In The United States District Court

For the District of Colorado

Civil Action No: 08-cv-00917-MEH-KMT

DAVID P. SCHERER;
JOHN H. LICHT;
AARON JOHNSON;
MIKE LOPEZ; AND
BARBARA BRICKLEY,

PLAINTIFFS,

V.

UNITED STATES FOREST SERVICE;
GLENN P. CASAMASSA, Forest Supervisor for Arapaho & Roosevelt National Forest; and DAVID GAOUETTE, Acting United States Attorney,

Defendants.

PLAINTIFFS' MOTION TO AMEND OR ALTER JUDGMENT

(RECONSIDERATION) UNDER FED.R.CIV.P. 59(e)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

INTRODUCTION

Plaintiffs hereby move this Court to reconsider its granting of a Fed.R.Civ.P. 12(b)(1) motion to dismiss Plaintiffs' claims with prejudice. In *Van Skiver v. U.S.*, 952 F.2d 1241, 1243 (1991), the Tenth Circuit noted that the Federal Rules of Civil Procedure do not explicitly recognize a "motion for reconsideration" but that such a motion may be considered a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e).

A motion for reconsideration is appropriate where the Court has misapprehended the facts, a party's position, or the controlling law. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

Plaintiffs respectfully request this Court's reconsideration for the following reasons:

1. The Court's analysis with respect to Plaintiffs' standing in a mandamus action is contrary to controlling legal principles governing the interpretation of statutes that carry criminal penalties, wherein agency discretion is limited.

2. The Court erroneously assumes that the law provides Plaintiffs with legal administrative remedies to seek redress, which was a basis for this Court's ruling in finding no standing when analyzing Plaintiffs' mandamus request and when it held that sovereign immunity was not waived with respect to their two causes of action.

3. The Court misconstrues the Plaintiffs' position with respect to their first cause of action and overlooks the criminal nature of the statute.

4. Granting a motion pursuant to Fed.R.Civ.P. 12(b)(1) to dismiss with prejudice is contrary to controlling Tenth Circuit law.

POINTS AND AUTHORITIES

A. Standing to Assert Right to Mandamus

This Court granted a Fed.R.Civ.P. 12(b)(1) motion to dismiss Plaintiffs' mandamus action for lack of standing, on the basis that they could not establish a statutory waiver to sovereign immunity. This Court acknowledges that the Tenth Circuit has determined that 28 U.S.C. 1361 provides the necessary statutory waiver of sovereign immunity for subject matter jurisdiction in mandamus actions. *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1234 (10th Cir. 2005) (Court Order page 8). Having found that statutory authority exists, the Court proceeds to determine whether or not Plaintiffs have, in their pleadings, established justification for a writ to issue. The Court ruled that Plaintiffs have no standing since they failed to demonstrate that they have a clear right to relief or that a ministerial duty is owed to Plaintiffs to justify mandamus relief, and dismissed the Complaint with prejudice. (Court Order page 11). This finding on the pleadings, with prejudice, precludes further actions by

Plaintiffs in this Court to either amend the Complaint with more specificity or to re-file an action that provides the needed clarity to demonstrate Plaintiffs' standing to sue by demonstrating that they have a clear right to the relief sought and that the Service has a non-discretionary duty owing to Plaintiffs pursuant to the requirements of the REA.

Plaintiffs respectfully assert that the Court's analysis with respect to Plaintiffs' right to mandamus must be determined in the context of criminal law, which has been overlooked. Congress conferred authority on the Service to charge standard amenity fees, with certain enumerated limitations. 16 U.S.C. 6802(f). When Plaintiffs have a duty to pay a fee pursuant to the REA, the failure to do so subjects Plaintiffs' conduct to prosecution as either a Class A or Class B misdemeanor, both of which carry the potential for incarceration. 16 U.S.C. 6811. Congress also specifically prohibited the Service from collecting fees when Plaintiffs are located on certain federal lands and for activities therein, indicating its intent that Plaintiffs should not be charged with a crime in such locations or for such activities. 16 U.S.C. 6802(d)(1)(A) through (K).

