to camp at undeveloped campsites." ER 113-114. They brought this suit to challenge the FS practice of charging for these activities in Mt. Lemmon HIRA in May of 2008, raising three claims, and seeking declaratory and injunctive relief (enjoining collection of fees for parking and camping, picnicking or hiking in undeveloped area), as well as a return of fees they had previously paid. ER 111-122.[3]

The Forest Service never filed an answer or an administrative record, but instead moved to dismiss two of the plaintiffs (Christine Wallace and Daniel Patterson) on claim and issue preclusion grounds, and moved to dismiss all three claims for failure to state a claim. ER

[3] The complaint was styled as a class action, although Plaintiffs ultimately did not press a class certification, and the case proceeded as a standard APA challenge to agency action.

68-70. The agency also moved to dismiss the requested relief of the return of fees paid on sovereign immunity grounds. ER 69.

The district court ruled on the Forest Service's motion on March 9, 2010. ER 5. It first ruled that sovereign immunity did not prevent Plaintiffs' requested relief of a return of fees they had paid. ER 7-8. It next ruled that two of the plaintiffs, Daniel Patterson and Christine Wallace, would be dismissed on claim and issue preclusion grounds. ER 8-9. It next ruled that Plaintiffs' Claim One, the sole claim now on appeal, failed to state a claim, finding that the Forest Service is properly charging fees to those entering the Mt. Lemmon HIRA to park and recreate on undeveloped lands. ER 10-14. Finally, the court ruled that Plaintiffs' Claims Two and Three, raising constitutional issues, failed to state a claim. ER 14-16.

Plaintiffs filed a Motion to Amend Judgment raising statutory interpretation deference issues related to Claim One, which the court denied on June 16, 2010. ER 1-3. Plaintiffs filed their notice of appeal on August 6, 2010. Plaintiffs hereby waive appeal of the district court's rulings dismissing plaintiffs Patterson and Wallace on claim/issue preclusion grounds, and dismissing Plaintiffs' Claims Two and Three.

Accordingly, the only issue in this appeal is the district court's dismissal of Claim One, challenging the Forest Service's charging of fees for parking and picnicking, hiking or camping in undeveloped areas in the Mt. Lemmon HIRA, as a violation of the REA.

SUMMARY OF ARGUMENT

The REA unequivocally prohibits the Forest Service from charging fees for parking and hiking, picnicking, or camping in undeveloped areas, yet the agency does just that in the Mt. Lemmon HIRA. The agency argues that it can do so for the sake of administrative convenience, since to allow visitors engaged in these activities to not pay would make it more difficult to collect fees for activities that it may charge for, such as use of visitor centers and developed picnic areas. However, administrative convenience does not allow a federal agency to violate an explicit Congressional command, and the Forest Service is plainly violating the REA by collecting fees for these activities in the Mt. Lemmon HIRA.

This case can be decided without consideration of what level of deference to the Forest Service's interpretation of the REA might be applicable if the relevant portions of it were deemed ambiguous, since

its language is plain and its meaning clearly discernable and therefore under Step One of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), no deference is owed to the agency's interpretation. However, even if the meaning of the relevant portions of the REA were not plain, the Forest Service would deserve little to no deference to its interpretation because its interpretation is biased by the pecuniary incentive, was not subject to public notice and comment, was not the subject of deliberation in a manner normally worthy of deference, and a violation of it may result in misdemeanor criminal penalties. But even under the most deferential standard applicable, the Forest Service's interpretation cannot be deemed reasonable, as it violates the intent of the REA which is to prohibit the charging of fees for recreation on undeveloped federal lands.

ARGUMENT

I. Reviewability and Standard of Review

The sole issue in this appeal was raised in the Forest Service's motion to dismiss, the Plaintiffs' response, and the Forest Service's reply. ER 68-70; CR # 14,20,25. It was ruled upon in the district court's

final order and judgment granting the Forest Service's motion, entered March 9, 2010, as well as the court's denial of the Plaintiffs' motion to alter judgment, entered June 16, 2010. ER 1-16.

