Judge John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELIZABETH A. CAMPBELL, a single woman, and SEATTLE CITIZENS AGAINST THE TUNNEL, a Washington State Non-profit corporation; HARVEY FRIEDMAN, a single man, and SHARON J. PRICE, a married woman, Plaintiffs, v. PETER JILIK, in his official capacity as Urban Area Engineer of the FEDERAL HIGHWAY ADMINISTRATION, an agency of the United States; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, an agency of the State of Washington, Defendants.	NO. C09-1305 JCC **FEDERAL DEFENDANT'S REPLY MEMORANDUM RE: MOTION TO DISMISS**

Defendant Peter Jilik, through his attorneys, hereby submits this memorandum in reply to the opposition of plaintiff Elizabeth A. Campbell to his motion to dismiss.

INTRODUCTION

Plaintiff Elizabeth Campbell, a self-professed "concerned citizen," asks this Court to enjoin a multi-million dollar highway project of immense importance to the region, both in terms of public safety and commerce. As federal defendant's motion to dismiss demonstrates, Ms. Campbell failed to properly or timely serve the summons and complaint on the federal government, thereby resulting in an absence of personal jurisdiction, failed to allege sufficient facts to support Article III standing, and improperly alleged a state law claim against the federal government under Washington's State Environmental Policy

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Act ("SEPA") for which there is no waiver of sovereign immunity. In response, Ms. Campbell has filed an opposition wherein the Court is asked to: (1) apply a heretofore unrecognized "constructive service" exception to Rule 4(i) of the Federal Rules of Civil Procedure; (2) find that she has standing despite the fact that she has not articulated a threat to any concrete and particularized interest; and (3) conclude that the federal government has impliedly waived sovereign immunity and is therefore amenable to suit under Washington's SEPA. None of these arguments have merit, as set forth below.[1]

ARGUMENT

I. THERE IS NO "CONSTRUCTIVE SERVICE" EXCEPTION TO RULE 4, Fed.R.Civ.P.

In order to acquire personal jurisdiction over the federal government in a civil action in a U.S. District Court, it is necessary to serve both the Attorney General in Washington, D.C. and the United States Attorney for the district in which the action is filed. Rule 4(i), F.R.Civ.P.; *Reynolds v. U.S.*, 782 F.2d 837, 838 (9th Cir. 1986). Even if there is actual notice, a defendant will not be subjected to the personal jurisdiction of a district court if service was not made in substantial compliance with Rule 4. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982). And, if service is not made within 120 days after the filing of the complaint, the action must be dismissed as to any defendant not served unless the plaintiff shows good cause why service was not made within that period. *Id.*; Rule 4(m), F.R.Civ.P.

As Ms. Campbell tacitly concedes, she failed to serve either the Attorney General or the United States Attorney, and more than 120 days has passed since the filing of her complaint. Nevertheless, Ms. Campbell asks the Court to find, notwithstanding the requirements of Rule 4(i), F.R.Civ.P., that service of a summons and complaint on federal employees, absent service on the Attorney General and the U.S. Attorney, constituted "properly effectuated" service of process. Campbell Mem., p. 2, *ll.* 17-21. It is difficult to understand, however, how or why Ms. Campbell believes that the court should find service which was so patently *improper* to be, nevertheless, "proper."

Alternatively, Ms. Campbell asks the Court to find that the summons and complaint were "constructively" served based on her delivery of those documents to certain federal employees. Federal

[1] As we have noted before, the only plaintiff properly before the Court is Ms. Campbell, who signed the operative complaint in this lawsuit *in propria persona*. Moreover, as a non-attorney, Ms. Campbell had no authority to represent anyone but herself, and no other party (or attorney) signed the complaint.

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defendants are unaware of any such exception to Rule 4(i) of the Federal Rules of Civil Procedure, and Ms. Campbell points to no case in which such an exception has been recognized. Rather, in this Circuit, substantial compliance with the rules is required. *Jackson, supra*, 682 F.2d at 1347.

