



INTERIOR BOARD OF INDIAN APPEALS

Leonie Gopher v. Rocky Mountain Regional Director, Bureau of Indian Affairs

60 IBIA 315 (05/15/2015)

Denying Reconsideration of:
60 IBIA 189

Related Board case:
58 IBIA 151



United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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LEONIE GOPHER,)	Order Denying Reconsideration
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-061-1
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	May 15, 2015

On April 28, 2015, the Board of Indian Appeals (Board) affirmed a December 2, 2011, decision by the Rocky Mountain Regional Director, Bureau of Indian Affairs (BIA), upholding BIA’s grant of a right-of-way (ROW) renewal to Phillips 66 Pipeline LLC (formerly known as ConocoPhillips Pipeline Company) (Phillips 66) across Allotment No. 426 (Allotment), in which Appellant owns an interest, on the Blackfeet Indian Reservation (Reservation). 60 IBIA 189. In affirming the Regional Director’s decision, we concluded that the record supported BIA’s finding that the owners of a majority interest in the Allotment consented to the ROW, that Appellant had not shown that their consent was invalid,¹ and that Appellant had not demonstrated that the compensation paid by Phillips 66 to the landowners was less than fair market value. We declined to consider a variety of new arguments that Appellant sought to raise late in the appeal proceedings that she had not raised during briefing on the merits or in the proceedings before the Regional Director.

On May 6, 2015, the Board received from Appellant a timely Motion for Reconsideration and Remand for Full Record Development, and a memorandum in support of the motion. In seeking reconsideration, Appellant makes a variety of merits-based and procedures-based arguments for why she believes the Board erred and should reconsider the decision.

Reconsideration of a Board decision “will be granted only in extraordinary circumstances.” 43 C.F.R. § 4.315(a); *Gardner v. Acting Western Regional Director*,

¹ It is undisputed that Appellant did not consent to the ROW and undisputed that BIA did not consider her to have consented.

46 IBIA 105, 105 (2007); *Jacobs v. Great Plains Regional Director*, 43 IBIA 272, 272 (2006). In our view, none of the arguments Appellant raises demonstrates that extraordinary circumstances exist that would warrant reconsideration of our decision, and thus we deny the motion.

Appellant reiterates several of the arguments that she raised late in the appeal, which the Board declined to consider, and argues that the Board wrongly applied its practice of declining to consider arguments raised for the first time on appeal.² Appellant contends that the Board has a trust responsibility to ensure that BIA fulfills its fiduciary obligations in granting and renewing ROWs, and that the “entire process has been one of obfuscation and, at the [BIA] level, one designed to keep Appellant confused according to emails never before seen by [Appellant] until the matter was on appeal.” Memorandum for Reconsideration and Remand, May 5, 2015, at 4 (Memorandum). Appellant argues that she was “denied and shut out from receipt of information at all phases of the renewal and review process.” *Id.* at 5. Appellant contends that she was allowed only 60 days to review the record and that “[n]o full copy [of the record] has ever been produced to Appellant.” *Id.* at 5-6.

Appellant’s allegation that she was denied access to the administrative record is incorrect. At the request of Appellant’s current counsel, the Board produced a complete copy of the record for counsel’s inspection at the Board’s office, and granted her two extensions of time to respond to the supplemental record. *See* Order Allowing Response to Regional Director’s Supplement to the Administrative Record, Oct. 31, 2014; Order Granting Extension for Appellant’s Response, Dec. 3, 2014; Order Granting Second Extension for Appellant’s Response, Dec. 31, 2014 (granting extension to Mar. 3, 2015). The original record was made available to Appellant early in the proceedings. *See* Notice of Docketing, Feb. 17, 2012 (record is available for inspection at Board’s office and the office

² During its review of the case, the Board ordered the Regional Director to file a supplemental record upon discovering that certain documents were missing. *See* 60 IBIA at 190. The record as originally submitted did not include copies of pleadings and exhibits filed by the parties in the proceedings before the Regional Director, and only a partial copy of the appraisal documents. *See* Order for Regional Director to Submit Remainder of the Administrative Record, Sept. 24, 2014, at 1-2. After the Regional Director supplemented the record with the missing documents, the Board allowed the parties to file responses. Appellant then raised a variety of new arguments, which the Board declined to consider, concluding that the arguments were not dependent on the record supplementation and could have been raised in the proceedings before the Regional Director, or at the latest during briefing the merits of the appeal. *Id.* at 189-90, 192-93.

of the Regional Director); *see also* Letter from Regional Director to Johnson, Mar. 15, 2012 (sending copy of record to Appellant’s counsel).