"A district court's decision to grant a motion to dismiss under Rule 12(b)(6) is reviewed *de novo*," and so this Court accords no deference to the district court's decision. *Ta Chong Bank Ltd. v. Hitachi High Technologies America, Inc.*, 610 F.3d 1063, 1066 (9th Cir. 2010) (citation omitted). "'All well-pleaded factual allegations are to be construed in the light most favorable to the pleader, and accepted as true.'" *Id.* (citation omitted). While "the denial of a motion under Rule 59(e) to alter or amend the judgment is reviewed for abuse of discretion," Plaintiffs here do not appeal anything specifically related to the district court's denial of the Plaintiffs' Rule 59(e) motion, and so only the *de novo* standard of appellate review is applicable here. *See id.* (citation omitted).

This is a case brought pursuant to the judicial review provision of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706. Under the APA, the reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law . . .." 5 U.S.C. § 706(A).

Where, as here, the Court is asked to determine the legal meaning of a statutory provision, it must ask whether Congress has "directly spoken" to the issue at hand, and if so, the Court must give effect to that plain intent without affording any deference to a contrary agency interpretation. *Chevron, supra,* 467 U.S. 837 at 843. "[A]s the Supreme Court indicated in *Chevron* and has reiterated since then, the reviewing court must 'employ[ ] traditional tools of statutory construction'--including, when appropriate, legislative history--to determine whether Congress 'had an intention on the precise question at issue.'" *Ohio v. U.S. Dep't of Interior*, 880 F.2d 432, 441 (D.C. Cir.1989) (citations omitted).

Only if a court determines that a statutory phrase is ambiguous should it proceed to *Chevron* Step Two, in which it employs various levels of deference to agency interpretations. But only consistent interpretations arrived at through "a formal adjudication or notice-and-comment rulemaking," untainted by other factors such as pecuniary bias or a lack of deliberation on the relevant statutory issue,

"warrant *Chevron*-style deference." *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citations omitted). Even in cases where full deference is warranted, courts must not "rubber stamp . . . decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *BATF v. FLRA*, 464 U.S. 89, 97 (1983).

II. Charging Fees for Parking and Undeveloped Recreation in the Mt. Lemmon HIRA Violates the REA

The plain language of the REA prevents the Forest Service from charging for parking and picnicking, hiking, or camping in undeveloped areas of the Mt. Lemmon HIRA and adjacent federal lands, yet the Forest Service does just that, and so is in violation of the law. Even if the language of the REA were not deemed plain, the Forest Service's interpretation of the REA which allows charging fees for these activities cannot be accepted, due to the minimal deference owed to the Forest Service's interpretation here, and the conflict of the agency's interpretation with the language, policy and legislative history of the REA.

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

The REA states that the Forest Service may charge fees for an area that contains all of several enumerated developed amenities, "[e]xcept as limited by subsection (d) . . .." 16 U.S.C. § 6802(f). Subsection (d) states that the Forest Service "shall not charge" **"**[s]olely for parking, undesignated parking, or picnicking along roads or trailsides," or "[f]or camping at undeveloped sites that do not provide a minimum number of facilities and services . . ..." 16 U.S.C. § 6802(d). However, the Forest Service does exactly this in the Mt. Lemmon HIRA, and so is in violation of the REA.

The Forest Service acknowledges that generally it may not charge for subsection (d) uses in HIRAs, including Mount Evans. For instance, subsection (d) states that the Forest Service may not charge "persons who are driving through, walking through, boating through, horseback riding through, or hiking through Federal recreational lands and waters without using the facilities and services," or for "use of overlooks or scenic pullouts." 16 U.S.C. § 6802(d)(1)(D),(F). And in fact, the Forest Service exempts such users from paying fees in the Mt. Lemmon HIRA, including those who enter without a vehicle to picnic, hike and

camp. ER 14. Yet, it charges users such as Plaintiffs who drive into the HIRA to park and picnic, hike, or camp in undeveloped areas accessible by the road into the Mt. Lemmon HIRA.

