

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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

DAVID P. SHERER,  
JOHN H. LICHT,  
MIKE LOPEZ,  
BARBARA BRICKLEY, and  
AARON JOHNSON,

Plaintiffs,

v.

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

Defendants.

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**ORDER ON MOTION FOR RECONSIDERATION**

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**Michael E. Hegarty, United States Magistrate Judge.**

Plaintiffs have moved for reconsideration of the Court's decision granting Defendants' Motion to Dismiss [filed March 6, 2009; docket #59]. The parties have consented to the jurisdiction of a Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Docket #27.)

Other than in one respect, the Court determines that Plaintiffs' Motion raises no basis to alter or amend the original order. However, Plaintiffs are correct in their assertion that the Court's dismissal should have been without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006) ("Since standing is a jurisdictional mandate, a dismissal with prejudice for lack of standing is inappropriate, and should be corrected to a dismissal without prejudice."); *Polaski v. Colorado Dept. of Transp.*, 198 F. App'x 684, 686, 2006 WL 2147526, \*2 (10th Cir. Aug. 2, 2006) ("[A] dismissal for lack of subject matter jurisdiction must be

*without prejudice.*”) (emphasis in original). The motion for reconsideration is **granted** regarding this issue.

The Court believes that the Administrative Procedure Act (APA) may provide a jurisdictional basis for Plaintiffs’ grievance, which challenges the collection of fees at the Mt. Evans High-Impact Recreation Area. Courts have regularly entertained APA actions challenging the Executive Branch’s imposition of fees. *E.g.*, *R/T 182, LLC v. Federal Aviation Admin.*, 519 F.3d 307 (6th Cir. 2008); *Lauran v. United States Forest Serv.*, 141 F. App’x 515, 2005 WL 1523488, \*1 (9th Cir. June 29, 2005); *Snyder v. Department of Defense*, No. C-03-4992, 2005 WL 1796228, \*1 (N.D. Cal. July 27, 2005) (APA governed action involving propriety of a fee charged in connection with his request under the Freedom of Information Act). Because dismissal of this case under the Court’s prior order should be without prejudice, Plaintiffs would be free to initiate a new action under the APA. The Court believes that judicial economy favors allowing Plaintiffs one final opportunity to assert a judicially cognizable claim. Plaintiffs are granted leave to file a Second Amended Complaint on or before April 23, 2009. If Plaintiffs choose to do so, Defendants may file an answer or other responsive pleading within the time permitted by the Federal Rules of Civil Procedure. If Plaintiffs do not file a Second Amended Complaint by that date, this case will stand closed.

Accordingly, it is hereby ORDERED that the Plaintiffs’ Motion to Amend or Alter Judgment [filed March 6, 2009; docket #59] is **granted** insofar as it requests that the Court’s dismissal of this case be *without prejudice* and **denied** in all other respects.

It is further ORDERED that Plaintiffs are given leave to file a Second Amended Complaint on or before **April 23, 2009**.

Dated at Denver, Colorado, this 9th day of April, 2009.

BY THE COURT:

s/ Michael E. Hegarty  
Michael E. Hegarty  
United States Magistrate Judge