IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gaye Adams; et al., Plaintiffs, vs. United States Dept. Of Agriculture; U.S. Forest Service; et al., Defendants.	No. CV 08-283-TUC-RCC **ORDER**

1. Introduction

Gaye Adams, Greg Lewis, Daniel Patterson, and Christine Wallace filed a complaint against the United States Department of Agriculture, United States Forest Service ("Forest Service"), Jeanine Derby, Forest Supervisor for the Coronado National Forest, and Dennis Burke[1], United States Attorney. Plaintiffs seek declaratory and injunctive relief for the themselves and other similarly situated persons. Plaintiffs allege that the Forest Service exceeded the scope of its legislative authority when it implemented the Federal Lands Recreation Enhancement Act ("REA"), 16 U.S.C. §§ 6801-6814, at the Coronado National Forest. Plaintiffs also allege that the Forest Service has violated their First and Fifth Amendment rights.

[1] At the time of the filing, Plaintiffs named United States Attorney for the District of Arizona was Diane J. Humetewa.

In response to these allegations the Defendants filed a Motion to Dismiss on September 9, 2009. The briefing is complete. Oral Arguments were held in open court on December 7, 2009. After consideration of the parties' briefing, oral arguments and relevant case law, the Court grants Defendants' motion to dismiss for the reasons below.

2. Factual Background

The Forest Service charges a fee under REA for recreational use within the Mt. Lemmon High Impact Recreation Area ("HIRA") at the Coronado National Forest. At least 80 % of the fees collected are used for the Mt. Lemmon HIRA. Plaintiffs are recreational users of the Mt. Lemmon HIRA.

The purpose of the REA is to sustain the quality of the Forest Service recreation programs. Congress granted the Forest Service the power to collect fees to improve recreational facilities and visitor opportunities on federal land.

REA authorizes the Forest Service to charge a standard amenity recreation fee, except as limited by 16 U.S.C. §6802 (d). *See* 16 U.S.C. §6802(f)(4). The only limitations that are at issue in this case are Section 6802(d)(1)(a)-(f), prohibition on fees for certain activities or services.

After REA was enacted, the Forest Service drafted the Interim Implementation Guidelines to ensure that its existing recreation fee projects were consistent with new requirements of the REA. The Interim Implementation Guidelines as applied to the Mt. Lemmon High Impact Recreation Area are the center of this dispute. Another District Court considered a similar legal challenge in *U.S. v.Wallace*, 476 F.Supp.2d 1129 (D.Ariz.2007).

3. Standard of Review

In a motion to dismiss for failure to state a claim under the Federal Rules of Civil Procedure 12(b)(6), the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court is required to give the plaintiff every reasonable inference from the well pleaded allegation of the complaint. *Retail Clerk Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1993). A plaintiff must do more than recite the formulaic elements of a cause of action. *Livid Holding Ltd. v. Salomon Smith Barney, Inc*.,416 F.3d 940, 966 (9th Cir. 2005). A dismissal for failure to state a claim "is proper only where there is no cognizable legal theory or an absence of sufficient facts

alleged to support cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (internal citation omitted). "The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)(citation omitted). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.*

4. Discussion

Defendants contend that the Plaintiffs' complaint must be dismissed because it asserts claims for money damages against the federal government without identifying a waiver of sovereign immunity. In the alternative, Defendants also argue that Plaintiffs Wallace and Patterson must be dismissed because their claims are barred under claim and issue preclusion . Defendants assert that the remaining Plaintiffs' claims must be dismissed because they fail to state a claim in which relief may be granted. Defendants contend that Plaintiffs' challenge to the REA must be dismissed because the District of Arizona has held that the Forest Service's interpretation of REA as memorialized in the interim implementation guidelines are valid and entitled to *Chevron* deference. *Wallace*, 476 F.Supp.2d at 1132-34. Defendants also assert that Plaintiffs' claim that the Defendants violated their First Amendment right to travel must be dismissed because there is no constitutional right of intrastate travel and they have failed to allege the required elements of a violation of the right to interstate travel. Lastly, Defendants contend Plaintiffs' Fifth Amendment claim must be dismissed because the REA criminal enforcement provisions do not offend the Fifth Amendment.

A. Sovereign Immunity

The United States may not be sued without its consent. *U.S. v. Navajo Nation*, 537 U.S. 488, 123 S.Ct. 1079, 1087 (2003). If the United States does not give consent to be sued, the Court lacks jurisdiction. *Cervantes v. U.S.*, 330 F.3d 1186,1187 (9th Cir. 2003).

