IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARK, *et al.*,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant,

NATIONAL FOREST RECREATION ASSOCIATION, et al.,

Defendant-Intervenors.

Case No.: **1:12-cv-1505-RC**

DEFENDANT-INTERVENORS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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A. Introduction

Defendant-intervenors hereby reply to Plaintiffs' Response to Defendants' Cross-Motions For Summary Judgment and Reply In Support of Plaintiffs' Motion for Summary Judgment (ECF No. 39) [hereinafter cited to as "Opp."]

B. Plaintiffs admit that the concessioners are providing goods and services to visitors at the sites and plaintiffs' claim that they are not actually using the goods and services which the concessioners are providing at the sites is incorrect.

In their brief, plaintiffs do not dispute that the concessioners are providing goods and services at the sites.[1] However, plaintiffs continue to falsely insist that, when they travel to the developed sites where the concessioners are providing these goods and services and park their cars and walk in the area, the concessioners are not providing *plaintiffs* with any goods or services because plaintiffs are not *actually using* any such goods or services. Opp. at 13 (the instant situation involves "when a good or service is not provided")(ECF No. 39)[hereinafter cited to as "Opp."]; *id*. at 16 (plaintiffs are entering the areas "only to access undeveloped federal land without using any of the goods or services" being provided by the concessioners); *id*. at 17 ("a visitor is not 'provided with' goods or services unless he actually uses them"). However, this assertion is incorrect because concessioners are providing goods and services to <u>all</u> visitors to the developed sites for their benefit, including plaintiffs. These services include providing safe and clean areas for all visitors. Defendant-intervenors clearly demonstrated this fact in their prior memorandum and, notably, plaintiffs never deny it. Moreover, plaintiffs' argument does not address the relevant language in § 6813(e) which focuses on whether the concessioners are "providing" the good or service.

[1] In fact, plaintiffs admit that the areas contain all of the amenities which would allow even the Forest Service to charge a fee for pursuant to 16 U.S.C. § 6802(d). Opp. at 19.

Plaintiffs' position appears to be that while concessioners "offer" goods and services at the sites, each plaintiff must affirmatively accept that "offer" in order for concessioners to be viewed as "providing [that] good or service to [the] visitor" pursuant to 16 U.S.C. § 6813(e).

> Intervenors make much of the fact that section 6813(e) states that concessionaires may charge for "providing" a good or service, and that therefore as long as they offer a good or service at an area, they may charge people who enter an area only to access undeveloped federal land without using any of the goods or services.

Opp. at page 16 (emphasis added). Plaintiffs insist that they never accepted and do not want the benefit of any of these "offered" goods or services, even though they do not deny that they are benefiting from them. However, plaintiffs' insistence that they must somehow affirmatively accept these goods and services in order to be charged a fee makes no sense given the nature of many of the goods and services at issue, such as trail grooming, signage, cleaning and security.

The goods and services that concessioners are providing to keep the areas clean and safe are not offered like, for example, a hot dog, where concessioners provide them only to visitors who ask for them. Instead, concessioners are constantly providing these goods and services to visitors at the site for the benefit of all visitors. The section of the REA explicitly addressing concessioners' fees recognizes this fact by explicitly allowing concessioners to charge "a fee for providing a good or service to a visitor." 16 U.S.C. § 6813(e). Thus, the plaintiffs' insistence that they must affirmatively accept any "offer" of a good or service in order for concessioners to be deemed as "providing" that service to them simply makes no sense in this context where the visitor benefits from the good or service regardless.

Therefore, while the relevant statute simply requires that a concessioner provide (*i.e.*, offer) a good or service, which they are, the fact is that plaintiffs are using these goods and services because they directly benefit from them. Plaintiffs argument that they must "actually

use[]" the services is based on the Ninth Circuit's analysis of different language in a different section of the REA in the *Adams* opinion which, as shown below, is inapplicable to the issue of whether concessioner fees are permitted under § 6813(e).

C. The Ninth Circuit's decision in *Adams* is entirely inapposite.

Plaintiffs assert that the Ninth Circuit's decision in *Adams* is not distinguishable from the instant case and demonstrates that concessioners are not charging fees for providing a good or service. Opp. at 16-17 (*Adams* is not distinguishable from the present case and applies because it addresses "nearly identical language" to the language at issue in the instant case). However, *Adams* is inapposite to the present case because it involved both very different facts and an entirely different section of the REA. Because the court in *Adams* was addressing different facts and different law, its statements simply do not apply to the current matter.

