PRESENTATION OF DEFENSE

U.S. v LAGUZZA-BOOSMAN
US DISTRICT COURT, EAST DIVISION, WASHINGTON STATE
VIOLATION # F3636406
TRIAL DATE: OCTOBER 26, 2009, 1:30 P.M., JUDGE IMPROZNIO

INTRODUCTION

I am the defendant and am defending myself. I am charged with violating 36 C.F.R. 261.17 by failing to pay a recreational use fee when parked to hike in the Okanogan-Wenatchee National Forest at the Cedar Creek trailhead, which is located approximately 4 miles west of Mazama. The authority to charge certain recreational fees is contained in the Federal Lands Recreation Enhancement Act (FLREA) which was passed as a rider in the 2005 Consolidated Appropriations Act, (Public Law 108-447) (HR 3283), and signed into law on December 8, 2004.

FLREA stipulates the conditions under which the U.S. Forest Service (along with the National Park Service, Bureau of Reclamation, and Bureau of Land Management) can and cannot collect recreational fees. These conditions are as follows:

Section 3, subparagraph (d)(1)(A & B) states that the Forest Service is *prohibited* from imposing fees for general access unless specifically authorized under Section 3, codified as follows:

16 U.S.C. 6802(d)(1) PROHIBITION ON FEES FOR CERTAIN ACTIVITES OR SERVICES ----The Secretary shall not charge any standard amenity fee for Federal recreation land and waters administrated by the Bureau of Land Management, the Forest Service, or the Bureau of Reclamation under this act 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 land and waters without using the facilities.

(E) For camping at undeveloped sites that do not provide the minimum number of facilities and services described in 16 U.S.C.6802 (g)(2)(A)

(F) For the use of overlooks or scenic pullouts.

16 U.S.C.6802 (e) (2) provides that the Secretary shall not charge an entrance fee for Federal recreational lands and waters managed by the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service.

Section 3, subsection (f)(4)(D) of FLREA imposes six requirements *before* the Forest Service can impose a standard amenity fee. These are: designated developed parking; a permanent toilet facility; a permanent trash receptacle; interpretive sign, exhibit, or kiosk; picnic tables, and security services. The exact language as codified is:

16 U.S.C.6802 (f)(4)(D) STANDARD AMENITY RECREATION FEE

Except as limited by subsection (d), the Secretary may charge a standard amenity recreation fee for Federal recreational lands and waters under the jurisdiction of the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service, but only at the following:

(1) A National Conservation Area.

(2) A National Volcanic Monument.

(3) A destination visitor or interpretive center that provides a broad range of interpretive services, programs, and media.

(4) An area—

(A) that provides significant opportunities for outdoor recreation;

(B) that has substantial Federal investments;

(C) where fees can be efficiently collected; **and**

(D) that contains <u>all</u> of the following amenities:

(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.

The only other place Congress authorizes the Forest Service to charge fees on public lands is through 16 U.S.C.6802 (g) EXPANDED AMENITY FEES, which include fees in normally charged areas such as camp sites, boat launches, and swimming sites, in addition to special recreation permits per 16 U.S.C 6802 (h) (see Exhibit B).

HISTORY

Prior to the passage of FLREA, a Recreational Fee Demonstration Program was authorized by Congress to determine the feasibility of user-generated fees to be directly spent for the maintenance and enhancement of forest facilities and amenities, (Public Law 104-134). That Recreational Fee Demonstration Program began in 1996, with periodic extensions, until the passage of FLREA (See Exhibit A) Codified under 16

U.S.C.6802 (see Exhibit B), which repealed it. Congressional intent was to place limits on where and when the public would be required to pay a fee to access public lands due to constituent anger over the agencies' implementation of Fee Demo (See Exhibit C). A statement by Ralph Regula (R-OH), a member of the House Resource Committee, and sponsor of HR 3283 (which was enacted as FLREA), makes it clear the intent of Congress in FLREA was to place limit on where fees could be collected on public lands:

> "As passed by Congress, H.R. 3283 {FLREA} would limit the recreation fee authorization on the land management agencies. No fees may be charged for the following: solely for parking, picnicking, horseback riding through, general access, dispersed areas with low or no investments, for persons passing through an area, camping at undeveloped sites, overlooks, public roads or highways, private roads, hunting or fishing, and official business. The language included by the Resources Committee is much more restrictive and specific on where fees can and cannot be charged." (See Exhibit D).