Defendants argue that the complaint must be dismissed because United States have not waived its sovereign immunity for claims seeking monetary relief. Defendants argue that Plaintiffs' claim for "money damages" is barred by the APA. Plaintiffs contend that under Section 702

restitution is not included in the definition of "money damages." At issue is whether Plaintiffs may seek "money damages" in the form of equitable restitution under 5 U.S.C. § 702 of the Administrative Procedures Act ("APA"). The APA authorizes suits against the United States for a limited purpose. Section 702 states that:

> A person suffering a legal wrong because of agency action, or adversely affects or aggravated by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than **money damages** and stating a claim that an agency or an officer or employee thereof acted or failed to act in the official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that is against the United States[.]

5 U.S.C. § 702. (**emphasis added**)

Defendants contend that the characterization of Plaintiffs' relief as restitution instead of money damages does not alter the outcome because both forms of relief are barred by the APA. *See Great-West Life & Annuity, Ins. Co. V. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 713 (2002); *see also California v. U.S.* , 104 F.3d 1086, 1095 (9th Cir. 1997); *see also Dufresne v. Veneman*, 114 F.3d 952, 954 n.2 (9th Cir. 1997); *see also U.S. v. $ 30,006.25*, 236 F.3d 610, 614 (10th Cir. 2000). The Court disagrees.

The Supreme Court has stated that two types of restitution existed: at law and in equity. Restitution as a form of damages at law are awarded when a plaintiff could not assert title or right to possession of a particular property, but could show just grounds for recovering money to pay for some benefit that the defendant received from him. *Great-West Life & Annuity, Ins. Co. V. Knudson* 122 S.Ct. at 714. This form of damages is referred to as compensatory damages. Restitution in equity is when a plaintiff could identify money or property as belonging to the plaintiff and it could be clearly traced to a particular fund or property in the defendant's possession. The Supreme Court has determined that "money damages" as used in Section 702 bars compensatory damages. *See Brown v. Massachusetts*, 487 U.S. 879, 895-900, 108 S.Ct. 2722 (1988) Here, Plaintiffs merely request a return of their property, an equitable remedy that is not barred by the Section 702. *See Id.* (holding not all monetary relief is 'money damages' within the meaning of Section 702). Therefore, the Court finds jurisdiction to hear Plaintiffs' claim for money damages.

B. Issue and Claim Preclusion

Defendants assert that Plaintiffs Wallace and Patterson are precluded from challenging the application of the interim guidelines to the Mt. Lemmon HIRA because this issue was decided against both Defendants in a previous action in this District.

To preclude an issue under federal law:

> (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated [by the party against whom preclusion is asserted] in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.

Trevino v. Gates 99 F.3d 911, 923 (9th Cir.1996)(brackets in original)(internal citation omitted).

It is undisputed that the present matter is identical to the prior litigation. Plaintiffs Wallace and Patterson argue that issue preclusion does not apply because they did not have a full and fair opportunity to litigate the claims and issues to the final conclusion.

Plaintiff Wallace contends that he was not afforded an opportunity to litigate to the final conclusion because he was not allowed to address this issue in the Court of Appeals. The record shows that Wallace litigated the validity of the citations in front of the Magistrate Judge and the District Court Judge. Wallace was successful in front of the Magistrate Judge. However, on appeal the District Court Judge reinstated the criminal charges. The record shows that several days before trial, one of the two citations were dismissed. The record also shows that Wallace did not appeal the remaining citation.

Plaintiff Patterson contends that he was not afforded an opportunity to litigate this issue to the final conclusion because he was a *pro se* criminal defendant. Plaintiff Patterson unsuccessfully argued the validity of his citation in front of the Magistrate Judge. The record shows that Patterson did not appeal the Magistrate Judge's ruling.

Based on the facts above, this Court finds that Patterson and Wallace had their day in Court and are subsequently barred by issue preclusion. The Court also finds that their constitutional claims are barred under the doctrine of claim preclusion because these claims could have been asserted in the prior action. *Federated Dep't Stores, Inc. V. Motie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed. 2d 103 (1981) (holding claim preclusion prevents " parties from relitigating issues that were or could have been raised in [a prior] action").

