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' REPLY BRIEF

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

The Federal Lands Recreation Enhancement Act ("REA") states that the ability to charge fees in fee areas on Forest Service land is only permitted "[e]xcept as limited by subsection (d)," which in turn prohibits charging fees for parking and recreating on undeveloped lands. 16 U.S.C. §§ 6802(d),(f). The legislative history of the REA is clear that exactly what the Forest Service had been doing at Mt. Lemmon and elsewhere under the Fee Demo program, and continues to do at Mt. Lemmon, namely charge fees for parking and recreation on undeveloped lands, was what the "overly prescriptive" fee prohibitions of REA subsection (d) sought to stop. *See* Op. Brf. at 4-5,8, citing 2004149 Cong. Rec. H7025-06 at H7033, H7034 (2003 WL 21673066) (daily ed. July 7, 2003); H.R. Rep. 108-790(I), 108th Cong., 2ND Sess. 2004 (Nov. 19, 2004), 2004 WL 2920863 at *18. The arguments of the Forest Service to the contrary cannot be accepted.

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 27), 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 developed amenities of the Mt. Lemmon High Impact Recreation Area ("HIRA"), while those who hike and camp in undeveloped areas are somehow using the developed amenities of the HIRA. However, this argument is internally inconsistent, and cannot be squared with the Forest Service's practices at Mt. Lemmon or with the REA.

First, the only "amenity" that someone parking and hiking or camping might possibly take advantage of would be security to the vehicle. *See* FS Brf. at 24. 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 in and out of the HIRA using scenic pullouts along the way, and those driving in part way solely to park and hike. *See id.*

Under the Forest Service's theory as it applies it 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 as well 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 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 any Forest Service document, including the

"HIRA Review" approval document for the Mt. Lemmon HIRA. *See* ER 105-107.[1] The only reason that squares with the facts for why the agency does not exempt those entering the Mt. Lemmon HIRA to park and hike or 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. 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 agency to "monitor each visitor's activities and assess a fee based on each visitor's actual use of particular facilities." FS Brf. at 20.[2] However, not only is this reason not a valid one as the Forest Service tacitly admits by

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[1]. The Forest Service is correct that this document embodies the "final agency action" challenged by the Plaintiffs. *See* FS Brf. at 2, 11-12.

[2] Further, the Forest Service relied on administrative convenience in the district court. CR #14 at 17-18 (FS Motion to Dismiss, arguing that its position should be accepted "given the administrative difficulties and expense that would arise if fees could be collected only at the smallest possible geographic scale that meets the statutory requirements for an 'area.'"); *id*. at 20 ("[The Forest Service's] ability to collect fees efficiently and in a cost-effective manner would be diminished" if it had to exclude all subsection (d) users from paying). *See also* n. 3, *infra* (practices at the Mt. Lemmon HIRA support administrative convenience as only the reason for its fee structure).

eschewing reliance upon administrative convenience (*see also* Op. Brf. at 20-21), but 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, who visit scenic overlooks, and who enter without motor vehicles, and charge the standard fee to everyone else. *See* Op. Brf. at 31.

The Forest Service next raises the "efficiently collected" and "minimum number of recreation fees" clauses of the REA without addressing Plaintiffs' argument regarding them. *Compare* FS Brf. at 20-21, citing 16 U.S.C. §§ 6802(c),(f)(4)(C) *with* Op. Brf. at 29-31. Plaintiffs stand by the argument in their opening brief regarding these clauses, which the Forest Service has not rebutted.

The Forest Service next 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 22. 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 "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 fees for use of developed amenities but prohibits fees for recreating on 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, including specifically at

Mt. Lemmon, and to which Congress responded by passing the REA. *See* Op. Brf. at 3-5. 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 19,22. 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 22, 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," where 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 it does not charge a parking fee in violation of REA section 6802(d)(1)(A), but instead only charges for using an "area" that has the requisite amenities. FS Brf. at 23,29. That cannot be the case, as the Forest Service does not charge those entering without a motor vehicle, even though they could use the HIRA in the same manner as those entering by vehicle. *See* FS Brf. at 12 ("[T]he Forest Service enforces the fee only against those who park their cars to recreate within the HIRA . . ..).[3] This is exactly the problem found in

[3] The Forest Service's contention that it exempts those entering the HIRA without a motor vehicle because the REA does not require the agency to charge all visitors merely begs the question of why it differentiates visitors on this basis, instead of answering it. *See* FS Brf. at 24 n.5. Given that the Catalina Highway into the HIRA is a county road and no HIRA fee money goes toward highway maintenance, plus the fact that those traveling non-stop or using scenic pullouts without leaving the vicinity of their vehicle are not charged any fees, the only logical explanation for charging only those who park a vehicle and walk

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

The Forest Service argues that because trails and undeveloped areas accessible from within the HIRA can potentially 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 25-26. 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

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away from it (rather than basing fees on whether a visitor plans to use the developed facilities and services) is the convenience of the Forest Service's vehicle ticketing scheme. *See* ER 89,107 (highway maintenance not among HIRA fee expenditures; "paved and unpaved pullouts along the highway" are mentioned at ER 107 but scenic pullout users are not charged a fee).

public land that are not theoretically accessible by long hikes from multiple trailheads, and given the REA's language and legislative history,[4] 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 Mt. Lemmon HIRA undercuts the Forest Service's argument as well. *See* ER 19 (map showing outside trailheads). While there may be trailheads near the very top and bottom of the HIRA (*see* FS Brf. at 26), the vast middle of the HIRA is miles away from any trailhead, and the middle of the HIRA itself provides the only easy access to many public land areas outside the HIRA. *See* ER 19. Able-bodied people might be able to make long treks from outside trailheads with significant effort,

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[4] The Forest Service's implication that Congress thought that fees charged under the Fee Demo program at Mt. Lemmon and similar areas were perfectly fine (FS Brf. at 34) simply cannot be squared with the fee prohibitions of REA subsection (d) and their legislative history. *See* Op. Brf. at 4-5,8, citing 2004149 Cong. Rec. H7025-06 at H7033, H7034 (2003 WL 21673066) (daily ed. July 7, 2003), H.R. Rep. 108-790(I), 108th Cong., 2ND Sess. 2004 (Nov. 19, 2004), 2004 WL 2920863 at *18. With the exception of now allowing motorists who do not park their car free passage, the fee structure at Mt. Lemmon is the same as it was under the Fee Demo program. FS Brf. at 5, citing ER 112 at ¶ 2.

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, finds no support in the REA.

The Forest Service argues that it does not charge for undeveloped camping since it does not charge an additional fee beyond the "standard amenity fee" to access to the Mt. Lemmon HIRA. FS Brf. at 25. 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 26. 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 nonsensical.

The Forest Service's attempt to distinguish *United States v. Smith* likewise fails. *See* FS Brf. at 28. 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 id.* 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.[5]

For these reasons, the Forest Service has not rebutted Plaintiffs' showing that the plain language of the REA prohibits the agency's

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[5] As noted in Plaintiffs' opening brief (at 22 n.5) and contrary to the Forest Service's argument (at 28-29), while the *Smith* court tried to distinguish the Red Rock HIRA at issue there with the Mt. Lemmon HIRA in an apparent attempt at comity, the factual differences between the two HIRAs lead to no different result. *See* 2010 WL 3809994 at *12. Both HIRAs require a visitor who parks only to use undeveloped public land to pay a fee, and that was the fatal problem there as here, not that the Red Rock HIRA is more spread out or has multiple collections points.

practices at the Mt. Lemmon 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 of the level of deference employed the agency has not shown that its interpretation of the REA and the practices at the Mt. Lemmon 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 under Step Two, because it acted with the "force of law." FS Brf. at 35, citing *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). However, while acting with the "force of law" is one prerequisite to granting full *Chevron* deference, it is not the only factor, and all the other applicable factors show that not only is full "reasonableness" deference not warranted, but neither is even "power to persuade" deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) appropriate.

First, while it is true that the lack of notice and comment on the Mt. Lemmon "HIRA Review" approval document does not *automatically* deprive the Forest Service of full *Chevron* deference (*see* FS Br. at 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 *Mead*. *See* FS Brf. at 30-31 (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)).

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 38-39, 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 self-serving pecuniary incentive for the agency's position. 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."). The Forest Service itself admits that the fees collected at Mt. Lemmon provide it with a "vital source of funding," which contradicts any claim that it does not have a pecuniary interest in its position. *See* FS Brf. at 1 and "Statement Regarding Oral Argument."

Plaintiffs argued that deference should be low or non-existent 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 "HIRA Review" approval document that approved converting the Mt. Lemmon Fee Demo area into a HIRA under the REA. Op. Brf at 27-28. The Forest Service asserts that it "approached the transition to REA in a prudent and thoughtful manner." FS Brf. at 31-32, citing the REA Interim Implementation Guidelines at ER 75-81. However, nothing in those Guidelines (let alone in the "HIRA Review" approval document for Mt. Lemmon specifically) contains a discussion

of how charging fees for non-facility 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." ER 78 (first column). *See also United States v. Smith,* 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.").

Finally, the Forest Service argues that great deference is warranted despite the criminal penalties imposed for failing to pay fees at Mt. Lemmon, based on the premise that this case involves a facial challenge to agency regulations. FS Brf. at 37-38. However, this is not a facial challenge to the HIRA rules as embodied in the Interim Implementation Guidelines, but to their application in a manner that results in charging visitors to Mt. Lemmon who do not use the developed facilities, and then fining (or threatening to fine) them if they fail to pay. In contrast, *Babbitt v. Sweet Home Chapter of*

Communities for a Great Oregon, cited by the Forest Service, was a case where the plaintiffs facially challenged regulations published in the Code of Federal Regulations applicable throughout the country. 515 U.S. 687, 690-91 (1995) ("This case presents the question whether the Secretary exceeded his authority under the [Endangered Species] Act by promulgating [50 C.F.R. § 17.3].").

In the end however, the Court need not determine the level of applicable deference, because the Forest Service's position violates the 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. *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."). 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 at Mt. Lemmon and similar areas. *See* Op. Brf. at 3-5, 8. The practices at the Mt. Lemmon HIRA remain virtually the same as they were under the Fee Demo program,

and do not represent a "reasonable" interpretation of Congressional intent to curb these abuses as expressed in the REA.

Respectfully submitted March 2, 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, and contains 3,837 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 March 2, 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.

/s/Matt Kenna
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