PAUL T. BARNES, JR. (ON RECONSIDERATION)

192 IBLA 166 Decided January 25, 2018
PAUL T. BARNES, JR. (ON RECONSIDERATION)


Reconsideration denied.

1. Rules of Practice: Appeals: Reconsideration

Under the Board's regulations, the Board may reconsider its decision in extraordinary circumstances. Extraordinary circumstances include new evidence that was not before the Board at the time the Board's decision was issued and that demonstrates error in the decision.

APPEARANCES: Paul T. Barnes, Jr., pro se; Janet Fealk, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

Paul T. Barnes, Jr. has filed a motion for reconsideration, requesting that the Board vacate a September 22, 2017, decision. In that decision, the Board affirmed BLM's decision to deny Mr. Barnes' applications for potassium prospecting permits on 10,172 acres of BLM-administered public lands in Esmeralda County, Nevada. In his motion, Mr. Barnes states that there is new evidence, not previously before the Board, that warrants reconsideration of the Board's decision.

1 191 IBLA 277 (2017).
Summary

Under our regulations, the Board may reconsider a decision in extraordinary circumstances, including when an appellant submits new evidence that was not before the Board at the time the Board's decision was issued and that demonstrates error in the decision. Here, Mr. Barnes seeks reconsideration of the Board's decision affirming a BLM decision to deny potassium prospecting permit applications. With his motion, Mr. Barnes submitted what he states is new evidence that shows that Albemarle Corporation, which conducts lithium operations in the area where Mr. Barnes seeks to extract potassium, tried to improperly influence BLM's decision on Mr. Barnes' applications. But none of the information submitted by Mr. Barnes is new within the meaning of our regulation; all was publicly available and obtained by Mr. Barnes through internet research. And Mr. Barnes did not provide any explanation as to why this information was unavailable at the time of his original appeal. We therefore deny his motion for reconsideration.

The Regulatory Criteria for Reconsideration

[1] The Board may consider a decision it has issued under "extraordinary circumstances." Under our regulations, extraordinary circumstances that may warrant granting reconsideration include, but are not limited to: (1) error in the Board's interpretation of material facts, (2) recent judicial development, (3) change in Departmental policy, or (4) evidence that was not before the Board at the time the Board issued its decision and that demonstrates error in the decision.

When an appellant seeks reconsideration based on new evidence, it must explain why the evidence was not provided to the Board during the course of the original appeal and why such evidence shows error in the Board's decision. As we have explained, "[s]uch a showing is required because motions to reconsider are designed to permit relief in extraordinary circumstances; they are not a vehicle to revisit issues already addressed or to advance arguments that could have been raised in prior briefing, but were not."

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2 43 C.F.R. § 4.403(b).
3 Id. § 4.403(d).
4 Id. § 4.403(d)(4) and (e); see Kathleen Ness (On Reconsideration), 188 IBLA 63, 65 (2017).
5 Kathleen Ness (On Reconsideration), 188 IBLA at 65; 43 C.F.R. § 4.403(f) ("The Board will not grant a motion for reconsideration that . . . merely repeats arguments made in the original appeal, except in cases of demonstrable error . . . ").
Summary of Mr. Barnes' Arguments

Mr. Barnes seeks reconsideration of this Board's September 22, 2017, decision, in which we affirmed BLM's decision to deny Mr. Barnes' prospecting permit applications based on the bureau's determination that there is a known valuable deposit of potassium on the lands contained in Mr. Barnes' applications. In our decision, we upheld BLM's action, finding that it had a rational basis supported by the record, and complied with the regulations, which provide that when BLM determines there is a known valuable deposit, it will not issue a prospecting permit; rather, in that situation, the regulations provide alternative procedures that allow for extraction of potassium, including exploration licenses and competitive leases.6

