2017 WL 1420268
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals,
Ninth Circuit.

OUR MONEY OUR TRANSIT and ROBERT MACHERIONE, Plaintiffs-Appellants,
v.
FEDERAL TRANSIT ADMINISTRATION; et al., Defendants-Appellees,
LANE TRANSIT DISTRICT, Intervenor-Defendant-Appellee.

No. 14-35766
|
Argued and Submitted April 5, 2017 Seattle, Washington
|
APRIL 21, 2017

Appeal from the United States District Court for the Western District of Washington Thomas S. Zilly, District Judge, Presiding, D.C. No. 2:13-cv-01004-TSZ

Before: KOZINSKI and W. FLETCHER, Circuit Judges, and TUNHEIM, ** Chief District Judge.

MEMORANDUM *

*1 Plaintiffs-Appellants Our Money Our Transit and Robert Macherione appeal the district court's summary judgment order in favor of Defendants-Appellees the Federal Transit Administration (FTA) and Lane Transit District (LTD). Appellants allege that the West Eugene EmX Extension (WEEE) approval failed to comply with the requirements of the National Environmental Policy Act (NEPA). In particular, they argue that the **Environmental Assessment** (EA) failed to consider a reasonable alternative and ignored the WEEE's environmental impacts on traffic, local trees, utilities, and Charnelton Street.

We affirm the district court's summary judgment in favor of Defendants-Appellees. "[A]n agency does not violate NEPA by refusing to discuss alternatives already rejected in prior state studies." *Honolulutraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1231 (9th Cir. 2014) (citing *Laguna Greenbelt, Inc. v. Dep't of Transp.*, 42 F.3d 517, 524 n.6 (9th Cir. 1994)). The FTA and LTD engaged in an Alternative Analysis (AA) that assessed over fifty alternatives prior to the EA. "[A] state-prepared [AA] may be used as part of the NEPA process as long as it meets certain requirements ...." *Id.* This AA met those requirements and resulted in several proposals being advanced to local stakeholders. As a result of consultation with those local stakeholders, the EA examined only the West 6th route as the Locally Preferred Alternative, as well as a No-Build alternative. We hold that it was not unreasonable to exclude the West 13th route from the EA.

We also affirm the district court's rejection of Plaintiffs-Appellants' argument that the EA and Finding of No Significant Impact (FONSI) did not fulfill the "hard look" requirement. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008). According to Appellants, both the EA and FONSI violate NEPA by failing to explain why traffic congestion, cutting down 200 mature trees, relocating utilities, and converting Charnelton Street from a local street will not so significantly affect the environment as to warrant a full Environmental Impact Statement. The argument concerning the relocation of utilities is raised for the first time on appeal and so is waived. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) ("This issue is raised for the first time on appeal, and we therefore treat the issue as waived."). Even if this objection were not waived, however, we would hold that both the EA and FONSI meet the standard of providing a convincing statement of reasons why the actions will not have a significant impact on the environment. *Ctr. for Biological Diversity*, 538 F.3d at 1219-20. This is especially true when these documents are combined with the AA, as allowed by our precedent. *Honolulutraffic.com*, 742 F.3d at 1231.

For the foregoing reasons, the order of the district court is

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2017 WL 1420268 (Mem)

Footnotes

** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

Second, the government's characterization of the scientist's letter amounts to a request that the Court draw an inference in its favor about the letter's propriety and legal effect. At this stage of the litigation, however, the party entitled to have inferences drawn in its favor is Seneca, not the government. This argument is thus entitled to no weight.

At bottom, Seneca's breach of contract claim turns on specific facts about USFS's acts and decisions, and evidence regarding those acts and decisions is not currently before the Court. And because Seneca's allegations, taken as true, set forth a plausible claim that it is entitled to relief, the Court has no basis for dismissing Seneca's complaint.

CONCLUSION

For the reasons discussed above, the government's motion to dismiss is **DENIED**.

IT IS SO ORDERED.

All Citations

130 Fed.Cl. 774

Footnotes

1 The facts set forth below are based on the allegations in Seneca's complaint, which the Court accepts as true for purposes of deciding the government's motion to dismiss, as well as on the underlying contract, Seneca's claim before the contracting officer, and the contracting officer's decision, which are "integral to" Seneca's complaint. See AstraZeneca Pharm. LP v. Apotex Corp., 669 F.3d 1370, 1378 n.5 (Fed. Cir. 2012) (quotation omitted).

2 In its reply brief, the government appears to expand this argument by stating that the contract "authorized the Forest Service to terminate the contract, in whole or in part, to comply with court orders or avoid environmental harm." Def.'s Reply in Supp. of Its Mot. to Dismiss (Def.'s Reply) at 6, ECF No. 8. Although this accurately describes the contract's terms, it provides no basis to dismiss the complaint. Further development of the record is required to determine whether USFS terminated the contract pursuant to its authority to do so to avoid environmental harm.