First, the facts in the present case are completely different. The instant case involves focused developed recreation areas with available parking where services are being provided by concessioners and used by all visitors. AR 0795; 0930; 1565; 2072; 3381. In contrast, *Adams* did not involve any concessioners or services, but instead involved isolated parking areas spread out over a 28-mile highway area that allowed access to undeveloped parts of the Forest. *Adams*, 671 F.3d at 1140. In addition, the instant case addresses fees which third-party concessioners are charging to visitors to the developed recreation sites. AR-0812; 0945; 1576; 1570; 2074; 2076; 2077; 3383; 3385; 3386. *Adams*, however, addressed fees the Forest Service was charging "all drivers who park their vehicles in a mile-wide piece of the Coronado National Forest running along the 28-mile Catalina Highway, the only paved road to the summit of Mount Lemmon." *Adams*, 671 F.3d at 1140. Most importantly, *Adams* did not involve a situation where goods and services are provided to and benefit all visitors in an area. *Adams* only dealt with the narrow

issue of whether a Forest Service fee was being charged "solely for parking, undesignated parking, or picnicking along roads or trailsides." *Adams*, 671 F.3d at 1140.

Second, the law in the present case is also different from the law at issue in *Adams*. Plaintiffs incorrectly assert that the language at issue in *Adams*, 16 U.S.C. § 6802, is "nearly identical" to the language at issue in the instant case, 16 U.S.C. § 6813(e). Opp. at 16. However, even a cursory comparison of the language in these different sections of the REA demonstrates that plaintiffs are wrong. *Adams* evaluated 16 U.S.C. § 6802(d), which states:

> **(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).
>
> (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.

In contrast, this case involves 16 U.S.C. § 6813(e), which states:

> **(e) Fees charged by third parties**
> Notwithstanding any other provision of this chapter, a third party may charge a fee for providing a good or service to a visitor of a unit or area of the Federal land management agencies in accordance with any other applicable law or regulation.

Plaintiffs claim that the language in the two sections is "nearly identical" because § 6802(f) (not § 6802(d)) authorizes the Forest Service to charge fees in an area "that *provides* significant opportunities for outdoor recreation." Opp. at 16-17 (emphasis added). Plaintiffs then assert that, because § 6813(e) exempts fees "*for providing* a good or service to a visitor in a unit," the language in the two sections is nearly identical. 16 U.S.C. § 6813(e); Opp. at 16 (emphasis added).

This assertion is nonsensical because these two statements deal with completely different issues. There is little similarity between the term "provide" as used in reference to an area that "*provides* significant opportunities for outdoor recreation" as compared to a concessioner who is "*providing* a good or service to a visitor." However, even if § 6802(f) is used to help interpret § 6813(e), it clearly demonstrates that "provides" refers to *providing opportunities*, whether or not they are actually engaged. 16 U.S.C. § 6802(f)(the Forest Service may charge fees to visitors to areas that merely "provide[] significant opportunities for outdoor recreation," regardless of whether the visitor actually engages in any outdoor recreation). Thus, under this comparison, the

opportunity for visitors to benefit from even additional goods or services provided by concessioners would constitute an additional basis for the fees because, pursuant to § 6813(e), fees may be charged for "providing" goods or services to visitors.

Moreover, the general reasoning in the *Adams* decision demonstrates that the issue in the instant case is whether the applicable plain language of the REA allows the fees "notwithstanding" any other prohibitions in that Act. If it does, the analysis ends there. *Adams* focused on the term "for," as used in 16 U.S.C. § 6802(d), which is the section of the REA which applies to Forest Service fees. Because this provision prohibited the Forest Service from charging fees "solely for parking, undesignated parking, or picnicking along roads or trailsides" and "the REA 'made clear that the [Forest Service] will not be permitted to charge solely for parking, scenic pullouts, and other non-developed areas," the *Adams* court found that the fees the Forest Service charged for what the court viewed as "solely" parking in non-developed areas were improper under "the plain language of the REA." *Id*. at 1140-41. As the court in *Adams* stated:

> The Forest Service is prohibited from charging an amenity fee 'solely for parking.' 16 USC 6802(d)(1)(A). There is nothing ambiguous about that text. If all a visitor does is park, and he is charged a fee, that fee is imposed 'solely for parking.' [] It may often be the case that a visitor, after parking, does something else. Then the fee would not be 'solely for parking' and so long as the 'something else' is not another activity for which subsection (d)(1) prohibits an amenity recreation fee, the agency is free to charge him. But if a visitor does nothing other than park, the fee is solely for parking and is therefore plainly prohibited by the REA. *Adams* at 1143-44.[2]

