No. 10-1418

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID P. SCHERER *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 Colorado, Magistrate Judge Michael E. Hegarty Presiding

APPELLANTS' REPLY BRIEF

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I. Charging Fees for Undeveloped Recreation Is Not Consistent with the Plain Language of the REA

The crux of the Forest Service's argument in its brief is that it charges visitors engaged only in certain undeveloped recreation activities listed in 16 U.S.C. § 6802(d) like hiking and camping not for the sake of administrative convenience (FS Brf. at 30), but because it may differentiate between such visitors and those driving through nonstop or only using scenic overlooks because the latter visitors are not using the amenities of the Mount Evans High Impact Recreation Area ("HIRA"), while those who park and hike in undeveloped areas are somehow using the amenities of the HIRA. FS Brf. at 18, 26, 29. However, this argument is internally inconsistent, and cannot be squared with the administrative record or the Federal Lands Recreation Act ("REA"), 16 U.S.C. §§ 6801-6814.[1]

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[1] The Forest Service argues that a "no set of circumstances" test applies here, based on the allegation that this case involves a "facial challenge" to a regulation as in *Colorado Wild vs. U.S. Forest Service*, 435 F.3d 1204 (10th Cir. 2006). FS Brf. at 27 n.5. However, in *Colorado Wild* plaintiffs facially challenged regulations published in the Code of Federal Regulations that were universally applicable to all timber sales throughout the country. 435 F.3d at 1212 n.2. The equivalent of that here would be a challenge to the Interim Implementation Guidelines (Aplt. App. 71), which created HIRAs generally. However, this is not a facial challenge to the Guidelines, but rather a site-specific challenge to the Mount Evans REA Implementation Plan which requires visitors to

First, the only "amenity" that someone parking a car and hiking or camping might possibly take advantage of would be security to the vehicle. *See* FS Brf. at 26-27. But as the Forest Service admits, these security services are also taken advantage of by those non-paying visitors driving through (and who may stop and get out at scenic overlooks), as the security service assists with "vehicle problems," a service certainly utilized equally by those who drive all the way to the summit and back, and those driving in part way solely to park and hike. *See id.* at 27, citing, *inter alia*, Aplt. App. 69.

Under the Forest Service's theory as applied to those hiking and camping in undeveloped areas of the HIRA (and in the Wilderness Area accessed by the HIRA), it should charge visitors traveling through by vehicle and using scenic overlooks because they too are availing themselves of the "security services." However, the agency does not do so, because it acknowledges those particular subsection (d) provisions which state that the Forest Service may not charge "[f]or persons who

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pay to use all "parking areas [and] trailheads" in the Mount Evans HIRA. *See* Aplt. App. 105,107 (Implementation Plan); FS Brf. at 2 (acknowledging the challenged final agency action here is the Implementation Plan).

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 "[f]or use of overlooks or scenic pullouts." 16 U.S.C. §§ 6802(d)(1)(D),(F).

Accordingly, the record shows that the Forest Service recognizes that the mere potential of utilizing the "security services" is not the equivalent of actually using "facilities and services" of the HIRA. And in fact, Congress' use of the term "facilities and services" shows that a visitor must be using the developed "facilities" in addition to "services" in order to be charged. *See Idaho v. Wright*, 497 U.S. 805, 831 (1990) ("'The word 'and' is conjunctive .... The Legislature would have used the word 'or' had it intended the disjunctive.'") (citation omitted).

It is no wonder then that this current argument of the Forest Service is found nowhere in the administrative record. The only reason that squares with the facts for why the agency does not exempt those entering the Mount Evans HIRA to hike and camp in undeveloped areas, like it does for non-stop drivers and scenic overlook users, is the difficulty the agency claims it would cause for its enforcement efforts. *See* Aplt. App. 229 (FS district court brief arguing "'administrative

efficiency and practicality'" as a reason to uphold its interpretation) (citation omitted); Aplt. App. 281 (district court opinion citing this reason as well).[2]

In fact, while in its primary argument the Forest Service eschews reliance on administrative convenience, elsewhere it argues that to permit those engaged only in undeveloped recreation to pass without payment would "require the Forest Service to monitor each visitor to the HIRA and charge differently according to each user's individual activities." FS Brf. at 22-23.[3] But the agency ultimately does not argue

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[2] Additional proof that the payment scheme is designed for the convenience of ticketing vehicles without payment passes is that the Forest Service charges all visitors entering the Mount Evans HIRA on foot or bicycle even though they, like exempted drivers, might only be traveling nonstop except at scenic overlooks. *See* FS brf. at 14. This can only be for the convenience of the agency's enforcement scheme, which is based on ticketing vehicles without payment passes, not because the Forest Service believes someone biking in to visit scenic overlooks uses more facilities and services than someone driving in to visit scenic overlooks.

