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 M. GAOUETTE, United States Attorney,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs originally brought this suit challenging the Forest Service's authority to collect a $10.00 standard amenity recreation fee for use of the Mt. Evans High-Impact Recreation Area ("HIRA") under the Administrative Procedure Act ("APA"). Defendants moved for a scheduling order under Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560, 1580 (10th Cir. 1994), which sets forth the procedures in this Circuit for a challenge to agency action. Plaintiffs, who did not wish to be bound by the procedural standards of the APA (under which judicial review is limited to the administrative record and discovery is ordinarily not available), responded by arguing that they should be permitted to amend their complaint to eliminate their citation to the APA. Dkt. #38, p. 4. The Court permitted Plaintiffs to do so, and Plaintiffs eliminated the reference to the APA in their Amended Complaint. Compare Compl., Dkt. #1, ¶ 4 with Amended Compl., Dkt. #42, ¶ 4.

Defendants then moved to dismiss the case based on several grounds, including Plaintiffs' failure to plead a waiver of sovereign immunity. In their responsive brief, Plaintiffs repeatedly invoke the APA as a basis for a waiver of sovereign immunity. Dkt. #48, pp. 7, 8-9. Having amended their Complaint to delete reference to 5 U.S.C. § 702, Plaintiffs should be estopped from relying on the APA to provide a waiver of sovereign immunity for their claims. See generally Bradford v. Wiggins, 516 F.3d 1189, 1194 (10th Cir. 2008) (judicial estoppel protects the integrity of the judicial system by "prohibiting parties from deliberately changing positions according to the exigencies of the moment.").

Plaintiffs' response also fails to demonstrate that their case falls within the narrow category of cases in which review of allegedly ultra vires government action is permitted notwithstanding a claimant's failure to identify a waiver of sovereign immunity. Because Plaintiffs have not identified a waiver of sovereign immunity or a private right of action that would permit this Court to award the relief they seek, including money damages, Defendants' motion to dismiss should be granted.

ARGUMENT

I. Plaintiffs Have Not Identified a Waiver of Sovereign Immunity That Allows Their Case to Proceed Against the Government, Nor Have They Shown That an Exception Allows Their Case to Proceed Absent a Waiver.

Plaintiffs argue that their action should be permitted, notwithstanding their failure to identify an appropriate waiver of sovereign immunity, under the ultra vires exception set forth in Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682, 702 (1949), which permits suit under narrow circumstances where a government official acts beyond the powers extended by Congress.[1/]

The Tenth Circuit, however, has recognized that the Larson exceptions are "narrow." Wyoming v. United States, 279 F.3d 1214, 1229, 1235 (10th Cir. 2002). The ultra vires doctrine is

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[1/] Another exception recognized in Larson, which permits challenges to the enforcement of an allegedly unconstitutional statute, is not at issue because Plaintiffs do not challenge REA itself.

grounded on "the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." Larson, 337 U.S. at 690. The Tenth Circuit has made clear that this distinction will be rigorously enforced, at least when review of the challenged action is also presumptively available under the APA.[2/] In particular, courts will not automatically apply the exception simply because a plaintiff has alleged that the challenged agency action violates a statutory prohibition, but will conduct a searching review of the purported violation. Wyoming, 279 F.3d at 1235; United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 547-48 (10th Cir. 2001). Plaintiffs are challenging the Forest Service's exercise of its fee collection authority under REA, not whether the Forest Service has the power to collect fees under REA. The Forest Service clearly has the authority under REA to collect a standard amenity recreation fee for an area that meets the statutory and regulatory criteria. 16 U.S.C. § 6802(f). Plaintiffs could have – under the APA – challenged whether that authority has been properly exercised with respect to the Mt. Evans HIRA. Wyoming, 279 F.3d at 1229, 1235. But under Wyoming, Plaintiffs' claims do not adequately state a challenge to the Agency's delegated power for purposes of establishing a waiver of sovereign immunity that would permit non-APA review of those claims.