C. Failure to State a Claim

i. First Claim

Plaintiffs allege that the Forest Service exceeded its statutory power when it applied the Interim Implementation Guide to the Mt. Lemmon HIRA. Defendants contend that Plaintiffs' First Cause of Action must be dismissed for failure to state a claim upon which relief may be granted because the Forest Service's interpretation of the term 'area' in § 6802(f) is reasonable and entitled to *Chevron* deference.[2] Plaintiffs contend that *Chevron* deference should not apply because the Forest Service's interpretation of the statute is contrary to congressional intent.

Under *Chevron*, if Congress has not addressed the specific question at issue, and left it open for an agency to define a term that is reasonable in light of Congressional intent, the Court is to decide whether the agency's resolution is "based on a permissible construction of the statute." *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 843 (9th Cir. 2009). Generally, an administrative agency's construction of a statute that it administers is afforded *Chevron* deference. An agency's interpretation receives *Chevron* deference when the agency has an indicia of delegated congressional authority such as: the power to adjudicate, notice and comment rule making, or some other comparable marking. *United States v. Mead*, 533 U.S. 218, 230-31, 121. S.Ct. 2164(2001).

Here, the Forest Service generally practices in notice and comment practice which would entitle it to *Chevron* deference. However, the Court has doubt on whether the Forest Service's Interim Implementation Guidelines should be given *Chevron* deference after reviewing the Chapter 4 of the Interim Implementation Guidelines. The passage at issue states:

> [t]o align our current program to comply with REA criteria, **in the short term units will make decision that may not follow all the public notification and involvement requirements outlined in REA**. For future decisions, the Forest Service will follow all

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[2] Defendants request this Court to follow the reasoning in *United States v. Wallace*, a District of Arizona case that addressed this similar legal challenge to REA. 476 F. Supp.2d 1129 (D.Ariz.2007). This Court respectfully declines to follow *Wallace*. *See Colby v. J.C. Penny Co., Inc.* 811 F.2d 1119 (7th Cir. 1987) (stating District judges in particular circuit must not treat decisions by other district judges in that circuit, and a fortiori in other circuits, as controlling, unless of course the doctrine of res judicata or collateral estoppel applies).

> public notification and involvement procedures as outlined in a forthcoming "Forest Service Public Involvement Strategy for the Recreation Enhancement Act.

Exhibit 1, Doc.14-2. (**emphasis added**).

This passage demonstrates that the Forest Service may have not followed all the notice and comment practice of rule-making. Given, an absence of such indicia of delegated congressional authority, the Court declines to apply *Chevron* deference.[3] The Court's conclusion regarding *Chevron* deference does not preclude the Court from applying a lesser deferential standard. The Court finds that *Skidmore* deference is appropriate. Under *Skidmore*, an agency's interpretation is given persuasive effect. The level of deference afforded to a federal agency "will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 , 65 S.Ct. 161, 89 L.Ed. 124 (1944). The Court finds that Interim Implementation Guidelines deserve some deference because they were created through the Forest Service's "official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular place[.]" *Id.* at 139.

Plaintiff argues that the Forest Service violated 16 U.S.C. 6802(d) & (f) when it combined multiple recreation areas and charged a parking fee in the Mt. Lemmon HIRA. REA authorizes the Forest Service to charge a standard amenity recreation fee, except as limited by 16 U.S.C. §6802 (d) for any "area":

> (A) that provides significant opportunities for outdoor recreation;
> (B) that has substantial Federal investments;
> (C) where fees can be efficiently collect; and
> (D) that contain all of the following amenities

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[3] Plaintiffs contend that rule of lenity prevents the use of *Chevron* deference in the criminal context. The court disagrees. The Supreme Court has held that the rule of lenity does not prevent an agency from resolving statutory ambiguity through valid regulations. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 704 n.18, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995)("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative guidelines whenever governing statute authorizes criminal enforcement."); *Mujahid v. Daniels*, 413 F.3d 991, 998 (9th Cir. 2005)(citing *Pacheo-Camarcho v. Hood*, 272 F.3d 1266 ,1271 (9th Cir. 2001)

(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)(4).

16 U.S.C. §6802(d)(1)(a-f) states that

> [t]he 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.

16 U.S.C. § 6802(d)(1)(a-f).

Plaintiffs assert that when the Forest Service combined multiple areas that included areas that do not have amenities or services readily available, the Forest Service circumvented the statute's out right prohibition of against charging a fee for solely parking, and enjoying the HIRA where no federal investments exist. *See* 16 U.S.C. § 6802(d)(1)(A) &(E).