The Forest Service's justification for this practice below was that it may do so on the grounds of administrative convenience. *See* CR #14.[4] According to the Forest Service, acknowledging the drive/walk through and scenic overlook provisions of subsection (d) is no problem, since such users either don't leave a car or venture far from it, while those parking to picnic, camp or hike leave an unattended car. As such, argues the Forest Service, they would not know which cars to ticket for non-payment, since owners of a parked car could potentially be using the developed amenities such as the bathrooms or developed picnic areas. It is the Forest Service's argument that if it had to acknowledge all the limitations of subsection (d), the agency would have to engage in more onerous enforcement efforts instead of just being able to ticket all

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[4] This is the only argument of the Forest Service applicable to Plaintiffs' claim. The agency also argued that it properly interpreted the term "area" in the REA in designating the Mt. Lemmon HIRA, and that it was not required to exclude undeveloped areas from it. But Plaintiffs do not disagree with those points, and instead merely argue that the agency may not charge those who enter the HIRA to park and recreate in undeveloped lands in the HIRA and beyond.

unattended vehicles without a payment pass, and therefore should be exempted from some of the explicit Congressional limitations on charging fees in subsection (d).

This argument is absolutely contrary to law, and reads an "administrative convenience" clause into the REA which is not found there. As this Court has previously stated where another agency within the U.S. Department of Agriculture tried to excuse its noncompliance with an explicit Congressional directive on similar grounds:

> We are troubled that the USDA may have acted more out of concern for administrative convenience and self-interest, rather than with an interest in administering the Act according to statutory requirements and Congressional intent. * * * The USDA failed to fulfill its responsibilities in this regard. It put administrative expediency ahead of the intent of Congress . . ..

Amalgamated Sugar Co. LLC v. Vilsack, 563 F.3d 822, 834,836 (9th Cir. 2009). The Forest Service may consider the REA to be a "tough law," but the agency is "not at liberty to ignore" it. *See Northwest Envtl. Defense Ctr. v. Brown*, 617 F.3d 1176, 1188 (9th Cir. 2010) (EPA may not ignore mandates of Clean Water Act simply because they are difficult to administer); *see also California v. Johnson*, 543 U.S. 499, 522 (2005) ("administrative convenience" no excuse for failure of government to

comply with law).

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

In a recent ruling from the District of Arizona (by a different judge than who ruled below), the court agreed with this plain reading of the REA (a.k.a. "FLREA"):

> Under the first step of the *Chevron* test, the Court finds the statutory language completely clear with regard to the extent of the authority conferred to charge a citizen a recreational amenity fee. Congress expressed a manifest intent in the FLREA that a fee not be charged solely to park on the National Forest, or at a site where the six specific listed "amenities" were not found. The FLREA is an extremely comprehensive and precise statutory scheme clearly delineating specific instances in which the public may be charged an amenity fee for use of the National Forests, and other public lands, and quite plainly prohibiting the agency from establishing any system which requires the public to pay for parking or simple access to trails or undeveloped camping sites.

* * *

> The very plain language of the statute prohibits the Forest Service from charging a fee for entering, i.e., accessing, a National Forest. The statute also clearly and specifically prohibits charging an amenity fee solely for parking a vehicle in an undeveloped parking lot. It is apparent that Mr. Smith would not have received a ticket had he not parked a vehicle, i.e., had a friend delivered him to the trailhead and retrieved him the following day. Accordingly, what Mr. Smith received was actually a ticket for parking, clearly prohibited by the plain language of the statute.

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

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

> clarified where a fee may and may not be charged while also establishing types of fees. This section was *overly prescriptive* to alleviate concerns of those who no longer trust certain federal

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[5] The *Smith* court tried to distinguish the HIRA at issue there with the Mt. Lemmon HIRA, but the factual differences lead to no different result. *See* 2010 WL 3809994 at *12. Both HIRAs require a visitor not using the developed amenities to pay a fee; the squarely on-point answer provided by *Smith* is that the Forest Service may not do so.

> land management agencies with the recreation fee authority. For example, *the amendment made clear that the USFS and the BLM will not be permitted to charge solely for parking, scenic pullouts, and other non-developed areas* while the NPS and the FWS may continue to charge an entrance fee.