The Court, in determining that Plaintiffs have no standing to argue the merits of their claim, infers that the Service was delegated discretion in its implementation of the REA's provisions authorizing fees. (Court Order page 9). However, in implementing a law with criminal sanctions, the Service must act as Congress has directed. Its discretion is necessarily limited since it does not administer criminal law and does not interpret criminal law. The courts administer and interpret criminal law, not an

administrative agency. *Crandon v. United States*, 494 U.S. 152, 177; *United States v. Welch*, 327 F.3d 1081, 1092 (10th Cir. 2003); *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998).

It is well settled that the terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to penalties, consonant alike with ordinary principles of fair play and settled rules of law. *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939).

No man should be held criminally liable for conduct that he could not reasonably understand to be proscribed. *United States v. Harriss,* 347 U.S. 612 (1954). The REA provides notice to the public with respect to what is criminal conduct and what is not by establishing the criteria for when and where fees may be charged and when and where they cannot. In a criminal case, there is no room for the interpretive flexibility commonly associated with deference to administrative agencies' interpretation of civil statutes. *Crandon v. United States*, 494 U.S. 152, 177 (1990); *Seneca-Cayuga Tribe v. National Indian Gaming*, 327 F. 3d 1019, 1031 (10th Cir. 2003); *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987). No rules have been promulgated by the Service to clarify its interpretation of the REA. With respect to this mandamus action, the Court owes no discretionary deference to the service in its interpretation of the REA. Even in civil actions, the Court may not defer to internal administrative guidelines, which is what was written in this case, wherein the Service

established the criteria for charging fees in what it calls a High Impact Recreation Area. *United States v. Mead*, 533 U.S. 218, 230-31 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *United States v. Atandi*, 376 F.3d 1186 n.8 (10th Cir. 2003)

Plaintiffs herein, however, run the risk of being charged with a criminal offense since the Service charges a fee if a person is located anywhere within what it calls a HIRA, notwithstanding Congressional prohibitions. Amended Complaint, ¶¶ 14, 15, 20. The REA imposes criminal penalties and no rules have been promulgated interpreting the congressional mandates contained in the REA.

All the Plaintiffs have frequented the Mt. Evans Byway and either travel to the summit overlook, park along the roads or at pullouts, hike in the wilderness, or park at Summit Lake Park to visit overlooks and hike into the Mt Evans Wilderness. All of these activities, Plaintiffs have alleged, are free-use activities. Amended Complaint, ¶¶ 49, 50, 51, 52, 53, 54. The Service informs the public that they must pay a fee if they stop anywhere within the HIRA and, if they do so without paying a fee, they could face a criminal prosecution, conviction and criminal penalties up to and including incarceration. Amended Complaint, ¶¶ 28, 30, 32; Response to Motion to Dismiss, Exhibits 1, 2, 3.

Plaintiffs have alleged they fear criminal prosecution for failure to pay, and have reluctantly paid for activities they believe are free. Amended Complaint, ¶¶ 14,

15, 16, 17, 18, 19, 29. Plaintiff Scherer received a warning notice on his car that he was in violation of the law when his car was parked at Summit Lake Park, a park owned by the City and County of Denver wherein all of the required amenities to justify a standard amenity fee are not present. Amended Complaint, ¶ 14; Response to Motion to Dismiss, Exhibit 2 (Scherer Declaration). This park provides access to hike into the Mt Evans Wilderness, a dispersed area wherein Congress prohibits the imposition of standard amenity fees. 16 U.S.C. 6802(d)(1)(C).

The right to relief, as Plaintiffs have asserted, is the freedom from being charged a fee and being told that they are subject to criminal penalties for failure to pay when recreating in areas and for activities where Congress prohibits the Forest Service from collecting fees. Amended Complaint, ¶¶ 14, 15, 16, 17, 18, 19.