Section 6802(d)(1)(A) states that the Forest Service may not charge a fee "solely for parking, undesignated parking, or picnicking along side roads or trailsides." Plaintiffs contend that the Forest Service's interpretation of 'area' violates §6802(d)(1)(A) because it applies "solely" to each term. Plaintiff contends the Forest Service's sentence construction nullifies the limiting language of the statute. The Court disagrees with Plaintiffs' argument that the limitation has meaning only when the Service is prevented from charging a fee to a person who drives and parks along trailsides or roads where there are no amenities within the HIRA.

Plaintiff also asserts that the Forest Service's interpretation of 'area' violates Section 6802(d)(1)(E). Section 6802(d)(1)(E) prohibits the Forest Service from collecting a fee "[f]or 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. The subsection referenced in the statute defines a developed campgrounds as one "that provides at least a majority of the following: (i) tent or trailer spaces ,(ii) picnic tables, (iii) drinking water, (iv) access roads, (v) the collection of the fee by an employee or agent of the Federal land management agency, (vi) reasonable visitor protection, (vii) Refuse containers, (viii) toilet facilities, [and] (ix) simple devices for containing a campfire." 16 U.S.C. 6802(g)(2)(A). Plaintiffs contend that the Forest Service violates this provision when it charged a recreation fees for the newly designed area that included undeveloped campsites.

The Court disagrees with Plaintiffs' contentions. The Court finds that the Forest Service interpretation "area" in §6802(f) is reasonable. The record shows that the Forest Service meets the requirements of Section 6802(f)(4). The record also shows that the Forest Service also established four additional criteria before, a local unit could charge a fee for the high impact recreational area. *See* Def. Ex. 1, 9-10. The establishment of additional requirements demonstrate that the Forest Service took affirmative steps to limit its power by narrowing the definition of "area."

The plain language of the statute does not limit their ability to combine multiple areas so long as the area has the minimum amenities or services listed in 16 U.S.C. § 6802 (f)(4). The limitations on the Forest Service ability to collect fees are parking fee restrictions as outlined in 16 U.S.C. 6802(d). *See* 16 U.S.C. 6802(d)(1)(a) (No fee shall be for solely for parking, undesignated parking, or picnicking along roads or trailsides.); *see also* 16 U.S.C. 6802(d)(1)(b)([f]or general access unless specifically authorized under this section), *see also* 16 U.S.C. 6802 (d)(1)(c)(For dispersed areas with low or no investment unless specifically authorized under this section.). The record shows that the Forest Service does not charge for vehicles traveling to the scenic pullouts. The Court finds that the Forest Service's interpretation is reasonable because it meets the statutory requirement that the Forest Service must collects fees in an efficient manner and avoids the creations of multiple layered recreation fees. *See* 16 U.S.C. 6802(f)(4)(C)(standard amenity recreation fee is allowed only "where fees can be efficiently collected"); *see also* 16 U.S.C. §6802(c)("[t]he Secretary shall ... shall avoid the collection of multiple or layered recreation fees for similar uses, activities, or programs.")

The underlying assumption in Plaintiffs' argument is that the areas that were created before the passage of REA should have an effect on the newly designed areas after the passage and implementation of REA. This assumption is not supported by case law or statute. Furthermore, Plaintiffs argument that the Forest Service should adopt smaller areas that have amenities and services that are close in hand is impractical. Plaintiffs contend that the smaller areas would not decrease efficiency because the Forest Service currently patrols these locations. This is unpersuasive in light of the Forest Service's learned understanding of executing this statute and the plain language of the statute. To have smaller subdivisions of the HIRA would violate the express terms of 16 U.S.C. § 6802(c) that requires the Forest Service to "avoid collection of multiple or layered recreation fees for similar uses, activities, or programs." The smaller subdivisions would also decrease the efficient collection of fees as mandated by Section 6802(f)(4)(C). Moreover, "there are numerous other ways to access the Mt. Lemmon HIRA without having to pay a fee, such as visiting the scenic overlooks, by using different access points outside the HIRA, or by coming to the HIRA on bike, horseback or foot." *Wallace*, 476 F.Supp.2d at 1133; Pl. Ex. A-4(showing free trail heads in the vicinity fo Mt. Lemmon). Based on these facts, the Plaintiffs can not show that Forest Service's interpretation of "area" is unreasonable. Therefore, Plaintiffs' claim should be dismissed for failure to state a claim in which relief may be granted.

ii. Second Claim

Defendants contend that the Plaintiffs' second cause of action must be dismissed because there is no recognized right to intrastate travel under the Constitution and minor regulatory requirements such as a modest fee do not unconstitutionally burden an individual's right to travel between sovereign states.