[3] The agency's assertion is unfounded- the Forest Service would merely need to allow free passage to these visitors just like it does with those engaged in non-stop travel and who visit scenic overlooks, and charge the standard fees to everyone else. *See* Op. Brf. at 35. While whether the Forest Service actually charges visitors using scenic overlooks is in dispute (*see* Op. Brf. at 11 n. 2 and 22 n.4), the agency's position that it does not underscores its ability to easily exempt visitors engaged only in subsection (d) activities.

that administrative convenience would suffice to overcome the explicit prohibitions of Congress. FS Brf. at 30.[4]

The Forest Service argues that "it would have been irrational for Congress to include parking and picnic tables in the list of required amenities, only to then prohibit the Forest Service from charging for use of those same amenities." FS Brf. at 24. But this argument fails to distinguish between the use of *those developed amenities* versus *undeveloped recreation*. Subsection (f) states that the Forest Service may charge for an "area" that contains "picnic tables," "developed parking," a "permanent toilet facility," and all the other developed amenities of subsection (f), "[e]xcept as limited by subsection (d)," which prohibits charging fees for visitors engaged only in activities such as

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[4] The Forest Service does contest the validity of *Everhart v. Bowen*, but it is still good law for the point cited, namely that "administrative convenience cannot be countenanced when the . . . regulations contravene the plain language of the statute." 853 F.2d 1532, 1537 (10th Cir 1988), *rev'd on other grounds Sullivan v. Everhart*, 494 U.S. 83 (1990). *See* FS Brf. at 29-30 n.7. The grounds upon which this Court's decision in *Everhart* was reversed was that the challenged regulations did *not* contravene the statute. *Id.* But regardless, this Court and the Supreme Court have ruled multiple times, including since the Supreme Court's decision in *Sullivan*, that administrative convenience is no excuse for government non-compliance with law, and the Forest Service has not challenged the validity of these other cases. *See* Pl. Brf. at 23.

"picnicking along roads or trailsides." 16 U.S.C. § 6802(f). The plain language of the statute shows that Congress intended that if a visitor uses developed amenities like visitor centers, bathrooms or picnic tables in an "area" that contains all six listed amenities, he may be charged, but a visitor who picnics "along roads or trailsides" without using those developed amenities or who "camps at undeveloped sites" without using the developed amenities in such an area must not be charged.

Accordingly, there is nothing irrational about Congress' statutory scheme, which permits charging for use of developed amenities but prohibits charging for recreating in undeveloped federal land. If Congress did not intend these fee prohibitions to apply within fee areas, it would not have stated that the fee "area" authority in subsection (f) was only permitted "[e]xcept as limited by subsection (d)." It was the practice of charging for access to undeveloped federal land within fee areas under the Fee Demo program that the public opposed, and to which Congress responded by passing the REA. *See* Op. Brf. at 2-4,8. Accepting the Forest Service's argument would render the reforms of the REA meaningless.

The word "solely" in subsection (d)(1)(A) does not save the Forest Service's argument. *See* FS Brf. at 21, 24. The agency argues that "Congress . . . chose to prohibit charging 'solely' for parking or picnicking; that is, where the other amenities required by REA are absent." FS Brf. at 24, citing 16 U.S.C. § 6802(d)(1)(A). A plain reading of the phrase shows that is not what "solely" means. It is only used in subsection (A), and it means that the agency cannot charge for parking or picnicking if that is all a visitor is doing, rather than using developed amenities as well in addition to those activities- it cannot be read to allow charging a visitor engaged only in those activities simply because developed amenities are present in the agency's designated "area," the visitor is not using them, and they may even be miles away at the other end of the HIRA.

The other subsections bear out this plain reading, such as subsection (d)(1)(D), which 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." The purpose of the subsection (d) prohibitions is obviously to exempt

those in fee areas where "facilities and services" are present from paying when they are not using the facilities and services, not to imply that such visitors must be assumed to be using the facilities and services simply because they are present in the fee area.

The Forest Service argues that because trails and undeveloped areas accessible from within the HIRA can be reached by other trailheads outside the HIRA as well, it may charge for accessing these trails and areas from within the HIRA. FS Brf. at 4,22,28. However, there is nothing in the REA which limits the application of the subsection (d) prohibitions to where undeveloped lands can only be accessed from the fee area- subsection (d) does not say "these fee prohibitions apply unless such undeveloped lands may be accessed from another point where fees are not charged." There are very few areas of public land that are not theoretically accessible by long hikes from multiple trailheads, and given the REA's language and legislative history, Congress could not have intended that the Forest Service may charge for access to the most convenient trailhead for a certain area simply because there might be more onerous means of access.

