IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG, Appellant,	)	
v.	)	Nos. 77-1831 and 78-1731 (Consolidated)
GENERAL SERVICES ADMINISTRATION, Appellee,	)	

REPLY TO APPELLANT'S OPPOSITION TO APPELLEE'S MOTION FOR RECONSIDERATION OF AWARD OF COSTS

In our motion for reconsideration, we argued that this court has no power to tax costs against the United States except in accordance with the terms of an express statutory waiver of sovereign immunity. We further argued that this Court's prior interpretations of the fees and costs provision of the Freedom of Information Act establish that the terms of the statutory waiver have not been met in this case. Appellant does not answer either of these contentions in his Opposition. Rather, Appellant relies upon an inapposite Rule, two improperly cited cases, and his own self-serving affidavits.

1. Rule 6(f) Has No Bearing Upon This Case.

Appellant has argued that the government's motion is untimely because it was filed twelve days after the entry of the order awarding him costs. Appellant relies upon Rule 6(f) of this Court which states that motions for reconsideration of orders entered by the clerk must be filed within ten days. However, the award of costs was not and could not have constituted

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a "clerk's order" within the meaning of Rule 6. That Rule specifically states that the Clerk may only grant (1) unopposed procedural motions of a routine sort and (2) motions to stay the issuance of the mandate. Since the award of costs does not fall into either category, Rule 6 of this Court is plainly inapplicable.

The order awarding costs to the Appellant was clearly granted by the Court, not by the Clerk. It is identical in form to the order which disposed of this appeal on the merits. Compare Order dated April 12, 1979 with Order dated March 15, 1979. Furthermore, Rule 39 F.R.A.P., specifically states that, where a portion of the judgment below is vacated, "costs shall be allowed only as ordered by the court." The relevant time frame for seeking reconsideration of actions taken by the Court is fourteen days, not ten. Far from being two days late, the government's motion was filed two days early.

2. Appellant Has Miscited Two Prior Decisions Of This Court.

Appellant does not address the argument that this Court has no authority to award costs against the United States unless the express terms of a statutory waiver of sovereign immunity have been met. Instead, Appellant cites two cases involving the award of costs against private litigants for the proposition this Court has discretion under Rule 39 to award costs whenever the judgment below is vacated in part. Rural Housing Alliance v. Department of Agriculture, 167 U.S. App. D.C. 345, 511 F.2d

1347 (1974); Wilderness Society v. Morton, 161 U.S. App. D.C. 446, 495 F.2d 1026 (1974). Neither case stands for so broad a proposition.

In Rural Alliance, this Court awarded costs to the United States. The issue of sovereign immunity only arises where a court attempts to tax costs against the government. Accordingly, the case has no bearing upon the arguments advanced in the Motion For Reconsideration. The decision in Wilderness Society also involved the taxing of fees and costs against a private litigant. More importantly, the decision was reversed sub nom. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

3. Appellant's Affidavits Cannot Establish His Entitlement To Costs.

Appellant does not address the argument that the law of this Circuit requires an award of fees or costs under 5 U.S.C. §552(a)(4)(E) to be predicated upon a multi-faceted analysis of numerous equitable and legal factors. Similarly, Appellant does not challenge the argument that this sort of analysis should be performed, in the first instance, by the District Court. Rather, Appellant attempts to demonstrate his entitlement to costs by referring the Court to a number of his own statements. Manifestly, the self-serving assertions of an interested party cannot substitute for the detailed findings of an impartial district judge applying the criteria set forth by this Court in Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 182 U.S. App. D.C. 83 (1977) and Cuneo v. Rumsfeld, 553 F.2d 1368, 180 U.S. App. D.C. 184 (1977).

The arguments advanced in the government's Motion For Reconsideration stand unrebutted. Since the award of costs to the Appellant is barred by the doctrine of sovereign immunity, it should be withdrawn. Costs should be awarded to the Appellant, if and only if, he can establish his entitlement in accordance with the terms of 5 U.S.C. §552(a)(4)(E) as interpreted by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 1979, I served the foregoing Reply To Appellant's Opposition To Appellee's Motion For Reconsideration Of Award Of Costs upon counsel for the Appellant by causing a copy to be mailed, postage prepaid, to:

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