If one were to apply the court's general reasoning in *Adams* to the facts and law at issue in this matter, it shows that the fees at issue are clearly proper. As with § 6802(d), there is

[2] In fact, the statutory text at issue prohibits fees "[s]olely for parking, undesignated parking, or picnicking *along roads or trailsides*." 16 U.S.C. § 6802(d)1)(A)(emphasis added). The plaintiffs in the instant case admittedly were not parking "along roads or trailsides," but in fact were parking at developed recreation areas.

nothing ambiguous about § 6813(e), the text of the REA applicable to the instant case. If a concessioner charges a fee for the various goods or services that it provides to all visitors and all visitors benefit from those goods or services, then the concessioner is in fact charging a fee "for providing a good or service to a visitor." These fees are explicitly allowed by the REA because they are consistent with § 6813(e) "notwithstanding any other provision of this Act." 16 U.S.C. § 6813(e). Whether or not the visitor does anything else and what they do is irrelevant because the fee at issue is for "providing a good or service to" a visitor and goods or services were provided. Under the plain language of the statute, the fee is allowed and exempted from any limitations set out in § 6802.

D. Based on plaintiffs' argument, there is a conflict between § 6813(e) and § 6802 of the REA, which means that fees which are consistent with § 6813(e) are allowed given that it is prefaced with the term "notwithstanding any other provisions of this Act."

Plaintiffs assert that *Adams* is relevant because concessioners are bound by the prohibitions on the Forest Service and therefore, as with the Forest Service, concessioners cannot charge fees to anyone "solely for parking" *even if* they are charging fees "for providing a good or service to a visitor." Opp. at 8-16. As demonstrated below, plaintiffs are incorrect for two reasons. Concessioners are not bound by the prohibitions on Forest Service fees and, even if they were, this would show that there is a conflict between § 6813(e) and § 6802, and, as plaintiffs concede, in such an instance, the concessioner fees which are consistent with § 6813(e) are allowable.

First, concessioners are not bound by the prohibition on Forest Service fees which is set out in the other provisions of the REA. Plaintiffs assert that the concessioners are bound by this because they are performing functions which are "governmental in nature." Opp. at 9 (*citing to*

Evans v. Newton, 382 U.S. 296, 299 (1966)("[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations"). Plaintiffs argue that, because concessioners are allegedly performing government functions, they cannot charge fees which the government itself is prohibited from charging. However, unlike the situation in *Evans*, where a private trustee was administering a city park that had been willed to the city and was regulating who could use the park (*i.e.*, not Negroes), the concessioners in the instant case are not provided with any governmental powers or functions but are merely acting as service providers at the sites.[3]

Set out below is an example of the types of services and goods which concessioners provide pursuant to their permits: maintain parking lots (painting stripes, cleaning, sealing, etc.)(AR-0831; 0832); repair parking lots (paving potholes, etc.)(AR-0832); sweep and/or blow clear roads, trails, walkways and parking spurs (AR-0831; 0832); inspect the area to ensure that no safety hazards exist (AR-0840); control vehicle use to ensure parking is at designated spots (AR-0833); repair or replace regulatory signs as needed (AR-0832); ensure fire hydrants are functioning properly (AR-0832); mow and trim grass along entrance road, entrance signs, steps and road shoulders (AR-0831; 0832); provide security for visitors, including fire evacuation needs (AR-0840; 0841; 0844-0845); provide immediate first aid support/assistance for medical emergencies by trained staff (AR-0827); provide ability to communicate in emergencies (radios/phones) where no cell service is available (AR-0828); clean and disinfect restrooms for

[3] In *Evans*, the Supreme Court examples of the kind of authority which was delegated to private parties but was governmental in nature involved authority that related to the control and regulation of government lands, such as which parties could access those lands, as well as delegations of aspects of the elective process, all of which are very distinct from the services being provided by the concessioners in the instant case. *Evans*, 382 U.S. at 299.

