UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 19-5541, *Larry Bailey v. USA, et al*
Originating Case No. : 6:17-cv-00090

Dear Sir or Madam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/C. Anthony Milton
Case Manager
Direct Dial No. 513-564-7026

cc: Mr. Robert R. Carr

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

No. 19-5541

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LARRY R. BAILEY, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

O R D E R

Before: BOGGS, WHITE, and MURPHY, Circuit Judges.

Larry R. Bailey, a pro se Kentucky plaintiff, appeals the district court's grant of summary judgment to the Secretary of Agriculture (Secretary) and the other individual defendants in this case on his claim for injunctive relief under the Federal Lands Recreation Enhancement Act (FLREA), 16 U.S.C. § 6801, *et seq*. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Admission into the nation's national forests is free. *See* 16 U.S.C. § 6802(e)(2); *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1242 (10th Cir. 2011). But the FLREA authorizes the Secretary to charge amenity fees for using federal recreational lands and waters, with the amount of the fee dependent upon the type of amenities a site contains. To charge a "standard amenity recreation fee," 16 U.S.C. § 6801(1), the site must contain designated developed parking; a permanent toilet facility; a permanent trash receptacle; an interpretative sign, exhibit, or kiosk; picnic tables; and security services. *See id.* § 6802(f)(4)(D). The Secretary is authorized to charge an "expanded amenity recreation fee," *id.* § 6801(2), "either in addition to a standard amenity fee

or by itself" for the use of, among other things, "highly developed boat launches with specialized facilities or services such as mechanical or hydraulic boat lifts or facilities, multi-lane paved ramps, paved parking, restrooms and other improvements such as boarding floats, loading ramps, or fish cleaning stations." *Id.* § 6802(g)(2)(B).

Bailey bought a 2017 annual pass to access the Marsh Branch Boat Ramp (Marsh Branch) in the Daniel Boone National Forest. Bailey received a 50% Golden Age discount on the annual fee of $30 because of his disability. A security light in Marsh Branch's parking lot remained broken for over a year, despite many complaints about the light that Bailey lodged with the Forest Service. Bailey claimed that the absence of a security light made the area dangerous at night, exposing him to injury from falls, wild animals, and menacing persons lurking in the parking lot.

Exasperated by the Forest Service's failure to act on his complaints, Bailey sued the Secretary and other federal agents under the FLREA, claiming that the light fixture was a "security service" that the Secretary was required to provide in order to charge an amenity fee under § 6802(f). Bailey sought an injunction compelling the Forest Service to repair the light. He also alleged that Marsh Branch did not have a picnic table, which he claimed the Secretary was also required by statute to provide.

The district court granted the Secretary's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court found that Marsh Branch was a "highly developed boat launch" because Bailey conceded that it contained multi-lane paved ramps, paved parking, boarding floats, and a boat ramp. And because Marsh Branch was a highly developed boat launch, it fell under the statutory provision for an "expanded amenity recreation fee" area, which does not require the Secretary to provide a security light or picnic tables. *See* 16 U.S.C. § 6802(g)(2)(B). The district court dismissed Bailey's complaint and denied his motion for reconsideration.

We reversed. *See Bailey v. United States*, No. 17-6408 (6th Cir. June 27, 2018) (order). We held that the district court erred in granting a motion to dismiss on the ground that Marsh Branch was an "expanded amenity recreation fee" area because it was not possible to determine the type of fee that users of Marsh Branch were paying from either Bailey's complaint or from permissible sources of judicial notice. *See id.*, slip op. at 3. We also thought that it was possible that the Secretary was using his authority under § 6802(g)(2) to charge both a "standard amenity

recreation fee" and an "expanded amenity recreation fee" to users of Marsh Branch. *See id.* We stated that on remand:

> the parties should be provided an opportunity to develop evidence about the designation of Marsh Branch. If the evidence adduced demonstrates that Bailey paid a standard plus expanded amenity fee, then the defendants are required to provide the six standard amenities enumerated in 16 U.S.C. § 6802(f)(4)(D). Conversely, the evidence may demonstrate that the Forest Service charges only an expanded amenity fee for Marsh Branch and therefore is not required to provide standard amenities. Currently, the record is silent as to what Bailey was charged for his pass.

Id., slip op. at 4.