As Ms. Campbell points out in her opposition memorandum, an exception does apply where there is both sufficient notice to the defendant and a "justifiable excuse" for the failure to serve properly. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 n. 4 (9th Cir. 1987). In addition, the plaintiff must show that he or she will be "severely prejudiced" by the dismissal. *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir.1991). In attempting to fit herself within this exception, Ms. Campbell asserts that federal defendant had sufficient notice, but she fails to establish that she has any justifiable excuse. Most glaringly, she has put forth no evidence to support her assertions of ignorance and belief because her opposition is unaccompanied by any sworn testimony or documentary evidence. Consequently, all that is before the Court is the argument of her attorney, which is not evidence. *See, U.S. v. Rivera-Ramirez*, 715 F.2d 453, 457 n.4 (9th Cir. 1983).

That problem aside, however, Ms. Campbell's argument utterly fails to establish a justifiable excuse. She contends that her failure to properly serve federal defendant should be overlooked by the Court because: (1) she is *pro se*; and (2) she was "unaware of the specific rules of service on a federal agency defendant." Campbell Mem., p. 3, *ll.* 5-10. However, *pro se* litigants must follow the same rules of procedure that govern other litigants, *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), and the mere fact that Ms. Campbell is a *pro se* litigant does not alone constitute a justifiable excuse for inadequate service. *See*, *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir.1991) (pro se litigant's reliance on clerk to tell him when time for filing started to run was not justifiable excuse for untimely service); *Swinyer v. Cole*, 2006 WL 1663665, *1 (W.D.Wash. 2006) (Plaintiff's pro se status, alone, is not a justifiable excuse for defective service).

Moreover, if her argument is to be believed, Ms. Campbell did not misunderstand or misapply the federal rules. She simply failed to make the effort to read them in order to determine what was required. Such neglectfulness cannot constitute a justifiable excuse. *See, Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992) (overruled on other grounds) ("inadvertent error or ignorance of governing rules alone will not excuse a litigant's failure to effect timely service.").

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Finally, Ms. Campbell has failed to establish that she would be "severely prejudiced" if her complaint was dismissed. According to her memorandum, she will suffer severe prejudice because "[her] NEPA claims could not be pursued . . ." Campbell Mem., p. 4, *ll*. 12-16. The factual basis for this conclusory assertion is not further explained. It is certainly true that in a number of cases this particular element was found to have been satisfied when a statute of limitations would present a bar to a new action. *See, e.g., Lemoge v. U.S.*, 587 F.3d 1188 (9th Cir. 2009). However, the statute on Ms. Campbell's NEPA claim will not run for almost five years. *See, Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (six year statute of limitations applies to NEPA). Having to refile the action might be inconvenient, if that is her choice, but severe prejudice has not been shown.

In summary, dismissal under these circumstances is appropriate.

II. MS. CAMPBELL HAS NOT ESTABLISHED THAT SHE HAS STANDING

As set forth in federal defendant's motion to dismiss, Ms. Campbell's allegation that she is a "concerned citizen seeking answers" is not sufficient to establish constitutional standing. One's status as a concerned citizen is the most abstract of interests, and one held in common with the public at large. *See, National Information and Resource Service v. Nuclear Regulatory Commission,* 457 F.3d 941, 954 (9th Cir. 2006). Nowhere in the complaint is there any allegation that federal defendant's actions are likely to cause any injury to a "concrete" and "particularized" interest of Ms. Campbell. *See, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Ms. Campbell's opposition protests to the contrary, but her argument is inconsistent with the law. In order to be "particularized," the alleged injury must affect Ms. Campbell in a "personal and individual way." *Lujan, supra,* 504 U.S. at 560 n.1. Generally speaking, in a NEPA case, this requires that there be a "geographic nexus" between the individual asserting the claim and the location suffering an environmental impact. *Ashley Creek Phosphate*, 420 F.3d 934, 938 (9th Cir. 2005). Because Ms. Campbell alleges no true geographic nexus to the Project, and no distinct concrete and particularized interest, her claims should be dismissed.[2]

[2] Ms. Campbell's contention that she has standing because "[a]s a citizen of Seattle, within which the entire project falls, she is entitled to avail herself of the protections NEPA affords," Campbell Mem., p. 6, *ll.* 15-17, simply misses the point. This is a characteristic which she shares with approximately 602,000 other people, and is not by itself sufficient.