Chairman Richard W. Pombo (R-CA) of the House Resources Committee, in a press release following the passage of FLREA stated:

> "This legislation protects the public's pocketbook, while enabling federal land managers to assess reasonable fees for specific activities and uses. This will put an end to fears that federal land managers cannot be trusted with recreational fee authority because we lay out very specific circumstances under which these fees can be collected and spent." (See Exhibit D).

As well as:

> "This bill will put an end to fears that fees will be misused by federal land managers since we have laid out very specific circumstances under which these fees can be collected and subsequently reinvested." (See Exhibit D).

Representative Greg Walden (R-OR) noted in the 9.22.04 press release that only well-developed sites on public lands would require fees:

> "For those sites that are developed with facilities such as information centers, picnic tables, security and restrooms, it is understandable that we who use them pay nominal fees to help maintain them" (See Exhibit D).

The intent of FLREA was to clearly define where and when the U.S. Forest Service could charge the public a fee to access public lands, and that if the public were charged a fee they should get a standard set of amenities for it.

The Forest Service does not have authority to charge the public a fee to access the National Forests outside those specifically granted by Congress in FLREA. However, they appear to think they do. In an article on my trail-fee ticket challenge published in the *Methow Valley News* on 9.30.09, Okanogan-Wenatchee National Forest program coordinator for developed recreation, Jocelyn Biro stated:

> "…the 2005 Federal Lands Recreation Enhancement Act allows the Forest Service and other agencies to charge fees at two types of recreational sites. The program covers more developed sites with all six amenities as well as high impact recreation areas, which encompass numerous sites in a contiguous area with natural or cultural features." (See Exhibit E).

Nowhere in FLREA does Congress authorize the Forest Service to designate large tracts of National Forests "High Impact Recreation Areas" for the purpose of charging the public a fee at sites that do not have the amenities required by Congress. The term "High Impact Recreation Area" (or HIRA) is never mentioned in FLREA, and, in fact, appears to be in direct conflict with both the wording and intent of this law as defined in Section 3, subparagraph (d)(1)(A&B) and 16 U.S.C.6802 (d)(1)(A&B).

HIRA designations appear in the *Forest Service Implementation Guidelines for the Federal Lands Recreation Enhancement* Act published on April 22, 2005. (See Exhibit F). Section 2.2 define HIRAs as:

> High-impact recreation areas. A high impact recreation area is a clearly delineated, contiguous area with specific, tightly defined boundaries and clearly defined access points (such that visitors can easily identify the fee area boundaries on the ground or on a map/sign); that supports or sustains concentrated recreation use; and that provides opportunities for outdoor recreation that are directly associated with a natural or cultural feature, place,

> or activity (i.e., waterway, canyon, travel corridor, geographic attraction – the recreation attraction). High impact recreation areas:
> a. Provide significant recreation opportunities for outdoor recreation.
> b. Have substantial Federal investments. It is important to note that provision of the six required amenities (listed below) does not mean there is substantial federal investment. The entire scope and scale of development needs to be evaluated.
> c. Are where fees can be collected efficiently; and
> d. Contain all the following amenities, and are located in an integrated manner so they reasonably accommodate the visitor.
> a. Designated developed parking*
> b. Permanent toilet facility*
> c. Permanent trash receptacle*
> d. Interpretive sign, exhibit, or kiosk*
> e. Picnic tables and
> f. Security services*

HIRA designations were not authorized by Congress in FLREA, nor are they mentioned in 16 U.S.C. 6802. HIRA designations appear to be an *interpretation* of FLREA, not the law itself. In addition, the FS guidelines on FLREA were developed outside the normal rulemaking process required to publicly vet such a document. This exemption was justified by the Department of Agriculture noting that only minor changes would be made to the law:

> "Because these changes are minor, purely technical, and nondiscretionary, the Department finds that good cause exists to exempt this rulemaking from public notice and comment under 5 U.S.C. 553(b)(B). (See Exhibit G).

when, in fact, the HIRA designation placed in the guidelines directly conflicts with the mandate and requirements established by Congress to govern when and where the public could be charged a fee to access National Forest Land. It is also curious to note that DOA's Federal Register announcement was published on November 22, 2005 while the FS Guidelines creating the HIRA designations were published five months prior on April 22, 2005. This is not the normal democratic process.