Given the specific mandatory fee prohibitions enacted by Congress when it authorized criminal penalties, the Service therefore has a non-discretionary duty to allow Plaintiffs free use and enjoyment on National Forest lands when Congress has said they are so entitled. Plaintiffs have a clear right to the use and enjoyment of those lands without being charged a fee.

The only discretion conferred on the Service with respect to fees, pursuant to the REA, is that the Service "may establish, modify, charge and collect recreation fees on federal lands as provided in this section." 16 U.S.C. 6802(a). The REA does not require the Service to charge standard amenity fees, but it is permitted to do so if it

follows the substantive language in the REA which spells out when fees are permitted and when they are not. If the Service were permitted to charge fees anywhere on federal land, Congress would have had no reason to enact specific prohibitions limiting the Service's fee charging authority. These limitations were enacted after the broad authority contained in the Fee Demonstration program was repealed. Pub. L. No. 104-134. Further, Congress recognized the Service's limitations on its fee authority in 16 U.S.C. 6802(a) by referencing their authority to "as provided in this section." The REA provides limiting language as well as permissive language. The Service cannot rely on 16 U.S.C. 6802(a) as authority for broad discretion when it must exercise its authority consistent with the limiting provisions contained in the REA.

This ministerial non-discretionary duty to follow the specific requirements of the REA was also acknowledged by the Service when it chose not to promulgate rules with respect to the implementation and interpretation of the REA in 2005. Federal Register Vol. 70. No. 224 pp. 70496-70498 (Exhibit 1). The Service said, "since the Department has no discretion in implementing these changes, public notice and comment are unnecessary." It also said "The Department is not replacing Part 291 [36 CFR 291] because the department believes that the REA is sufficiently prescriptive that it does not require interpretation in a regulation." The Service essentially found that there was no need, via rulemaking, to interpret the provisions of the REA since it was bound by the provisions contained therein. The provisions contained therein proscribe

agency certain actions. Further, the Service in the Federal Register states that the REA provides the sole authority for the Forest Service to establish, modify, charge, and collect recreation fees on National Forest System Lands.

B. Lack of Administrative Remedies

This Court also apparently accepted as true the Service's argument that Plaintiffs have other administrative remedies available to seek redress of "erroneous" agency action, despite the repeated assertions by Plaintiffs to the contrary. (Court Order, page 11). Hence it ruled that Plaintiffs may not assert a waiver under 5 U.S.C. 702 when pleading its causes of action.[1] As demonstrated above, the Service did not allow for public notice or comment. There was no way to challenge agency action within the meaning of the APA. The Service implemented its interpretation of the REA in an internal policy manual where no public participation was authorized and where no deference is due it by the Court. *Christensen*, supra at 576. The only public participation authorized under the REA is for *new* areas where fees are being considered that meet the criteria for permissible fees. 16 U.S.C. 6803. The fees at Mt. Evans are not new fees, as they were charged under the earlier Fee Demonstration

[1]Plaintiffs note that following the conference call on December 1, 2008, Plaintiffs amended the complaint, omitting 5 U.S.C. 702. Since Plaintiffs asserted that there were no administrative remedies available to them, it appeared from our discussion and, from Plaintiffs noting in our response opposing a protective order, that 28 U.S.C. 1361 could be alleged as a basis for a statutory waiver. Since then it has become apparent to Plaintiffs that the Tenth Circuit approves 5 U.S.C. 702 as a statutory waiver absent the availability of administrative remedies.

program and continue to be charged notwithstanding the limitations placed on it by the REA.

The Recreation Resource Advisory Committees, established pursuant to the REA, provide for public input regarding *new* fees for permissible areas or modifications to existing fees, but are not authorized to make factual determinations, or otherwise adjudicate claims that the agency is in error or exceeded its authority in interpreting the REA. 16 U.S.C. 6803.