The difficulty for Appellant, with respect to the new arguments she sought to raise late in the appeal, and in seeking reconsideration, was that the new arguments were not dependent on having access to, or a lack of prior access to, the *supplemental* record documents, which consisted largely of pleadings and exhibits that the parties themselves had filed in the proceedings before the Regional Director, and served on each other.³ And as we noted, Appellant did not object to the record as originally submitted to the Board, nor complain during merits briefing that she was being denied access to the record, or that further record development was necessary. 60 IBIA at 191. Appellant’s arguments that the Board made a fundamental error in declining to consider her new arguments, thus warranting reconsideration under the “extraordinary circumstances” standard, are unconvincing.

Appellant also contends that the Board misapplied the burden of proof by requiring Appellant “to prove a negative in an evidentiary vacuum.” Memorandum at 6. According to Appellant, she had no duty to “rebut or produce evidence nor can she be expected to mount arguments pertaining to records she has been denied or never had access to.” *Id.* The Board did not misapply the burden of proof. An appellant has the burden of proof on appeal to demonstrate error in the decision being appealed, which includes the responsibility to raise arguments or produce evidence that she wishes to have considered by the Board. *See, e.g., Linda Lowery Archer v. Eastern Regional Director*, 38 IBIA 111, 112-13 (2002) (an appellant who fails to make arguments has not carried her burden of proof) (citing *Johnson v. Rocky Mountain Regional Director*, 38 IBIA 64, 67 (2002), and cases cited therein). If Appellant believed that the record was insufficient (i.e., that evidence was lacking) in any respect to support BIA’s grant of the ROW renewal, she need only have identified the alleged deficiencies in her appeal to the Regional Director and on appeal to the Board.⁴ The Board reviews sufficiency-of-evidence arguments *de novo*. *See* 60 IBIA

³ The supplemental record also included a complete copy of the appraisal, which Appellant then sought to challenge as defective because it appraised the value of the Allotment based on a “highest and best use” as agricultural land, and because it allegedly was outdated. But even the record as originally submitted included an excerpt from the appraisal that identified the type of property as agricultural and included the date of the appraisal. *See* Original Administrative Record (Gopher Appeal) Tab 20.

⁴ In seeking reconsideration, Appellant contends that the Board misunderstood her to challenge only the manner of consent, not the sufficiency of the consent obtained, but the Board *did* address the merits the sufficiency of evidence regarding consent, recognizing that Appellant might have intended to include such a challenge. 60 IBIA at 194-96.

at 194. To the extent Appellant wished to rebut evidence in the record, it was indeed her burden to produce rebuttal evidence (and excuse any failure to have produced it for consideration by the Regional Director).⁵ The Board did not misapply the burden of proof.

We have reviewed the arguments raised in Appellant’s motion and memorandum seeking reconsideration, as well as a post-decisional pleading that Appellant filed before filing her motion for reconsideration. *See* Appellant’s Motion for Leave to File Response and Appellant’s Response to Phillips 66 Pipeline LLC’s Reply Brief, Apr. 28, 2015 (Post-Decisional Response) (received by Board, Apr. 30, 2015).⁶ We understand that Appellant disagrees with the Board’s decision, but we are not convinced that she has demonstrated that extraordinary circumstances exist to warrant reconsideration.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board denies Appellant’s motion for reconsideration of the Board’s April 28, 2015, decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

⁵ In seeking reconsideration regarding the consent issue, Appellant reiterates her allegation that two “withdrawal of consents” were signed, but not counted, Memorandum at 8, but she does not dispute the Board’s findings that she had produced no evidence that the purported revocations—from Appellant’s own siblings—were communicated to BIA; that she failed to explain when she first obtained copies of the documents; and that she failed to explain why she did not submit them in the proceedings below. *See* 60 IBIA at 193.

⁶ In her post-decisional response brief, Appellant argues that the attorney who represented her in the proceedings before the Regional Director, and during merits briefing in this appeal, did not adequately represent her because she had a conflict of interest. Post-Decisional Response at 5-6. Appellant does not produce any evidence to support that assertion.