Plaintiffs' attempts to distinguish REA from the statute at issue in Wyoming are unpersuasive. In Wyoming, the statute delegated power to the relevant agency to regulate wildlife, and a saving clause (upon which the plaintiffs relied) purportedly limited that authority. In this case, REA delegates to the Forest Service the power to collect recreation fees, and Plaintiffs are attempting to rely on a provision of the statute that circumscribes that authority. The propriety of collecting a fee for the use of any particular site, area, or resource within the Mt. Evans HIRA, in

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[2/]The Tenth Circuit has also suggested that the passage of the APA, which waives sovereign immunity for lawsuits that challenge agency action (and attaches conditions to that waiver) has superseded Larson in part. United States v. Murdock Mach. and Eng'g Co., 81 F.3d 922, 930 (10th Cir. 1996); Wyoming, 279 F.3d at 1236, n.20.

combination with other amenities provided by the Forest Service, turns not on the existence of delegated power, but on whether the Forest Service has erroneously exercised that power by charging a fee for the use of the Mt. Evans HIRA. Plaintiffs argue that Larson provides a waiver of sovereign immunity because the Forest Service's exercise of its authority allegedly violates a prohibition on charging a fee for scenic overlooks, 16 U.S.C. § 6802(d)(1)(F), but this argument merely raises a question about whether Defendants have properly interpreted REA. See Wyoming, 279 F.3d at 1230-31.[3/]

Relying on Simmat v. United States Bureau of Prisons, 413 F.3d 1225 (10th Cir. 2005), a case in which a federal prisoner brought an Eighth Amendment challenge based on the failure of prison officials to provide dental care, Plaintiffs assert that the APA's waiver of sovereign immunity applies even in cases in which the APA does not provide the cause of action. In Simmat, however, the court declined to decide whether APA review would have been available in the plaintiff's case. 413 F.3d at 1225 n.9. Here, in contrast, "[a] presumption of reviewability accompanies agency actions under the APA." High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1181 (10th Cir.

[3/]As Defendants' motion for summary judgment explains, the Forest Service is not violating section 6802(d)(1)(F) because there are no developed overlooks in the Mt. Evans HIRA, only pull-offs; the Agency does not charge visitors in through status; and even assuming the pull-offs were scenic overlooks under REA, the Agency may charge a fee for the use of overlooks in combination with the other required amenities, including developed parking, toilet facilities, trash receptacles, interpretive signs, and security services. See Ex. A-13 to Defs.' Mot. for Summ. J., Dkt. #46; United States v. Wallace, 476 F. Supp. 2d 1129, 1133 (D. Ariz. 2007). The legislative history of the Pombo amendment (upon which Plaintiffs rely heavily, see Resp. 2) supports Defendants' interpretation that the prohibition on charging for the use of scenic overlooks proscribes only fees charged "*solely* for . . . [the use of] scenic pullouts." H.R. Rep. 108-790(I) at 2 (2004) (emphasis added). Applying similar reasoning to another of REA's limitations, which prohibits the collection of a fee "solely for parking, undesignated parking, or picnicking along roads or trailsides," 16 U.S.C. § 6802(d)(1)(A), a federal district court has upheld the Agency's interpretation that the fee is charged not for parking alone, but for parking in combination with the other amenities offered in the HIRA. Wallace, 476 F. Supp. 2d at 1134.

2006).[4] The APA provided a waiver of sovereign immunity, but Plaintiffs did not wish to accept the limitations that came with it. Gallo Cattle Co. v. USDA, 159 F.3d 1194, 1198 (9th Cir. 1998) ("[T]he APA's waiver of sovereign immunity contains several limitations.").[5] Plaintiffs should not be permitted to rely on those parts of the statute they deem beneficial and reject those they do not. Block v. North Dakota, 461 U.S. 273, 287 (1983) ("[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied.").

II. Plaintiffs' Claims for Money Damages are Barred by Sovereign Immunity.

There is no waiver of sovereign immunity for Plaintiffs' claims for monetary relief. See cases cited at Mot., Dkt. #45, pp. 9-10. To seek monetary damages, Plaintiffs must show an unequivocally expressed waiver of sovereign immunity that "extend[s] unambiguously to such monetary claims." Lane v. Pena, 518 U.S. 187, 192 (1996). There is no such waiver here.

Plaintiffs' Responsive brief, Dkt. #48, attempts to rely upon the APA to provide a waiver of sovereign immunity for its claims for monetary damages. But after eliminating all references to the APA in their Amended Complaint, Dkt. #42, Plaintiffs cannot now rely upon it for a waiver of sovereign immunity. Even if Plaintiffs could rely upon 5 U.S.C. § 702, their claims for monetary relief would still be barred because the APA's waiver of sovereign immunity is limited to claims "seeking relief other than money damages."

Instead of distinguishing the cases cited in Defendants' brief, Plaintiffs' Responsive brief

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[4]For the same reason, this Court should reject Plaintiffs's unsupported assertion that REA "does not confer a private right of action . . . since Congress had no reason to believe that the Forest Service would violate its statutory provisions," Dkt. #48 at 5. Congress did not need to confer a private right of action because of the "presumption of reviewability" that accompanies agency actions under the APA. High Country Citizens Alliance, 454 F.3d at 1181.

[5]Compare with Wyoming, 279 F.3d at 1223 & 1235 (plaintiffs took position that court was "not bound by" APA review provisions and only "grudgingly" added APA counts to their complaint).

characterizes their claims for monetary relief as "restitution," but this characterization does not alter the analysis. See Dkt. #45 at pp. 9-10. Plaintiffs also cite two inapposite cases: Bowen v. Massachusetts, 487 U.S. 879 (1988), and Kanemoto v. Reno, 41 F.3d 641 (Fed. Cir. 1994). Each case involves plaintiffs asking the courts to enforce a statutory requirement that they receive certain monies, and the monetary relief requested was therefore a necessary component of the equitable relief sought. Bowen, 487 U.S. at 900 (where statute provided that HHS "shall pay" for appropriate Medicaid services, suit to enforce statute was "not a suit seeking money in *compensation* for the damage sustained . . . rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.") (emphasis in original); Kanemoto, 41 F.3d at 646 (statute at issue "is a mandate for the payment of money"). Here, Plaintiffs have not pointed to any statute that entitles them to be reimbursed for the standard amenity recreation fees they allegedly paid to use the Mt. Evans HIRA, and the cases they have cited simply do not apply.

III. Plaintiffs' Claims Should Be Dismissed Because There is No Private Right of Action Under REA, and a Suit in the Nature of Mandamus is Not Authorized.

Plaintiffs' claims for alleged violations of REA should be dismissed because REA does not confer an express or implied private right of action.[6/] See cases cited at Mot., Dkt. #45, p. 10. Plaintiffs attempt to distinguish Alexander v. Sandoval, 532 U.S. 275 (2001), by claiming that the "Plaintiff would have had a private right to sue had intentional discrimination been alleged," Dkt. #48 at p. 13, but this statement in no way undermines the holding of the case – that the plaintiffs could not sue to enforce disparate impact regulations because a private right of action was contrary to congressional intent. 532 U.S. at 278-93. Similarly, here, REA does not explicitly confer a private right of action, and there is no evidence of congressional intent that would support the

[6/] Neither Plaintiffs' Amended Complaint, Dkt. #42, nor Plaintiffs' Responsive Brief , Dkt. #48, cites to a provision conferring an express private right to sue in REA. Plaintiffs' Responsive Brief appears to concede that such an express right is absent from REA. See Dkt. #48 at pp. 11-14.

recognition of such a right.

Plaintiffs attempt to distinguish Southwest Air Ambulance, Inc. v. City of Las Cruces, 268 F.3d 1162, 1166-72 (10th Cir. 2001), by arguing that it was "decided in the context . . . of a comprehensive regulatory scheme" in which "plaintiffs could seek redress with administrative remedies before the Federal Aviation Administration and then appeal any adverse ruling to the district court." Dkt. #48 at p. 12. This argument fails, however, because Plaintiffs also have a comprehensive regulatory scheme for enforcing REA[7] – agency decisions regarding implementation of REA are subject to judicial review pursuant to the APA.

Because there is no private right of action under REA, Plaintiffs assert that they are entitled to bring their REA claims under the mandamus statute, 28 U.S.C. § 1361. The mandamus statute vests courts with jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff," 28 U.S.C. § 1361. For mandamus to issue, Plaintiffs "must demonstrate that a government officer owes [them] a legal duty that is a specific, ministerial act, devoid of the exercise of judgment or discretion." Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv., 112 F.3d 1283, 1288 (5th Cir. 1997) (internal citations omitted); see also Schulke v. United States, 544 F.2d 453, 455 (10th Cir. 1976). "The legal duty must be set out in the Constitution or by statute, and its performance must be positively commanded and so plainly prescribed as to be free from doubt." Dunn-McCampbell, 112 F.3d at 1288 (internal citations omitted). The court in Dunn-McCampbell held that the plaintiff's "general claims of agency overreaching are simply insufficient to create a legal duty under the Mandamus Act." Id.