Further, the Administrative Procedures Act does not contain any provisions that would allow Plaintiffs a forum for their claim. (See 5 U.S.C. 500-706)

This Court relied to Plaintiffs' detriment on a misrepresentation by the Service that the APA was/is available as a forum for the adjudication of Plaintiffs' claims. It did so when analyzing Plaintiffs' request for mandamus and in analyzing Plaintiffs' two causes of action. Hence, Plaintiffs are precluded from arguing that the actions of the Service fall within the scope of review authorized by 5 U.S.C. 706, even though the Tenth Circuit has held that such relief is available to Plaintiffs when their claims do not fall within the purview of the APA. *Simmat v. United States Bureau of Prisons*, *supra* at 1234; *United States v. Murdock Mach. & Engineering Co. of Utah*, 81 F.3d 922, 930 n 8 (10th Cir. 1996).

The misrepresentation by the Service has led this Court to analyze Plaintiffs' causes of action only with respect to whether or not Plaintiffs have demonstrated that

their claims comport with the limited exceptions to justify an "implied" waiver of sovereign immunity when no statute so authorizes.

C. First Cause of Action - Plaintiffs' Position

Plaintiffs have alleged that the Service exceeds the scope of its legislative authority in implementing the REA and that its actions are ultra vires since it charges fees on certain federal lands and for certain uses that Congress has prohibited it from doing. Amended Complaint, ¶¶ 1, 48.

Even assuming Plaintiffs cannot rely on a statutory waiver, Plaintiffs' ultra vires argument is made in the context of the interpretation of a statute that imposes criminal sanctions, which was not addressed in the Court's decision.

This Court found that Plaintiffs' Complaint does not comport with the ultra vires doctrine since the Service has delegated authority to charge fees, even though it may have done so erroneously. (Court Order, page 14). It said sovereign immunity is not waived when errors are made by the Service in the implementation of the REA if made pursuant to the exercise of its discretion. (Court Order, page 13). As noted earlier, due to the fact that criminal penalties are imposed by the REA, the Act cannot be construed to confer delegated discretion to the Service to charge and criminally prosecute Plaintiffs for failure to pay a fee where Congress prohibits the charging of a fee.

When Congress places specific prohibitions on the exercise of an agency's

authority, it has not delegated to the agency the right to bypass the prohibitions. This Court however, appears to view the limitations placed on the Service as "guidelines" (Court Order, page 13) subject, apparently, to change by the Service. However, the language contained in the sections limiting the Service's authority state clearly: "Prohibition on fees for certain activities or services—The Secretary shall not charge any standard amenity fee…for Federal recreational lands and waters administered by…the Forest Service…for any of the following. 16 U.S.C. 6802(d)(1)(A) through (K). Also, in 16 U.S.C. 6802(d)(3), Congress stated, "Prohibition on fees for certain persons or places." (See (A) through (J)) Congress also prohibits entrance fees for Federal recreational lands managed by certain agencies, including the Forest Service. 16 U.S.C. 6802(e)(2).

Since the REA imposes criminal sanctions for failure to pay a fee, the language of the statute must give clear and fair warning to the average person with respect to when the duty arises to pay a fee and when it does not. The REA, by the language contained therein, specifically tells the average person what to expect by way of free use of the forest as well as when the duty to pay arises for the use of standard amenities.

This Court cites *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682 (1949) as authority to hold that while an agent's actions might be erroneous, his actions are still the actions of the sovereign if performed pursuant to his delegated authority

(Court Order, page 13). Therefore, absent a statute waiving sovereign immunity, Plaintiffs have no standing.

In *Larson*, however, it was not alleged that there were statutory limitations placed on the federal agency in the exercise of its powers. *Larson* said there may be suits for specific relief when the officer's powers are limited by statute, as his actions beyond those limitations are considered individual and not sovereign actions. *Id*. at 689, 690. *Larson* said a claim of error in the agent's performance of his delegated duties is insufficient. *Id*. at. 690. It is necessary for Plaintiffs to set out in their Complaint the statutory limitation on which they rely. *Id*. at 690. The statutory limitations on agency action were clearly alleged and enumerated in this Complaint as well as in Plaintiffs' Response to Defendants' Motion to Dismiss; Amended Complaint, ¶¶ 23, 24, 43, 49, 50, 51, 52, 53, 54. Hence, the Complaint in the instant action comports with *Larson*.