Plaintiffs contend that the access fee is an impermissible burden on a citizen's right to intra-state travel. The Court rejects Plaintiffs' contention that the access fee is an impermissible restriction on the right to intra-state travel because neither the Supreme Court nor the Ninth Circuit has recognized such right. *See Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 946, 949 n.7 (9th Cir. 1994).

Plaintiffs also allege that the access fee unnecessarily burdens the right to interstate travel. Plaintiffs' argument is not persuasive in light of Ninth Circuit precedent. *See Miler v. Reed,* 176 F.3d 1202, 1205 (9th Cir. 1999)(recognizing that "minor burdens impacting interstate travel, such as toll roads, do not constitute a violation of the right to travel"); *see also Lauran v. U.S. Forest Service*, 141 Fed. App. 515, 2005 WL 1523488 *2-*3 (9th Cir. 2005)(stating "[a] five dollar vehicle parking fee, charged for recreational use of the National Forest, does not constitute a barrier to interstate travel or interstate travel."). The Court finds that the five dollar vehicle fee does not constitute a barrier on interstate travel.

iii. Third Claim

Defendants contend that the Plaintiffs' claim must be dismissed for failure to state a claim in which relief may be granted because the statute at issue does not offend the Fifth Amendment. Plaintiffs' third cause of action alleges that the criminal enforcement of the civil provisions of REA offends the due process clause of the Fifth Amendment because 16 U.S.C. § 6811(c) & (d), authorizes the Forest Service to conclusively presume that an owners of a vehicle are criminally liable for failing to pay a fee.

Section 6811(c) & (d) reads:

> (c) Joint Liability. The registered owner and any occupant of a vehicle charged with a nonpayment violation involving the vehicle shall be jointly liable for penalties imposed under this section, unless the registered owner can show that the vehicle was used without the registered owner's express or implied permission.
>
> (d) Limitation on Penalties. If party fails to pay the recreation fee established under this chapter shall be the party is " punishable as a Class A or Class B misdemeanor, except that in the case of a first offense of nonpayment, the fine imposed may not exceed $100.

16 U.S.C. §6811(c)-(d).

A statutory presumption offends the Due Process Clause when it "creates a mandatory presumption, either conclusive or rebuttable, which shifts from the prosecution the burden of proving beyond a reasonable doubt an essential element of a criminal offense." *United States v. Warren,* 25 F.3d 890, 897 (9th Cir. 1994). Here, the only fact that is presumed is that the car cited is being used by the registered owner. This presumption does not shift the burden of proof. The Court rejects Plaintiffs argument that Section 6811(c) does not afford a defense for "registered owners to demonstrate that

he/she was under no legal duty to pay a standard amenity fee to government based on his absence from the forest." Plt. Resp. Br. 20. This argument is not supported by the language of Section 6811(c). The statute allows the car owner to rebut this factual assumption. Furthermore, a single violation for failing to pay a recreation fee does not attach criminal liability. Criminal Liability attaches only if, the party has failed to pay two citations. *See* 6811(d) Therefore, the Court finds that Section 6811(c) & (d) do not offend the Due Process Clause.

Plaintiffs also argue that a failure to pay a standard amenity to the Forest Service should not be a strict liability crime because it does not constitute public welfare protection. The Court disagrees. The Court finds that this statute is a prime example of public welfare protection. This statutory scheme allows the Forest Service to improve recreational facilities and visitor opportunities on federal lands. *See* 16 U.S.C. § 6807(a)(3)(C) & (D)(authorizing fees collected to be used for (C) habitat restoration directly related to wildlife-dependant recreation that is limited to hunting, fishing, wildlife observation or photography; (D) law enforcement related to public use and recreation.) Therefore, the Court finds Plaintiffs have failed to state a claim in which relief may be granted.

5. Conclusion

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is **GRANTED**. (Doc.14).

IT IS FURTHER ORDERED that Plaintiffs' complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk of the Court shall close this case.

DATED this 8th day of March, 2010.

Raner C. Collins
United States District Judge