On remand, the district court assigned the case to a magistrate judge to preside over discovery. The parties began to develop a discovery plan, but upon consideration of a motion filed by the defendants, the magistrate judge ruled that Bailey's FLREA claim was subject to the Administrative Procedures Act (APA), which meant that review of the Secretary's decision on Marsh Branch's fee designation was limited to the administrative record. Bailey's complaint was subject to the APA because he is ostensibly challenging the Secretary's decision to designate Marsh Branch as *only* an "expanded amenity recreation fee" area and *not* a "standard amenity fee" area. *See* District Court Dkt. No. 41, Admin. 2, at 0071. If Marsh Branch had been designated as a "standard amenity fee" area, the security lights in the parking lot would need to be fixed. *See* 16 U.S.C. § 6802(f)(4)(D). But an "expanded amenity recreation" area does not require the park service to maintain security services. The magistrate judge ruled that Bailey could supplement the administrative record only by showing that the defendants had deliberately or negligently excluded documents from the record or that there was background information that the court would need in order to review the agency's decision. The magistrate judge thus ordered that the parties would not be permitted to take discovery beyond the administrative record without leave of court. The district court overruled Bailey's objection to this order, as well as his objections to several other magistrate judge orders that denied his requests for discovery or to supplement the record.

The defendants filed the administrative record, and the parties filed cross-motions for summary judgment. The district court found that Marsh Branch is an expanded amenity recreation fee site based on the Forest Service Handbook, which discourages charging layered recreation fees

(i.e., charging both a standard amenity recreation fee and an expanded amenity recreation fee for the same site); Bailey's receipt of a discount on his annual fee, which was available only for expanded amenity recreation fee sites; and the amenities provided at Marsh Branch, which met the requirements for a highly developed boat launch. And the district concluded that because Marsh Branch is an expanded amenity recreation fee site, the Secretary was not required to provide a security light or picnic tables at the site.

On appeal, Bailey argues that: (1) the district court's limitation on discovery violated our remand order; (2) the district court abused its discretion in denying his discovery requests; (3) the district court should have construed an argument in his motion for summary judgment as a motion to amend his complaint; (4) defendants should have served their initial disclosures under Rule 26 of the Federal Rules of Civil Procedure as he requested; and (5) we should remand the case to the district court for reconsideration in view of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).[1]

Three of Bailey's assignments of error concern the district court's limitations on discovery, which he argues violated our mandate to allow the parties to develop evidence on Marsh Branch's fee designation and the fee that he paid to access Marsh Branch. He also complains that defendants did not serve their initial disclosures under Rule 26(a)(1). As stated, the district court held that general discovery was precluded by the APA, which limits review of an agency decision to the administrative record, *see S. Forest Watch, Inc. v. Jewell*, 817 F.3d 965, 977 (6th Cir. 2016), but it concluded that permitting Bailey to supplement the administrative record by showing that defendants had omitted documents from the record appropriately threaded the needle between the requirements of the APA and our remand order. Nevertheless, the district court denied each of Bailey's discovery requests, finding generally that he failed to establish grounds to supplement the administrative record or that he sought discovery on irrelevant issues.

[1] Bailey did not assign error to the district court's ruling that defendants were entitled to summary judgment because Marsh Branch is an expanded amenity recreation fee site, and therefore the Secretary was not required to provide a security light or a picnic table at that site. Consequently, Bailey has forfeited appellate review of that ruling. *See United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006). In any event, as explained further below, the record conclusively demonstrates that Marsh Branch is an expanded amenity recreation fee site.

The mandate rule requires the district court to act in accordance with the orders of the court of appeals when a case is remanded for further proceedings. *See Allard Enters., Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 569-70 (6th Cir. 2001). "The trial court must 'implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.'" *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (quoting *United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir. 1991)). A court of appeals typically reviews de novo a district court's interpretation of a remand order. *See United States v. Bagley*, 639 F. App'x 231, 232 (5th Cir. 2016). But here, assuming that the district court's restriction on discovery violated the remand order, we conclude that the alleged violation did not affect Bailey's substantial rights, and therefore was harmless. *See* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); *Shinseki v. Sanders*, 556 U.S. 396, 408 (2009) (stating that whether an error is harmless depends "on the facts and circumstances of the particular case").