H.R. Rep. 108-790(I), 108th Cong., 2ND Sess. 2004 (Nov. 19, 2004), 2004 WL 2920863 at *18 (emphases added). As further stated by one member of the House of Representatives when the REA was introduced: "When a hiker parks on the side of the road and ventures onto an unmanaged trail with no amenities along the way, they should certainly not have to pay." ER 60 ¶4. As stated by another member of the House when the REA passed that chamber, the new statute

> would limit the recreation fee authorization on land management agencies. No fees may be charged for the following: solely for parking, picnicking [etc.]. Additionally, **no entrance fees will be charged for any recreational activities on BLM, USFS, or BOR [Bureau of Reclamation] lands.** The language included by the Resources Committee is much more restrictive and specific on where fees can and cannot be charged.

ER 63 (emphasis in original).

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

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

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

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

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

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

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

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

> at "areas" with amenities, Congress clearly intended to exclude from the definition of an "area" a place without amenities where the result would be that the public would be charged solely to park or for general access or undeveloped camping.

2010 WL 3809994 at *12.[6]

That would be the result even assuming that full *Chevron* deference were warranted, where the agency would only need to show that its interpretation constituted a "reasonable" interpretation of the statute. However, such deference is not warranted, for several reasons. First is the self-serving pecuniary incentive for the Forest Service's interpretation:

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

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[6] While *Smith* framed this result in terms of needing to exclude non-amenity areas from HIRAs, the same result is reached if undeveloped areas are allowed to remain part of HIRAs but the Forest Service is prohibited from charging visitors who enter such HIRAs to only use undeveloped areas.

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

A second reason for according little to no deference is the fact that neither the "HIRA Review" document for the Mt. Lemmon HIRA, nor the Forest Service's Interim Implementation Guidelines that created the concept of HIRAs, were subject to notice and comment rulemaking. *See* ER 71,104. Accordingly, at most the positions in those documents are entitled only to "power to persuade" deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). *Christensen v. Harris County*, *supra*, U.S. at 587 ("[I]nterpretations contained in policy statements, agency manuals, enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.").

A third reason for little to no deference is the lack of relevant legal deliberations contained in either the HIRA Review document or the Interim Guidelines on the issue at hand. As this Court has stated, "the Handbook address[es] the issue before us only tangentially. The rules and the Handbook, therefore, have no 'power to persuade' us of any particular interpretation" of the statutory phrase. *Northern Cal. River Watch v. Wilcox*, 620 F.2d 1075, 1088 (9th Cir. 2010). The same is

true here. The Forest Service argued below that the term "area" in the REA (16 U.S.C. § 6802(f)(4)), upon which the creation of HIRAs in the Guidelines was based, was ambiguous and therefore deference was due to the Forest Service's interpretation of the REA as contained in the Guidelines. However, that argument is beside the point, because Plaintiffs do not challenge the idea of HIRAs or the creation of the Mt. Lemmon HIRA. Rather, Plaintiffs challenge the practice of charging fees for entering the Mount Lemmon HIRA when a person only seeks to park and recreate in the undeveloped portions in the HIRA and beyond without using the developed amenities, and neither the Guidelines nor the HIRA review document grapple with this issue in any meaningful way. *See U.S. v. Smith, supra*, 2010 WL 3809994 at *11 ("None of the *Skidmore* factors that weigh in favor of persuasion are present in this matter, *i.e.*, there is no indication that the agency thoroughly considered where an amenity fee could or could not be charged, pursuant to the explicit terms of the [REA].").

A fourth reason for reduced deference is that because the failure to pay a Forest Service recreation fee is punishable as a misdemeanor crime (16 U.S.C. § 6811(d)), "when choice has to be made between two

readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). The Forest Service's "harsher alternative" reading of the REA accordingly deserves little deference.