public safety/convenience (AR-0830; 0831); repair restrooms (AR-0830; 0831; 0833); empty bathroom vaults (AR-0833; 0839); apply odor treatment so bathrooms do not impact all visitors' experience (AR-0830); provide toilet paper in restrooms (AR-0830); remove graffiti which would detract from all visitors' experiences (AR-0831; 0832); maintain picnic tables (clean, paint/stain, repair)(AR-0832); empty and maintain dumpsters and garbage cans (AR-0834; 0838); clean up litter in area (AR-0830; 0839); provide information to all visitors through trained staff (camp hosts, etc.) (AR-0848); provide signs for visitors that educate them on the rules, including bear precaution guidelines (AR-0838; 0849); provide signs for visitors that help them appreciate the natural area (AR-0847); provide drinking water dispenser (fountain, sink, etc.)(AR-0837); maintain water lines for drinking water (AR-0839); test drinking water to ensure that it is safe/take corrective action if not (AR-0839); and monitor site and remove public safety hazards (hazardous trees, etc.)(AR-0833; 0837; 0842).

These functions are not "governmental in nature" nor are plaintiffs in any way governing these areas. Instead, their functions are custodial in nature and are functions that most businesses which operate recreational sites provide. Thus, plaintiffs' argument is meritless. Moreover, if concessioners were viewed as subject to the same provisions as the Forest Service, then there would be no need for an entirely separate section (§ 6813(e)) focused on concessioners. While plaintiffs also make the bald assertion that the Forest Service might abuse the exemption provided for concessioner fees, they never allege nor provide any evidence in the record that the permits at issue were issued to "bypass" the REA. Opp. at 9 ("The REA would be rendered a nullity if the Forest Service could simply bypass it by permitting concessionaires to charge fees for that which it itself cannot charge, which is a reading of the statute not supported by any principle of law"). In fact, the facts in this case rebut that unsupported prediction given that

three of the challenged concession operations predate the REA. AR-0797; 0813; 1018; 1031-22; 1577, 3462-64. Therefore, certainly for these areas, plaintiffs cannot claim that the Forest Service put the concessioners in place to bypass the REA given that the REA was not even in existence when the concessioners began operations.

Second, even if the prohibition on Forest Service fees in § 6802 implicitly applied to concessioners because they are somehow viewed as performing government functions, the language in § 6813(e) demonstrates that Congress explicitly intended for third-party concessioner fees to be treated differently. Congress explicitly separates out third-party concessioners' fees in § 6813(e) from the other provisions of the REA and prefaces that direction by stating it is "notwithstanding any other provisions of this Act." Therefore, Congress clearly did not intend for those other provisions of the REA to apply to fees charged by concessioners. Plaintiffs appear to recognize this fact, as they concede that "whether concession fees are exempt from the restrictions of the REA must rise and fall on the 'notwithstanding' clause of REA section 6813(3)." Opp. at 9.

Plaintiffs then incorrectly argue that, while the "notwithstanding" preface would apply to where there is a conflict between § 6813(e) and other provisions of the REA, there is no conflict in this situation. Opp. at 15 ("Plaintiffs do not seek to add a 'proviso' to the 'notwithstanding' provision, but simply point out that there is no conflict that would require overriding the REA's fee prohibition on undeveloped recreation when section 6813(e) merely states that a private party may charge for a "good or service"); Opp. at 14 ("there is no conflict requiring an override of the REA's fee prohibitions: a concessionaire can still charge for providing a good or service without also charging for no good or service"). However, plaintiffs are wrong because, in this case, the concessioners are clearly charging fees for providing a good or service, as identified in §

6813(e). Plaintiffs insist those *very same fees* allowed under § 6813(e) are prohibited by § 6802(d). That allegation demonstrates that there is a conflict between the two sections. In the event of a conflict with other sections of the REA, the fact that § 6813(e) is prefaced with the phrase "notwithstanding any other provisions of this Act" means that any fees which are identified in § 6813(e) are allowable notwithstanding any prohibitions in § 6802.

E. The wine cellar analogy in *Adams* shows why the *Adams* decision is completely inapposite to the instant case.

In an attempt to apply the analysis in *Adams* to the instant case, plaintiffs' refer to an analogy that was set out in the *Adams* opinion to a restaurant's wine cellar. However, plaintiffs' attempt to apply this analogy to the facts at hand vividly demonstrates why *Adams* is inapposite to the instant case.

In creating the analogy that charging fees for something that was never used is like a restaurant charging its patrons for wine in its wine cellar that is never drunk, the *Adams* court was responding to an argument the Forest Service never actually made about the term "for" as used in the term "solely for parking." The point the *Adams* court was making was that, if the Forest Service is not allowed to charge a fee to visitors who are "solely parking," the Forest Service cannot claim that, because there are opportunities for visitors to do things other than park, the fee was not "solely for parking" but was "for" the opportunity to do these other things. The court argued that the word "for" (which is <u>not</u> set out in § 6813(e)) prevented this outcome.