The Forest Service does not have the authority to unilaterally create a special HIRA designation outside the standards defined by Congress. HIRAs have never been subjected to a full judicial review, and, in fact, are the targets of two lawsuits currently taking place: one in U.S. District Court in Arizona (Mt. Lemmon Lawsuit) and one in U.S. District Court in Colorado (Mt. Evans Lawsuit).

Additionally, in U.S. v. Wallace (tried at U.S. District Court for the State of Arizona) Ms. Wallace was charged with two violations of failure to pay recreational fees at Mt Lemmon on the Coronado National Forest: one at a developed trailhead containing all six amenities, and another at a trail parking area in a designated HIRA lacking the required amenities. Her case was dismissed by Federal Magistrate, Judge Pyle, and brought back for trial on appeal by the USFS. Shortly before her trial date, the Forest Service dropped the charge against Ms. Wallace for failing to pay a fee in the HIRA designated area, cutting off her option of an appeal to the 9th Circuit Court that would have clarified the question of where the Forest Service has the legal authority to charge a fee.

HIRAs are a legally untested, possibly unauthorized interpretation of the law by which I should not be judged. My understanding is that this is a criminal case, and, as such, I am entitled to be judged by the law itself, not the Forest Service's interpretation of the law. I also understand this is particularly true when formal rulemaking procedures have not been followed. The law, as defined in FLREA (16 U.S.C.6802), is unambiguous on where and when the Forest Service can charge a fee. Congress clearly spoke on the issue by specifically prohibiting parking and hiking fees from being assessed, and by requiring a standard set of amenities be present before a fee could be charged.

In the case before this Court the only interpretation of FLREA is contained in the Forest Service's interim implementation guidelines (Exhibit F). These guidelines do not even mention the limiting language of the statute, let alone analyze it, and have produced an interpretation of FLREA (HIRA designations) that is in direct conflict with the law itself. This is not the standard by which I should be judged. As a criminal case, I ask to be judged by the standard set by Congress in the law itself, not by the Forest Service's possibly unauthorized interpretation of this law.

FACTS

I was issued a $75.00 ticket on May 31st, 2009 at the Cedar Creek trailhead over Memorial Day weekend, for failing to pay a $5.00 recreational fee on National Forest land. The Cedar Creek trailhead is an undeveloped site without the required standard amenities stipulated under FLREA. It is located in a large gravel pit, not a developed designated parking area (see Exhibit H). It is difficult to know, when entering the site, where in the gravel pit it is safe to park. The interpretive kiosk has been shot full of holes for the 18 years I have been hiking this trail, and is practically illegible (see Exhibit H). The trash can is an old, dented, common household variety which is chained to the outhouse and could easily be broken into by the bears, cougars, or raccoons (See Exhibit I). There is no picnic table at the Cedar Creek trailhead. I saw no instructions on where to call a Forest Service security service for help at this site if I met a bear, cougar, hostile hiker, etc...

The Federal Lands Recreation Enhancement Act requires that six amenities must be available at a site where the public is charged a fee to access the National Forests. The Cedar Creek trailhead does not have the required number of amenities defined by

Congress in FLREA to qualify as a fee collection site, and most of those present were substandard.

If I wanted to access all the amenities for which I was told to pay at Cedar Creek, I would need to do the following: In order to access a picnic table, I would have to travel 3.2 miles from the Cedar Creek trailhead to the Klipchuck Campground where I would be required to pay an additional $8 camping fee to secure a campsite to access this amenity (See Exhibit I). The nearest picnic table at a non-campground site is over 15 miles away at the Washington Pass rest area – a no fee site. The nearest National Forest trailhead with a picnic table is 20 miles away at Rainy Pass. But it appears I would have to pay an additional $5 fee to access this amenity, as standard National Forest Recreation Day Passes require you to write down the name of the site (singular) where you are paying your fee (See Exhibit J).