The practical reality of alternative access from outside the Mount Evans HIRA undercuts the Forest Service's argument as well. *See* Aplt. App. 129 (map showing it is miles from other trailheads to areas easily reached by State Highway Five in the upper reaches of the Mount Evans road). Able-bodied people might be able to make these long treks with significant effort, but there are many who could not, and the idea that some people have to expend great effort to get to such areas unless they pay for access, or that less-abled people might be excluded altogether unless they pay, contradicts the REA.

The Forest Service argues that it does not charge for undeveloped camping because it does not charge an additional fee beyond the "standard amenity fee" to access to the Mount Evans HIRA. FS Brf. at 27-28. But if that is the only activity a visitor is engaged in, that is a fee for camping. That point is proved by the Forest Service's position regarding use of scenic pullouts. *See* FS Brf. at 28-29. For the Forest Service's logic to be valid, it would not exempt scenic overlook users from the amenity fee, on the ground that there is no extra fee for scenic overlooks, simply the single fee for the entire HIRA where "facilities and service" are "present." But the agency acknowledges it may not

charge an amenity fee for those only using scenic overlooks, rendering this "no additional fee" argument invalid.

The Forest Service's attempt to distinguish *United States v. Smith*, ___ F. Supp. 2d ___, 2010 WL 3809994 (D. Ariz. 2010), likewise fails. *See* FS Brf. at 30-31. First, the *Smith* court did not find that the HIRA at issue there failed to contain the required amenities, nor that it could not otherwise remain a HIRA. *See* FS Br. at 31. To the contrary, the court's opinion concluded by stating that "[a]ssuming 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 [containing existing amenities] would be appropriate." 2010 WL at *14. The problem was that "Mr. Smith's use of the National Forest was limited to driving to and from a parking area on a dirt Forest Service road, overnight parking at an undeveloped dirt parking area, *i.e.*, there were no toilet facilities, picnic tables, or trash receptacles at the parking area, and hiking into the forest on a trail, and camping for one night in a non-developed, dispersed site." *Id.* at *7. That is the exact practice plaintiffs challenge here, making *Smith* directly applicable.

For these reasons, the Forest Service has not rebutted Plaintiffs' showing that the plain language of the REA prohibits its practices at the Mount Evans HIRA under Step One of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), and the Court need not proceed to Step Two.

II. Little Deference is Owed to the Forest Service's Position, and Regardless of Deference Issues it Cannot be Upheld

In the event that the Court believes that a *Chevron* Step Two analysis is appropriate, little to no deference is owed to Forest Service's position, and regardless the agency has not shown that its interpretation of the REA and practices at the Mount Evans HIRA can be accepted, as they simply do not comport with the overall language and purpose of the REA.

The Forest Service argues that it deserves full Chevron "reasonableness" deference here, primarily relying upon *American Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001). However, *American Wildlands* does not apply here, and all applicable deference factors indicate that little to no deference is owed to the Forest Service's position.

First, this Court found in *American Wildlands* that the statutory provision at issue there was "silent on the specific questions of statutory interpretation raised by this case. Thus, we will accord *Chevron* deference." 260 F.3d at 1197. For the reasons already discussed above and in the opening brief, the prohibitions in REA subsection (d) directly address the issue here, and so the Court should not proceed to Step Two of *Chevron* as it did in *American Wildlands*.

Second, even if the Court felt that a Step Two analysis were appropriate, and even if full *Chevron* deference were warranted, it would not save the Forest Service's position, because the agency's position simply cannot be squared with the language and purposes of the REA. *See General Dynamics Land Systems Inc. v. Cline*, 540 U.S. 581, 600 (2004) ("[T]oday, we neither defer nor settle on any degree of deference because the Commission is clearly wrong.").

Third, in the event that the Court believes that the statutory language is ambiguous and that the level of deference would make a difference in the outcome here, *Chevron* deference would not be appropriate, and in fact little to no deference is warranted. While it is true that the lack of notice and comment on the Mount Evans

Implementation Plan here does not *automatically* deprive the Forest Service of full *Chevron* deference (*see* FS Br. at 35-36), the level of deference to be accorded an agency interpretation is determined on a spectrum, and where other factors also point to reduced deference, the lack of notice and comment rulemaking continues to weigh against granting full *Chevron* deference, even after *United States v. Mead Corp*, 533 U.S. 218 (2001). *See* FS Brf. at 38-39 (acknowledging the "spectrum" approach to deference, quoting *Mead*); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487-88 (2004) (noting post-*Mead* that non-notice and comment government positions deserve "'respect'" but still usually "'do not warrant *Chevron*- style deference.'") (citing, *inter alia*, *Mead* and *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Plaintiffs discussed several factors that weigh against full *Chevron* deference in addition to the lack of notice and comment rulemaking here (Op. Brf. at 29-33) which point to according little to no deference, and the Forest Service's rebuttals do not overcome them.