With these deference issues in mind, an examination of additional provisions of the REA cited by the Forest Service and relied upon by the district court below shows that they aid the Forest Service's position no better than the directly applicable provisions of the REA discussed above. It is true that the REA states that "areas" where fees can be charged must be "where fees can be efficiently collected," and that this requirement is reiterated in the authority for creating HIRAs in the Guidelines. 16 U.S.C. § 6802(f)(4)(C); ER 80 (Interim Guidelines); *see* ER 13 (district court opinion). However, no amount of deference[7]

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

could save the plain meaning of that phrase, which is that a *prerequisite of designating a fee area* such as a HIRA must be that fees can be "efficiently collected" there; it cannot be read to mean that once a fee area is designated, that the agency can charge fees for subsection (d) activities within that area. This phrase comes from subsection (f) which creates the authority to create fee areas, "[e]xcept as limited by subsection (d) of this section." 16 U.S.C. § 6802(f). Accordingly, the limitations of subsection (d) trump the provisions of subsection (f), not the other way around.

In addition to the "efficiently collected" provision, the district court relied on the subsection of the REA which directs that agencies "shall avoid the collection of multiple or layered recreation fees for similar uses, activities, or programs." ER 13, *quoting* 16 U.S.C. § 6802(c). This provision does not aid the Forest Service's interpretation. The *full* subsection states: "The Secretary shall establish the minimum number of recreation fees and shall avoid the collection of multiple or layered recreation fees for similar uses, activities, or programs." It is plain that the aim of this subsection is to *limit* the imposition of fees

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257 (2006).

such that an agency may not charge more than one fee for a single activity, if charging for a certain activity is permitted at all. As such, it has no bearing here, and cannot be read to permit charging for subsection (d) activities. If anything, it is yet another example of the "overly prescriptive" nature of the REA in limiting the discretion of the Forest Service to collect fees.

Finally and as a practical matter, allowing users of all subsection (d) activities (instead of just some) to pass the Mt. Lemmon fee station without paying would not create an undue hardship on the Forest Service. The agency could generally trust the members of the public to be honest about their intended activities, and agency staff could tell visitors at the payment station that they do not have to pay unless they will be using the developed amenities. That trust could be enforced with patrols of the developed amenities to look for payment passes, which would require *less* enforcement effort than is now used to check *all* parked cars in the HIRA along highway pullouts etc. True, this might result in a few scofflaws using developed amenities without paying. However, "[t]hat one who may be guilty goes free is a small price to ensure that all who are innocent live freely." *United States. v.*

Wogan, 356 F. Supp. 2d 462, 470 (M.D. Penn. 2005), *citing, inter alia, Silverthorne Lumber v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.). And unlike the agency's current practice, it would not violate the REA.

In fact, such a situation is common on Forest Service lands. For instance, one must buy a permit at a local Forest Service office or commercial outlet to cut down a Christmas tree on Forest Service lands, and the agency does not erect payment stations for this activity and charge everyone entering the Forest a fee to cut a Christmas tree even if they have no intention of doing so, based on the fear that otherwise it would be too hard to catch people cutting Christmas trees without a permit. Rather, the public is mostly on its honor to buy a permit, and the Forest Service backs this up with random enforcement throughout the Forest even though some Christmas tree cutters undoubtedly fail to get a permit.

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

them for the sake of ease of enforcement.

CONCLUSION AND REQUESTED RELIEF

For these reasons, the district court's order and judgment dismissing Plaintiffs' Claim One should be reversed.

Respectfully submitted December 17, 2010

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this Court. However, a case is pending in the Tenth Circuit on a similar briefing schedule which presents a nearly identical legal issue regarding a HIRA in Colorado, *Scherer v. U.S. Forest Service*, 10th Cir. No. 10-1418.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify that this brief is proportionally spaced using a 14-point Century Schoolbook font, and contains 6,908 words, which complies with the requirements of Ninth Circuit Rule 32-4 and Fed. R. App. P. 32(a).

/s/Matt Kenna
Matt Kenna

CERTIFICATE OF SERVICE

I certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 17, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I served one copy of appellants' Excerpts of Record on the following counsel of record by First-Class, U.S. Mail on December 17, 2010.

/s/Matt Kenna
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