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United States Court of Appeals
Tenth Circuit

September 6, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and THE WILDERNESS SOCIETY,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES BUREAU OF LAND MANAGEMENT, and CHRIS CONRAD, in his official capacity as Price Field Office Manager,

Defendants-Appellees,

and

XTO ENERGY, INC.

Intervenor-Defendant-Appellee.

No. 17-4134
(D.C. No. 2:15-CV-00194-JNP-EJF)
(D. Utah)

ORDER AND JUDGMENT[*]

Before **BRISCOE**, **BALDOCK**, and **EID**, Circuit Judges.

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

In November 2011, the United States Bureau of Land Management (BLM) issued four oil and gas leases. The four lease parcels sit atop Horse Bench, within the West Tavaputs Plateau area in Carbon County, Utah. The Southern Utah Wilderness Alliance, Natural Resources Defense Council, and the Wilderness Society (collectively, "SUWA") sued to challenge the lease issuance, arguing that BLM's actions violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. The district court upheld BLM's actions, holding that BLM's explanation for rejecting SUWA's proposed alternatives was neither arbitrary nor capricious, and, in the alternative, that SUWA did not demonstrate prejudicial error. D. Ct. Op. at 20. SUWA appealed. After considering the briefs and record, we hold that the appeal is moot because SUWA did not challenge the district court's prejudicial-error holding.

I.

NEPA "places upon federal agencies the obligation 'to consider every significant aspect of the environmental impact of a proposed action.'" *Utah Shared Access All. v. U.S. Forest Serv.*, 288 F.3d 1205, 1207 (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983)). NEPA also "ensures that an agency will inform the public that it has considered environmental concerns in its decision-making process." *Id.* NEPA's purpose is "to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). Under NEPA, an agency must "study, develop, and describe" reasonable alternatives when a proposed action "involves

unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

SUWA challenged BLM's issuance of the four lease parcels in federal district court. Specifically, SUWA argued that BLM violated NEPA when it failed to consider two reasonable alternatives proffered during the drafting of the Environmental Assessment (EA) for the proposed lease sale: (1) deferring the four Horse Bench parcels from leasing, or (2) issuing the leases with No Surface Occupancy (NSO) stipulations. D. Ct. Op. at 11–12; Aplt. App'x at 516. SUWA argued that these stipulations would have protected wilderness characteristics. *Id*. BLM maintained that it had sufficiently considered these options in prior environmental impact statements, whose analysis it incorporated in its EA of the sale of the lease parcels at issue in this case. D. Ct. Op. at 12–13.

The district court upheld BLM's actions on two independent grounds. First, it concluded that BLM's rejection of SUWA's proposed alternatives was not arbitrary and capricious and, therefore, did not violate NEPA. D. Ct. Op. at 14–20. Second, the district court held that, even assuming that BLM's rejection of the proposed alternatives was erroneous, SUWA failed to demonstrate that the rejection "compromised the EA so severely as to render the [Finding of No Significant Impact (FONSI)] arbitrary and capricious." D. Ct. Op. at 20 (quoting *W. Watersheds Project v. Bur. of Land Mgmt.*, 721 F.3d 1264, 1275 (10th Cir. 2013)). The district court reasoned that errors in agency decision-making do not require reversal unless the plaintiff demonstrates prejudice from the error. D. Ct. Op. at 20–21 (citing *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d

1183, 1183 (10th Cir. 2013)). The court concluded that BLM's analysis was likely sufficient to make an informed decision about the leases, or, at any rate, SUWA had not demonstrated otherwise. Accordingly, the district court affirmed the BLM's decision to issue the lease parcels.

II.

On appeal, SUWA challenges the first basis for the district court's decision—the holding that BLM's rejection of SUWA's proposed alternatives was not arbitrary or capricious. Aplt. Br. at 26–27. However, SUWA did not appeal the district court's second, independent finding—that SUWA was not entitled to relief because it failed to show prejudice. That failure disposes of this appeal.

It is well settled that arguments not raised or inadequately presented in a party's opening brief are waived. *Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). "[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine." *Bronson*, 500 F.3d at 1105. In this case, SUWA waived consideration of the district court's finding of no prejudice by failing to argue the issue in its opening brief.

SUWA's arguments to the contrary are unavailing. First, SUWA argues in its reply brief that it *did* challenge the prejudicial-error finding when it asserted that the district court imposed a "novel and inappropriate" burden on SUWA by conflating the sufficiency of BLM's analysis of impacts with its evaluation of alternatives. Reply Br. at 3. But that argument is not the kind of clear presentation of an issue that satisfies Federal

Rule of Appellate Procedure 28(a), which requires an opening brief to identify "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). The issue of the district court's alleged conflation of impacts with alternatives is, quite simply, a different issue from the question whether any errors rendered BLM's decision arbitrary. To be sure, SUWA may have been trying to argue that the district court's supposed mistake as to the burden tainted its prejudice finding, but SUWA did not make that argument explicit. SUWA therefore did not satisfy its burden to identify its "contentions and the reasons for them," *id.*, in sufficient detail to let the court know what it was arguing on appeal. *See Femedeer v. Haun*, 227 F.3d 1244, 1255 (10th Cir. 2000) ("parties must do more than offer . . . unexplained complaints of error").

Second, SUWA contends in a footnote to its reply brief that even if this argument was waived, this court should hold that the district court's prejudice finding was wrong as a matter of law. Reply Br. at 3 n.1. SUWA correctly notes that this court may address even waived arguments when "the proper resolution is beyond any doubt, or where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations and quotations omitted). But this is not such a case. SUWA argues that whether an agency's ultimate *decision* would have differed is "immaterial" to a NEPA violation, because the alleged injury in a NEPA case is the agency's failure to follow NEPA *procedures*. Reply Br. at 4 n.1 (citing *Catron Cty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996)). That might be true, but this is the kind of argument that needed to be raised and fully argued in the opening brief, rather

than made in a footnote in a reply brief. SUWA's failure to explain its argument in its opening brief deprived the appellees of a full opportunity to consider and respond to the argument. *See Hill v. Kemp*, 478 F.3d 1236, 1250–51 (10th Cir. 2007) (noting that arguments presented in a reply brief are generally waived because, without full briefing, the court "would run the risk of an improvident or ill-advised opinion, given our dependence . . . on the adversarial process for sharpening the issues for decision.") (quoting *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994)). We decline to consider this issue without the benefit of full adversarial briefing and accordingly hold that SUWA waived its challenge to the district court's prejudice holding.

SUWA's failure to challenge one of the two independent bases for the district court's decision moots this appeal. *See Petrella v. Brownback*, 787 F.3d 1242, 1255 (10th Cir. 2015). "A case is moot when it is impossible for the court to grant any effectual relief whatever to the prevailing party." *Id.* (quoting *Office of Thrift Supervision v. Overland Park Fin. Corp.*, 236 F.3d 1246, 1254 (10th Cir. 2001)). In this case, even if we agreed that the agency's failure to consider SUWA's proposed alternatives was arbitrary and capricious, the district court's prejudice finding would stand as an independent basis for its decision. Any appellate holding on the alternatives claim would thus be purely advisory, with no "effect in the real world." *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015) (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 (10th Cir. 2010)). This court does not have subject-matter

jurisdiction to issue advisory opinions in moot cases. *See id.* (noting that "mootness is an issue of subject matter jurisdiction"). We therefore dismiss the appeal.

III. CONCLUSION

Based on the foregoing, we dismiss the appeal for lack of subject matter jurisdiction.

Entered for the Court

Allison H. Eid
Circuit Judge