On remand, the principal question to be resolved was whether Marsh Branch is a "standard amenity recreation fee" area or an "expanded amenity recreation fee" area, and the administrative record conclusively shows that the Secretary designated Marsh Branch as a "highly developed boat launch," and therefore that it is an "expanded amenity recreation fee" area. Moreover, the administrative record conclusively establishes that Marsh Branch meets the requirements of a "highly developed boat launch" because it has, among other things, multi-lane paved ramps, paved parking, toilets, and a floating dock. *See* 16 U.S.C. § 6802(g)(2)(B). Although security lighting and a picnic area are amenities that a highly developed boat launch *may* provide, neither the FLREA, *see id.* § 6802(g)(2), nor the Forest Service's official guidance *requires* the provision of these amenities to qualify as an expanded amenity recreation fee site.

The second question on remand was the type of fee that Bailey actually paid and whether he paid both a standard amenity recreation fee and an expanded amenity recreation fee. Here, again, the record conclusively establishes that Bailey paid only an expanded amenity recreation fee to access Marsh Branch. Bailey admitted, and the administrative record shows, that he received a 50% Golden Age discount on the annual fee of $30. This discount was not available on the

standard amenity recreation fee. And the official guidance discourages charging both a standard amenity recreation fee and an expanded amenity recreation fee for the same site.

The record before the district court demonstrated that Marsh Branch is an expanded amenity recreation fee site. Bailey's discovery requests, had they been approved by the district court, would not have changed that outcome. Bailey sought discovery on how fee revenue was spent, whether the Forest Service issued parking tickets, and whether there were dangerous animals in the area that necessitated a security light. Bailey's request for initial disclosures from defendants sought essentially the same information. The district court's denial of discovery on these issues, and defendants' failure to provide initial disclosures to Bailey, did not affect his substantial rights because these issues were not sufficiently related to the two questions to be resolved on remand.

For instance, how the Forest Service spent the fee revenue it generated at Marsh Branch has minimal bearing on the kind of fee that it actually charged, and Bailey does not point to any statute or regulation that indicates otherwise. *See id.* § 6806(c)(1)(A) (requiring that at least 80% of site-specific recreation fees be retained for expenditure at that site); *id.* § 6807 (describing the authorized uses of site-specific fee revenue, which includes "repair, maintenance, and facility enhancement related directly to visitor enjoyment, visitor access, and health and safety"). In any event, this discovery request went beyond the parameters of our remand order, which stated that the relevant issue was the type of fee that the Forest Service charged, not how the money was spent. And whether there were wild animals in the area, which might have made the provision of a security light desirable as a matter of common sense, was not relevant to the issue whether the Secretary was mandated by statute to provide a security light. Also off-topic was Bailey's discovery request on the Forest Service's contracts with local law enforcement agencies. That information would not have resolved a fact of consequence, *see* Fed. R. Civ. P. 26(b)(1); Fed. R. Evid. 401, because the Forest Service may provide security services for expanded amenity recreation fee areas, including highly developed boat launches. *See* 16 U.S.C. § 6807(a)(3)(D) (providing that site-specific fee revenue may be spent on "law enforcement related to public use and recreation").

Accordingly, for all of those reasons, we conclude that the district court's orders limiting discovery to the administrative record did not affect Bailey's substantial rights.

Bailey next argues that the district court erred in not permitting him to amend his complaint to add a claim that the Secretary was required to provide a light at Marsh Branch regardless of its designation. Bailey, however, did not file a formal motion to amend his complaint, and his argument in his motion for summary judgment that Marsh Branch is both a standard and expanded amenity fee area did not constitute a proper motion for leave to amend. *See PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 698-99 (6th Cir. 2004), *abrogated in part on other grounds*, *Frank v. Dana Corp.*, 646 F.3d 954, 961 (6th Cir. 2011). The district court therefore did not abuse its discretion in failing to grant Bailey leave to amend his complaint. *See id.*

Bailey argues that we should remand this case to the district court for reconsideration in view of *Kisor*. *Kisor* addressed when federal courts should defer to an agency's interpretation of ambiguous regulations, *see* 139 S. Ct. at 2408, but Bailey's initial brief failed to identify any allegedly ambiguous regulations that pertain to Marsh Branch's fee designation, nor did he develop any argument demonstrating that *Kisor* affects the outcome of this case. Bailey has therefore forfeited this assignment of error. *See McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997).

Finally, Bailey argues that counsel for the government behaved unethically in rejecting his discovery requests and his request for legal research materials and that the district court was biased against him because of his indigency and pro se status. As already explained, any errors by the district court and opposing counsel with respect to discovery matters were harmless, and Bailey's claim that the district court was biased against him is based entirely on the court's rulings, which is insufficient to establish judicial bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

We **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk