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9th Cir. Holds Some National Park Fees Illegal

By TIM HULL

(CN) - Marking a key victory for public land advocates, the 9th Circuit ruled that federal law prohibits the U.S. Forest Service from charging fees to hikers, campers, picnickers and sight-seers who use undeveloped portions of a national forest.

Colorado-based attorney Matt Kenna told Courthouse News that the decision - the first time an appellate court has ruled on such fees, which have been challenged far and wide - could affect pending cases in Colorado and elsewhere.

"It's actually very important," Kenna said in a phone interview. "No matter how wealthy or poor you are, you can always go and use the public lands ... it's a great equalizer, and that's being encroached on by these [fee] programs."

Though it will likely have national implications, the battleground for the present case was Southern Arizona's Santa Catalina Mountains, which tower over the desert city of Tucson and reach heights of 10,000 feet above sea level. One of the range's peaks, Mount Lemmon, with its twisting paved road into its cool forest climes, is a very popular recreation area for hikers and campers and families hoping to briefly escape the desert heat below. It's also the site of the nation's southernmost ski run.

The Coronado National Forest began collecting a \$5 per car fee from all drivers who parked along the 28-mile highway leading to the Mount Lemmon as part of a pilot program that began in 1996. In 2004, Congress enacted the Recreation Enhancement Act (REA), which created guidelines governing when and where the Forest Service could charge visitors for using public lands.

The act prohibits the agency from charging fees "solely for parking, scenic pullouts, and other non-developed areas."

Nonetheless, the Coronado National Forest retained the Mount Lemmon fees, figuring they were legal because the mountain is a "High Impact Recreation Area".

In 2008, four individuals sued the agency, arguing that the act did not allow it to charge recreational visitors who merely parked their cars then hiked into the undeveloped forest to picnic or camp. They sought an injunction and return of the money they had spent on fees and fines. U.S. District Judge Raner Collins initially dismissed the case, finding that the plaintiffs had failed to state a claim. A three-judge panel of the 9th Circuit reversed on Thursday from San Francisco.

"Everyone is entitled to enter national forests without paying a cent," wrote Senior U.S. District Judge Robert Gettleman for the unanimous panel. Gettleman sat on the panel by designation from the Northern District of Illinois.

The panel found that the REA clearly prohibits the agency from charging fees for the use of non-developed areas, calling the Forest Service's reading of the law "nonsensical".

"By ignoring the plain text, the Forest Service arrives at an interpretation that would enable an end-run around the clear statutory restrictions," Gettleman wrote. "If the REA gave the agency complete discretion to dictate a fee's so-called purpose, then the agency could entirely evade the prohibition on parking fees by simply declaring that its fees are 'for' something else too."

"Because the REA has a plain meaning that does not lead to an absurd result, we have no need to afford deference to the agency's competing, nonsensical interpretation," he added.

People who visit the national forests do so for different reasons, and the law requires the agency to distinguish between those who use developed recreation facilities and those who do not, according to the panel.

"The Forest Service fails to distinguish-as the statute does-between someone who glides into a paved parking space and sits at a picnic table enjoying a feast of caviar and champagne, and someone who parks on the side of the highway, sits on a pile of gravel, and eats an old baloney sandwich while the cars whizz by," according to the ruling. "The agency collects the same fee from both types of picnickers. That practice violates the statute's plain text."

Kenna, who is involved in a similar battle over fees charged on Mount Evans in the Arapaho National Forest, said the deep impetus behind the fee program is the "privatization of public lands."

"I think they [the Forest Service] would be doing this no matter how much money they had," he said. "If you want to go into one of these areas to go hiking ... it doesn't cost the Forest Service any money; what they are trying to do, is unlawfully get money from people to fund fancy developments on the forest."

Coronado National Forest officials did not immediately respond to a request for comment.