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Ms. Campbell does not argue against federal defendant's recitation of the law. Nevertheless, in her memorandum, she argues that the purely procedural injuries she says she will suffer "do affect Plaintiff's concrete interests." Campbell Mem., p. 6, *ll.* 9-11. The law is against her on this point. As the high court said only last term, "deprivation of a procedural right without some concrete interest that is affected by the deprivation - a procedural right *in vacuo* - is insufficient to create Article III standing." *Summers v. Earth Island Institute*, ___ U.S. ___, 129 S.Ct. 1142, 1151 (2009). Because Ms. Campbell has failed to allege any concrete and particularized interest that will be affected by the Project, her complaint fails to establish that she has standing to bring this action.[3]

III. SOVEREIGN IMMUNITY MAY NOT BE WAIVED BY IMPLICATION

Our motion asks the Court to dismiss Ms. Campbell's claim against it under Washington's State Environmental Policy Act ("SEPA") because there is no waiver of sovereign immunity which authorizes this state law claim to be brought against the federal government in a U.S. District Court. Absent such a waiver, a district court lacks subject matter jurisdiction to entertain the claim. *See, Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1250 (9th Cir. 2006).

In her opposition, Ms. Campbell does not appear to argue against the principle that the federal government is not subject to state regulation absent a waiver of sovereign immunity. This is a sound concession, even if it only a tacit one. *See, U.S. v. State of Washington*, 872 F.2d 874, 877 (9th Cir. 1989) ("Absent an express waiver of sovereign immunity, the 'activities of the Federal Government are free from regulation by any state.'") (*quoting*, *Mayo v. United States*, 319 U.S. 441, 445 (1943) (footnote omitted)). She also does not appear to be arguing that Congress has enacted any express waiver of

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Fundamentally, to establish standing, one must demonstrate an injury to a concrete and particularized interest. This requirement represents a form of quality control by ensuring that litigation will be prosecuted only by those who have a genuine and well-defined stake in the outcome. In a NEPA case, this almost always requires a geographic nexus. *Ashley Creek Phosphate Co., supra*, 420 F.3d at 939. But mere propinquity without a concrete and particularized injury is not sufficient. *Id.* ("Not only is the geographic link missing, the substantive concrete injury is wholly absent."). Ms. Campbell's mailing address in the Magnolia neighborhood places her almost five miles away from the location of this Project. Given this distance, it is far from self-evident that she will suffer injury to a concrete and particularized interest and, in any event, she has identified none.

[3] The analysis, and conclusion, is no different for the other "plaintiffs." Moreover, to the extent that Ms. Campbell makes factual assertions relative to their standing in her opposition memorandum, those averments are a nullity inasmuch as they are unsupported by any evidence in the record. As noted previously, arguments of counsel do not constitute evidence. *See, U.S. v. Rivera-Ramirez*, 715 F.2d 453, 457 n.4 (9th Cir. 1983).

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sovereign immunity which would cause the federal government to be subject to regulation under SEPA. In any event, she does not identify any such waiver, and this Court has previously concluded that one does not exist. *See, West v. U.S. Army Corps of Engineers*, 2007 WL 4365790 *1 (W.D.Wash. 2007) (The United States has not waived sovereign immunity with respect to SEPA, is not bound by its provisions, and may not be sued for a purported violation of SEPA.) Instead, Ms. Campbell argues that the federal government should be deemed to have "impliedly waived" its sovereign immunity because of its close working relationship with the State and because of the federal grant for the Project. Campbell Mem., p. 7, *l.* 20. No citation to any authority is given for the proposition that a waiver of sovereign immunity can be found by implication, and, indeed, the law is very clearly against Ms. Campbell's position. *See, e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) ("A waiver of sovereign immunity cannot be implied but must be unequivocally expressed."); *Harger v. Department of Labor*, 569 F.3d 898, 903 (9th Cir. 2009) (same).

Because there is no waiver of sovereign immunity to support Ms. Campbell's SEPA claim against the federal government, that claim should be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, and for the reasons stated in his original memorandum, defendant Peter Jilik respectfully requests that his motion be granted and all claims alleged against him be dismissed.

DATED this 7th day of May, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 7, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant(s):

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