As in Dunn-McCampbell, Plaintiffs' general claim of agency overreaching in interpreting

[7]REA also gives members of the public an opportunity to air complaints during the development of or changes to a recreation fee through the provisions in 16 U.S.C. § 6803.

REA, Dkt. #48 at p. 6, is insufficient to create a legal duty under the Mandamus Act. Furthermore, Plaintiffs' attempt to cast their challenge as enforcement of a duty "to refrain from demanding fees, by way of notices of opportunities to pay, by warnings and by violation notices," Dkt. #48 at p. 6, does not satisfy the requirement that the relief sought must be "positively commanded" because such duties are not plainly set forth in REA. To the contrary, REA authorizes the collection of fees under specified circumstances. See 16 U.S.C. § 6802(a) (authorizing Forest Service to "establish, modify, charge, and collect recreation fees at Federal recreation lands"). Mandamus does not provide jurisdiction for the court to hear Plaintiffs' claims under REA and those claims should be dismissed.

Plaintiffs also complain that "there is no statutory enforcement scheme to compel the Service to follow the provisions of REA," Dkt. #48 at p. 13. But there is – REA was enacted against the backdrop of the APA, which is the presumptive means for plaintiffs to challenge agency action. In this case, Plaintiffs have declined to rely upon the APA because they do not want to be bound by its requirements. Plaintiffs should not be permitted to shoehorn their cause of action into a statute that does not support it simply because they made a tactical choice to forgo the avenue of relief provided by Congress, the APA.

IV. Plaintiffs' Second Cause of Action Should be Dismissed Because the Allegations Fail to State a Claim Upon Which Relief May be Granted.

Defendants argued in their motion to dismiss that enforcement of REA's criminal provisions, under authority of the Organic Act,[8/] falls well within the broad reach of Congress' power under the Constitution's Property Clause, which permits Congress to make all "needful Rules and Regulations" to protect federally owned lands. U.S. CONST. art. IV, § 3, cl. 2. The Supreme Court has construed the language of the Property Clause expansively, to apply beyond territorial limits. Kleppe v. New Mexico, 426 U.S. 529, 538-40 (1976). Although Defendants' motion cited many

[8/]The Organic Act is the source of authority for 36 C.F.R. § 261.17, which makes the failure to pay any recreation fee subject to a fine.

authorities in support of this proposition, Plaintiffs' response offers no cases that rebut it. Rather, Plaintiffs attempt unpersuasively to limit the scope of the precedents cited by Defendants. Because the Tenth Circuit has also recognized repeatedly, citing Kleppe, that Congress' "power over the public land . . . is without limitations," Plaintiffs' efforts fail. Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 636 (10th Cir. 1998); Wyoming, 279 F.3d at 1227. Similarly, the Organic Act has been held to be a broad grant of authority "to administer recreation and wildlife habitat resources of the national forest," despite arguments that its scope should be limited to regulations that "preserve the forests . . . from destruction." McMichael v. United States, 355 F.2d 283, 284-85 (10th Cir. 1965).

Plaintiffs argue that REA's purpose is not related to the protection of public property, and that it therefore cannot be a basis for regulatory actions on lands adjacent to federal property. The purpose of REA – to "improve recreational facilities and visitor opportunities on federal recreational lands by reinvesting receipts from fair and consistent recreational fees," H.R. Rep. No. 108-790(I) pt. 1 at 1 (2004) – falls well within the prerogatives recognized by under Property Clause cases. See, e.g., Camfield v. United States, 167 U.S. 518, 527 (1897) (Property Clause was appropriate basis to regulate fence enclosures on adjacent property as a nuisance). The collection of fees in highly trafficked areas like the Mt. Evans HIRA, which receives approximately 130,000 visitors per year and has a correspondingly high need for operation and maintenance, visitor services, and resource protection, is a significant component of the Forest Service's ability to administer such areas and one that Congress clearly deemed necessary when it enacted REA and its predecessor statute. See H.R. Rep. No. 108-790(I) pt. 1, at 12 (2004) ("Backlogged maintenance and infrastructure needs for these agencies is substantial, and estimates reach into the billions of dollars.").