Plaintiffs showed that deference should be minimal because of the inconsistent manner in which the agency has variously opined in the

record that non-amenity users such as plaintiffs should either have to pay or not pay. *See* Op. Brf. at 29-30. The Forest Service asserts that its view has been consistent, citing portions of the record that are consistent with its position (FS Brf. at 40), but it fails to address contradictory statements in the record raised by the plaintiffs where the agency has at times taken the position that those who do not use the "facilities" at Mount Evans should not have to pay. *See* Op. Brf. at 29 (citing the administrative record).

The government argues that the pecuniary interest factor of *Amalgamated Sugar Co. LLC v. Vilsack* does not apply here because its economic interest in that case was somehow greater and because REA money cannot be used for employee bonuses. FS brf. at 42-43, citing 563 F.3d 822 (9th Cir. 2009). However, no greater economic interest or employee bonuses were at issue in *Amalgamated Sugar*, and it involved the same issue here, namely a pecuniary incentive for the agency's position. *See also* 563 F.3d at 834 ("Even if the USDA received no direct financial benefit, the existence of a possible pecuniary interest is of concern in evaluating the manner in which the USDA administered the Act and interpreted its provisions.").

Plaintiffs also argued that deference should be low because of the lack of deliberation on the *direct question at issue* here in either the Interim Guidelines that created the concept of HIRAs generally, or in the Implementation Plan that created the Mount Evans HIRA. Pl. Brf at 31. The Forest Service asserts that it "approached the transition to REA in a prudent and thoughtful manner." FS Brf. at 39-40, citing SA 010-016, Aplt. App. 74,75,79. However, nothing in those cited documents contains a discussion of how charging fees for non-amenity users entering HIRAs squares with the language of subsection (d). In fact, the Interim Guidelines themselves list "general access," "parking only," and "dispersed areas with low or no investment" as activities/areas "for which no fee can be charged." Aplt. App. 77 (first column). *See also U.S. v. Smith, supra*, 2010 WL 3809994 at *11 ("None of the *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)] 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 new statutory scheme.").[5]

Finally, the agency denies that reduced deference is warranted because of the criminal penalties for failing to pay fees at Mount Evans, based on the premise that this case involves a facial challenge to agency regulations. FS Brf. at 41. However, as already discussed, this is not a facial challenge to the HIRA rules, but to their application in a manner that results in charging visitors to Mount Evans who do not use the developed facilities, and then fining (or threatening to fine) them if they fail to pay. *See* n.1, *supra.* Also, while the Forest Service cites *NLRB v. Okla. Fixture Co.*, this Court's decision in that case actually supports that only "some deference," and not full *Chevron* deference, is likely owed to agency interpretations of statutes imposing criminal penalties. 332 F.3d 1284, 1287 (10th Cir. 2003) (discussing the unsettled status of applicable case law).

In the end however, the Court need not determine the level of applicable deference, because the Forest Service's position violates the

[5] Given that Plaintiffs made this argument in its opening brief (Op. Brf. at 32), the Forest Service's argument that plaintiffs admit that *Skidmore* "power to persuade" deference is appropriate is misplaced. *See* FS Brf. at 38.

plain language of the REA's fee prohibitions found in subsection (d) under *Chevron* Step One, and could not be deemed reasonable under *Chevron* Step Two even if full "reasonableness" deference were granted. Congress enacted the subsection (d) prohibitions of the REA to curb the abuses of the predecessor Fee Demo program, namely charging the public for access to recreate on undeveloped federal land. *See* Op. Brf. at 3-4, 8. The practices at the Mount Evans HIRA remain virtually the same as they were under the Fee Demo program, and are not a "reasonable" interpretation of Congressional intent to curb these abuses as enacted in the REA. *See* Op. Br. at 10.

Respectfully submitted January 6, 2011

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify that this brief is proportionally spaced, using a 14-point Century Schoolbook font. It contains 3,549 words, which complies with the requirements of 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 Tenth Circuit by using the appellate CM/ECF system on January 6, 2011. 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.

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