As stated by the court:

> In common understanding, a buyer pays a fee "for" something he chooses to buy . . .. Consider what would happen if a restaurant-goer inspected his bill and noticed an unexpected charge. If told that the fee was for ten bottles of wine that the patron's group neither ordered nor drank, the patron would rightly be outraged. He would not find much solace in a waiter's explanation that the wine cellar contained ten bottles, which the patron could have ordered if he wished.

Adams, 671 F.3d at 1144. However, as demonstrated above, the fees at issue in the instant case are not "for" an opportunity to do something else. The fees are "for providing a good or service to a visitor" that actually benefited each and every visitor. Thus, the analogy to charging a fee for a bottle of wine that is never drunk simply is inapplicable to the facts in this case. The proper analogy would be to a restaurant accounting for the costs of the air conditioning and lighting in its bill. These services benefited the diners, even though they did not "order" them. Thus, the fees are for providing these services.

In addition, the *Adams* decision also suggests that a Forest Service fee under § 6802(d) might be allowed where security services are provided because they would be "used" by all visitors. *Adams*, 671 F.3d at 1145. The *Adams* court, however, did not pursue this issue because § 6802(d)(1)(D) requires a "us[e of] facilities *and* services" to justify a fee, and no facilities were being used in that case. *Id*. (emphasis added). Notably, § 6813(e) allows concessioner fees "for providing a good *or* service." (Emphasis added.) Therefore, this part of the decision in *Adams* would further support a fee for a service that ensured the safety of all visitors and demonstrate that this type of service is "used" by a visitor.

F. The statements in the prospectuses are not relevant to the determination of the legal issues presented in this case.

Plaintiffs assert that, because the prospectuses for the permits at issue stated that the concessioners could only charge fees "to the extent the Forest Service can charge recreation fees under REA," "that should be the end of the matter." Opp. at 1, 3. However, as shown above, the concession fees being challenged are not contrary to the REA (*i.e.*, they are allowed by § 6813(e)). Therefore, because the "matter" which plaintiffs refer to is this Court's determination

of whether the concessioner fees are legal pursuant to the REA, these pre-permit statements do not resolve that "matter." The law and the facts decide the matter.

In addition, the specific actions being challenged are the Forest Service's approval of the permits at issue. As plaintiffs concede, those permits did not include any language stating that the concessioners could only charge fees in situations where the Forest Service itself could charge fees. Thus, as a threshold matter, the language in the prospectuses which plaintiffs refer to as putting an end to the matter was not even part of the final agency action which is being challenged.

The plaintiffs appear to be asserting that the Forest Service should be estopped from now asserting anything that contradicts the statements in the prospectuses. However, plaintiffs have not shown that, especially in a case where they are seeking to reduce revenue which would be received by the government, estoppel would apply in this situation. *See Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990)(finding that, pursuant to a longstanding rule, the government should not be estopped based on erroneous oral and written advice given by a Government employee). As stated in *Swedish American Hospital v. Sebelius*, 773 F.Supp.2d 1, 8 (D.D.C. 2011):

> "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). A party attempting to apply equitable estoppel against the government must show, *inter alia*, that "the party relied on its adversary's conduct in such a manner as to change his position for the worse [and that] the party's reliance was reasonable." *Keating v. Fed. Energy Regulatory Comm'n*, 569 F.3d 427, 434 (D.C.Cir.2009) (internal citations omitted).

Plaintiffs have not shown any detrimental reliance on these statements in the prospectus.

G. The plaintiffs still fail to identify any "policy" that can be overturned.

Plaintiffs incorrectly assert that the defendant-intervenors argued that the Court "may not rule on Forest Service policies involved in approving the challenged permits." Opp. at 21. That assertion is not accurate. Defendant-intervenors argued that plaintiffs have not identified any policies in the record, much less any policies that were a final agency determination. Plaintiffs still have not identified any such policies. *See* Opp. at 21-22. Thus, there is no policy that can be overruled.

H. Conclusion

For the reasons set forth above and in their prior submissions, Defendant-Intervenors Recreation Resource Management, Inc., Rocky Mountain Recreation Company, CLM Services Corporation, Dianne Hunn of Aud & Di Campground Services, Inc. and the National Forest Recreation Association respectfully request that their motion for summary judgment be granted and that plaintiffs' motion for summary judgment be denied.

Respectfully submitted,

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