Defendants pointed out in their motion that enforcement by the Forest Service of the fee

policy in the City and County-owned areas[9/] – to the extent Plaintiffs could show such enforcement – is permitted to prevent visitors who wish to avoid paying the fee from parking in the City and County-owned areas, and then using federal areas and facilities in other parts of the HIRA. Plaintiffs assert that the remedy for this problem would be for the Forest Service to charge visitors separately for the use of the Dos Chappell Nature Center (and presumably for the use of every recreation site within Mt. Evans where all of the required amenities are present), rather than charging a fee for use of the entire HIRA, Dkt. #48, at 8. That approach is inconsistent with REA, which requires that the agencies "avoid the collection of multiple or layered recreation frees for similar uses, activities, or programs," 16 U.S.C. § 6802(c); is impractical, Wallace, 476 F. Supp. 2d at 1134 (rejecting construction of REA that would "leave the Service with no option but to constantly patrol every area that provides amenities"); and is not required. Moreover, the assumption that the Dos Chappell Nature Center is the only site that would provide an appropriate basis for fee collection in the Mt. Evans HIRA is inconsistent with REA, which permits the Forest Service to collect fees for any "area" that includes all the required amenities. 16 U.S.C. § 6802(f)(4).

Finally, Plaintiffs' attempts to rely on the Cooperative Agreement between the City and County of Denver and the Forest Service fail, both because Plaintiffs lack standing to assert a violation of the agreement, and because nothing in the text of that agreement prohibits compliance efforts by the Forest Service in the Summit Lake Park area. The provision, for example, that the "Forest Service will be responsible for enforcement of their laws and regulations on lands for which they have jurisdiction" merely states a legal conclusion and says nothing about whether the Forest

[9/]The Agency's delegated authority under the Property Clause also is sufficient to support regulatory efforts on state-owned roads within the HIRA.

Service may (or must) enforce its regulations in the Summit Lake Park area.[10/] The language that "[t]he Forest Service will not issue notices on behalf of DENVER" is also irrelevant, as Plaintiffs make no claim that the Forest Service has done so.

For the foregoing reasons, Defendants' motion to dismiss should be granted.

[10/]Read in context with another provision of the Collection Agreement, which provides that "Denver shall provide compliance checks at Summit Lake Park when the Forest Service is not available," Ex. BB at 3, the language is more consistent with an effort by the Forest Service to ensure that it is not held responsible for failing to conduct compliance efforts at Summit Lake Park, rather than a prohibition on its ability to do so.

Dated this 13th day of February, 2009

Respectfully Submitted:

DAVID M. GAOUETTE
United States Attorney
STEPHEN D. TAYLOR
Assistant United States Attorney

JOHN C. CRUDEN
Acting Assistant Attorney General

Of Counsel:
ELLEN HORNSTEIN, Esq.
USDA Office of the General Counsel
Natural Resources Section
U.S. Department of Agriculture
Stop 1412
Washington, D.C. 20250-1412

By: /s/ Stacey Bosshardt
STACEY BOSSHARDT
United States Department of Justice
Environment & Natural Resources
Division, Natural Resources Section
P.O. Box 663
Washington, D.C. 20004
stacey.bosshardt@usdoj.gov
Telephone: (202) 514-2912
Facsimile: (202) 305-0506
Attorneys for Federal Defendants

By: /s/ Kathryn M. Liberatore
KATHRYN M. LIBERATORE
United States Department of Justice
Environment & Natural Resources
Division, Natural Resources Section
P.O. Box 663
Washington, D.C. 20044
kathryn.liberatore@usdoj.gov
Telephone: (202) 616-5082
Facsimile: (202) 305-0506

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

I hereby certify that on February 13, 2009, I electronically filed the foregoing Defendants' Reply in Support of Motion to Dismiss with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Mebarilotti@msn.com

s/ Stacey Bosshardt
Stacey Bosshardt