If I wanted to access a permanent trash receptacle that had less chance of being broken into by wildlife, I would need to drive 3.7 miles from Cedar Creek trail head to Driveway Butte trailhead, or 15.4 miles to Washington Pass Overlook (Exhibit K). If I wanted to park at a trailhead with an actual designated, developed parking area (as opposed to an undesignated, undeveloped parking area) I would need to drive 10.3 miles from the Cedar Creek trailhead to Cutthroat Lake trailhead, 16.2 to Blue Lake Trailhead, or 18.8 miles to Bridge Creek Trailhead (see Exhibit L). Cutthroat Lake trailhead, however, makes it clear at the fee site area, that there is no trash service available at this trailhead (see Exhibit M) despite the fact that trash service is a requirement by Congress that must be met in order for a fee to be charged. To my knowledge, there is no trailhead within 20 miles of the Cedar Creek trailhead that contains all 6 of the amenities required by

Congress to be fee collection sites as outlined in FLREA (See Exhibits N & O). This is not what Congress had in mind.

Conclusion

The Cedar Creek trailhead does not meet the standards set by Congress in the Federal Lands Recreation Act as a fee collection site. It does not include "all" six standard amenities FLREA requires in order for a fee to be charged: designated developed parking; a permanent toilet facility; a permanent trash receptacle; interpretive sign, exhibit, or kiosk; picnic tables, and security services. Instead, the Cedar Creek trailhead has only one standard amenity (a permanent toilet facility), an undesignated, undeveloped parking area, a damaged, illegible interpretive sign, a nonpermanent, area-inappropriate trash receptacle, no picnic table, and no FS security services available for visitors.

Congress has not authorized the Forest Service to charge fees at trailheads that lack the standard six amenities the law requires. FLREA does not provide for "High Impact Recreation Areas" exempt from these standards set by Congress. The Cedar Creek trailhead is not a site as defined by FLREA that should require the payment of a recreational fee. I did not violate the law as defined by Congress in FLREA (codified in 16 U.S.C.6802 (f)(4)(D)), by failing to pay a fee at the Cedar Creek trailhead. I am innocent of breaking the law by the standards set by Congress. I ask to be judged by the standards set out in FLREA as defined by Congress, not a legally untested, possibly unauthorized interpretation of this law as defined by the Forest Service. I ask this court to find me innocent.

ATTACHED LIST OF EXHIBITS:

Exhibit A – A copy of the Federal Lands Recreation and Enhancement Act (FLREA).

Exhibit B - Copy of 16 U.S.C.6802, Recreation Fee Authority

Exhibit C – Write-up on opposition to original Recreation Fee Demonstration Project by the American Lands Alliance as posted at www.wildwilderness.org/docs/amlands.doc

Exhibit D – Statement by Ralph Regula dated 12.15.04; House Committee on Resources Press Release dated 9.22.04; House Committee on Resources Committee Press Release dated 11.19.04.

Exhibit E– Article in the *Methow Valley News* "Local Fights Forest Fee Ticket" dated 9.30.09

Exhibit F – Copy of publication, *Forest Service Implementation Guidelines for the Federal Lands Recreation Enhancement Act*, published on April 22, 2005

Exhibit G – Copy of Federal Register notice FS exemption of rulemaking laws when drafting guidelines for FLREA.

Exhibit H – Photos of Cedar Creek Trailhead's undeveloped, undesignated, gravel pit parking area and Cedar Creek Trailhead's Interpretive Sign.

Exhibit I – Photo of Cedar Creek trash receptacle and Klipchuck campsite picnic table.

Exhibit J – Copy of National Forest Recreation Day Pass.

Exhibit K – Photos of Driveway Butte trailhead's permanent trash receptacle and Washington Pass Overlook's permanent trash receptacle.

Exhibit L – Photos of designated, developed parking areas at Cutthroat Lake trailhead, Blue Lake trailhead, and Bridge Creek trailhead.

Exhibit M – Photo of Cutthroat Lake trailhead fee area and "No Trash Service" sign.

Exhibit N – List of USFS sites within 20 miles of Cedar Creek, including mileage and corrected list of available amenities.

Exhibit O – Copy of USFS Map showing location of Cedar Creek trailhead, plus surrounding trailheads and campsites.