UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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EDSON G. GARDNER,

    Plaintiff - Appellant,

v.

WENDI LONG, in her official capacity as
Treasurer of Uintah County, Utah,

    Defendant - Appellee.

No. 21-4101
(D.C. No. 2:18-CV-00509-RJS-DBP)
(D. Utah)

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ORDER AND JUDGMENT[*]
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Before **TYMKOVICH**, Chief Judge, **HOLMES** and **ROSSMAN**, Circuit Judges.
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Edson G. Gardner is no stranger to the federal courts. Over the last several

decades, Gardner has filed numerous suits challenging the authority of Utah's state

and local governments over both him and his property based on the theory that he is

an Indian and therefore entitled to the protections and benefits afforded to members

of Indian tribes under federal law. He has pursued these suits despite the fact that

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[*] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. _See_ Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

nearly thirty years ago, this court held that Gardner is not a member of an Indian

tribe. *See Gardner v. United States*, No. 93-4102, 1994 WL 170780, at *2-5

(10th Cir. May 5, 1994). In this, the latest chapter in Gardner's never-ending battle

against the local authorities,[1] he sought a permanent injunction against Wendi Long,

the Treasurer of Uintah County, Utah, preventing her from foreclosing tax liens on

so-called Indian trust lands to which he claimed ownership. The suit was concluded

when the district court dismissed Gardner's amended complaint with prejudice as a

sanction for failing to make the initial disclosures required by Fed. R. Civ. P. 26(a)

and respond to an order to show cause. Gardner, pro se, timely appealed. Exercising

jurisdiction under 28 U.S.C. § 1291, we affirm.

Gardner's amended complaint alleged that he is an Indian and the subject real

property was an "Indian Allotment[]" or otherwise held in trust for him by the United

States. Aplee. Suppl. App., Vol. IV at 664. As a result, he sought to enjoin

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[1] *See, e.g.*, *Gardner v. Wilkins*, 593 F. App'x 800, 801-02 (10th Cir. 2014) (noting "Gardner['s] . . . history of unsuccessfully litigating . . . issues based on his purported Indian status" and describing his appeals as "a burden on the federal court system" (internal quotation marks omitted)); *Gardner v. Wilkins*, 535 F. App'x 767, 767 (10th Cir. 2013) ("Litigation regarding Gardner's Indian status is a road well-traveled. He does not claim to be a member of a federally recognized tribe[;] [r]ather, he claims only to be a descendent of a former member, as are many other Americans. Despite his best efforts in federal, state, and tribal court, this heritage does not entitle him to Indian status whether or not he lives and works on the reservation."); *Gardner v. Ute Tribal Ct. Chief Judge*, 36 F. App'x 927 (10th Cir. 2002) (litigating the Ute Tribe's election system and his right to practice law in the tribal courts). In addition to these appeals, Gardner has filed numerous district court suits in various contexts based directly or indirectly on his alleged status as an Indian. He is currently under filing restrictions in the district court based on his frivolous and duplicative filings.

Ms. Long from enforcing tax liens against the property. Other than filing an

amended complaint, Gardner took no steps to advance the case on the merits. For

example, he engaged in no fact discovery; instead, he focused his efforts on filing

motions designed to delay the proceedings and burden both Ms. Long and the district

court.[2]

The scheduling order entered by the district court established: January 6,

2021, as the deadline for the parties to submit their initial disclosures; March 15 as

the last day to supplement disclosures; March 22 as the close of fact discovery; and

May 15 for filing dispositive motions. Ms. Long timely served her initial disclosures

on January 6; however, Gardner never served any disclosures, nor did he seek to

amend the scheduling order. In a request for a scheduling conference, Ms. Long

informed the court that Gardner had never served his initial disclosures or provided

any information about proposed exhibits or witnesses at trial. The court determined

that it needed to address Gardner's failure to serve his initial disclosures before

setting a trial date because

> [w]here a party fails to provide information or identify a witness as required
> by Rule 26(a), Federal Rule of Civil Procedure 37(c)(1) provides "the party
> is not allowed to use that information or witness to supply evidence on a

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[2] The record supports Ms. Long's statement that "[t]hese disruptive filings
included at least eight *Motions for Injunctive* relief, including *Motions to Stay*; eight
objections to the Magistrate's *Reports and Recommendations*; four *Notices of Appeal*;
and two *Motions to Recuse*." Aplee. Br. at 14-15 (footnotes omitted). "Gardner also
repeatedly violated the Court's *Filing Order* that required him to request leave of
court prior to filing matters of record in this case, and was sanctioned with a finding
of contempt for violating that *Order*. In addition, when the District Court did grant
Gardner leave to file a *Motion*, he would repeatedly file the same *Motion*." *Id.* at 15
(footnotes omitted).

motion, at a hearing, or at a trial, unless the failure was substantially
justified or is harmless."

Aplee. Suppl. App., Vol. VI at 1236. To that end, the court ordered Gardner to

"show cause . . . why this case should not be dismissed pursuant to Rule 37(c)(1)."

Id. at 1237. The court further ordered that "Gardner must address why his failure to

make initial disclosures is justified or harmless under the four factors cited in [*HCG*

Platinum, LLC v. Preferred Prod. Placement Corp., 873 F.3d 1191, 1200 (10th Cir.

2017)]. *Id.*

But Gardner failed to respond to the show cause order; instead, he filed several

pleadings unrelated to the show-cause order, such as a motion for default judgment

and a request that the case be assigned to a different judge. The court found that

"[n]one of these filings respond to the Order to Show Cause." R. at 287. Moreover,

the court found that "[e]ven construing these filings as responses to the Order to

Show Cause, none address Gardner's failure to make initial disclosures or offer any

argument about why that failure is substantially justified or harmless as required

under Rule 37(c)(1)." *Id.* Thus, the court dismissed the amended complaint with

prejudice.

Gardner's appellate briefs do not discuss the grounds on which the district

court dismissed the amended complaint; rather, he maintains that the court's

"fail[ure] to grant injunctive relief" was "mercurial and capricious." Aplt. Opening

Br. at 3. But Gardner's failure to address the grounds on which the amended

complaint was dismissed means the issue is waived. *See Bronson v. Swensen*,

500 F.3d 1099, 1104 (10th Cir. 2007) ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue."). This rule applies equally to pro se litigants. *See Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012) ("This court has not hesitated to apply this waiver rule . . . even to [litigants] who proceed pro se and therefore are entitled to liberal construction of their filings."). Gardner has therefore waived a challenge to the district court's dismissal.

The judgment is affirmed. We deny Gardner's motion to proceed on appeal without prepaying costs or fees because he has not presented "a reasoned, nonfrivolous argument on the law and facts." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

Timothy M. Tymkovich
Chief Judge