To the extent that this Court construes Plaintiffs' position simply as alleging that the Service erred in its exercise of its lawful discretion pursuant to a delegation of authority, we respectfully assert that it is not the case. There are specific, clearly defined limitations placed on the Service in defining the scope of its powers. The Service did not err in its application of the provisions of the REA, but rather it exceeded its legislative authority, an ultra vires act.

D. The Court Is Without Authority to Dismiss a Fed.R.Civ.P. 12(b)(1) Motion with Prejudice

This Court determined that it did not have subject matter jurisdiction to entertain Plaintiffs' claims and that the dismissal with prejudice is not based on the merits of Plaintiffs claims. (Court Order, page 18).

The Tenth Circuit in *Brereton v. Bountiful City Corp*., 434 F.3d 1213 (2006) held that dismissal for lack of subject matter jurisdiction must be dismissed without prejudice. *Brereton* provides a thorough analysis:

> "A longstanding line of cases from this circuit holds that where the district court dismisses an action for lack of subject matter jurisdiction, the dismissal must be without prejudice. See, e.g., *Albert v. Smith's Food and Drug Centers, Inc.*, 356 F.3d 1242, 1249 (10th Cir. 2004); *Martinez v. Richardson*, 472 F.2d 1121, 1126 (10th Cir.1973) ("It is fundamental....that a dismissal for lack of jurisdiction is not an adjudication of the merits and therefore.... must be without prejudice.")"

Once a Court determines it lacks jurisdiction over a claim, it perforce lacks jurisdiction to make any determinations of the merits of the underlying claim. *Brereton*, *Id*. at 1216.

This Court dismissed, with prejudice, all of Plaintiffs' claims based on lack of standing. It did so without deciding the merits of their position and without giving them an opportunity to amend their Complaint to demonstrate subject matter jurisdiction with more specificity. This Court did not, however, decide that an

amendment would be futile to Plaintiffs to justify its position on standing. (See *Grossman v. Novell, Inc.,* 120 F.3d 1112, 1126 (10 Cir. 1997)). Plaintiffs assert that it is not a futile attempt for Plaintiffs to amend their Complaint to more thoroughly demonstrate standing, given the criminal penalties imposed by the REA and hence the lack of discretion the Service has in the implementation of the REA. But, a dismissal with prejudice has the effect of denying Plaintiffs an opportunity to amend their Complaint even if it is not a futile attempt to do so.

PRAYER FOR RELIEF

1. Plaintiffs request that the Court amend its judgment and find that Plaintiffs have demonstrated a statutory waiver to sovereign immunity pursuant to 28 U.S.C. 1361 given the lack of discretion the Service has in interpreting the REA, a statute that imposes criminal penalties. Or, in the alternative, permit Plaintiffs to amend their Complaint.

2. Plaintiffs request that the Court amend its judgment and find that Plaintiffs have demonstrated a statutory waiver to sovereign immunity pursuant to 5 U.S.C. 702 since such a waiver is authorized despite the lack of administrative remedies. Or, in the alternative permit Plaintiffs to amend their complaint.

3. Plaintiffs request that the Court amend its judgment to find that Plaintiffs have established an "implied" waiver to sovereign immunity given Plaintiffs' allegations that Defendants have exceeded the scope of their delegated authority when

implementing the REA or, in the alternative, permit Plaintiffs to amend their Complaint.

4. Plaintiffs request that the Court amend its judgment to a dismissal without prejudice in the event it denies Plaintiffs' aforementioned requests.

RESPECTFULLY SUBMITTED this 6th day of March 2009.

/s/ Mary Ellen Barilotti

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on March 6, 2009, I electronically filed the foregoing Motion to Amend or Alter Judgment (Reconsideration) with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

kathryn.liberatore@usdoj.gov

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/s/ Mary Ellen Barilotti

Mary Ellen Barilotti