In his motion, Mr. Barnes asserts that there is new evidence, not before the Board during his appeal, which shows error in the Board's decision. He first asserts there is new evidence that shows that Albemarle Corporation, which conducts lithium operations in the area where Mr. Barnes seeks to extract potassium, tried to “influence the decision in this case to Albemarle's direct benefit and Appellant's detriment . . .”7 The new evidence submitted by Mr. Barnes includes a document prepared by Albemarle Corporation that contains statements indicating communications between the company and BLM concerning Mr. Barnes' permit applications.8 Mr. Barnes also submitted a document published in January 2017 by the Nevada Legislative Counsel Bureau, Legislative Committee on Public Lands, and a July 14, 2016, letter from the BLM Nevada State Director to the Chairman of the Nevada Legislative Committee on Public Lands.9 According to Mr. Barnes, these documents, which he obtained through internet research, contain prohibited ex parte communications, in violation of the regulations at 43 C.F.R. §§ 4.22(b) and

6 191 IBLA at 285-87; 43 C.F.R. §§ 3506.10, 3508.11.
7 Motion for Reconsideration at 3.
8 Id., Exhibit (Ex.) B (“Silver Peak, Nevada Lithium Operations,” May 20, 2016, prepared by Albemarle Corporation, and labeled as “Proprietary Information of Albemarle Corporation”) at 11 (“Albemarle has made the case on the relevancy of the Barnes appeal to BLM State Director John Ruhs and others in Reno, the Battle Mountain office, the Tonopah office as well as with the BLM Solicitor General's office in Washington,” “We have yet to hear BLM’s response on the merits of our argument on the IBLA appeal.”).
9 Id., Exs. C (“Legislative Counsel Bureau, Legislative Committee on Public Lands, Bulletin No. 17-8,” January 2017) and D (Letter from BLM Nevada State Director to Chairman, Nevada Legislative Committee on Public Lands, July 14, 2016).
4.27(b), and indicate Albemarle Corporation’s attempt to influence BLM’s decision on Mr. Barnes’ prospecting permits.\textsuperscript{10}

Mr. Barnes also asserts that there is new evidence showing error in the Board’s affirmance of BLM’s determination that the area contains known valuable deposits of potassium.\textsuperscript{11} In support of this claim, Mr. Barnes provided a 1991 settlement agreement entered into by BLM and Cyprus Foote Mineral Company, which held placer mining and mill site claims for valuable deposits of lithium, resolving litigation challenging the mineral patent issued by BLM to Cyprus Foote’s predecessor-in-interest.\textsuperscript{12} In that settlement, the United States agreed not to issue any prospecting permits for so long as Cyprus Foote is conducting lithium operations; during a 10-year “standby period” commencing on the date Cyprus Foote suspends operations; and 1 year after Cyprus Foote permanently ceases operations.\textsuperscript{13} Mr. Barnes claims that Albemarle Corporation has asked that this settlement agreement be waived so that Rockwood Holdings, a wholly-owned subsidiary of Albemarle Corporation, can enter into a material sales agreement with BLM to process the salts produced from its lithium operations.\textsuperscript{14} Mr. Barnes further alleges that if this settlement agreement had not been in place, “it is reasonable to say that Barnes would have been issued prospecting permit[s] in 1989.”\textsuperscript{15}

Finally, Mr. Barnes argues that because BLM has not rejected potassium prospecting permits filed by Rockwood Holdings that “potentially would access [the] same aquifers for discovery of valuable deposits,” BLM’s decision to deny Mr. Barnes’ applications is “arbitrary and capricious,” and “affirms collusion between BLM and Albemarle.”\textsuperscript{16} In support of this argument, Mr. Barnes submitted various BLM serial register pages showing the pending status of applications submitted by Rockwood Holdings.\textsuperscript{17}

In his motion, Mr. Barnes also seeks reconsideration of the Board’s September 12, 2017, order granting BLM’s motion to protect from public disclosure

\textsuperscript{10} Id. at 3-4.
\textsuperscript{11} Id. at 4.
\textsuperscript{12} Cyprus Foote Mineral Co. v. United States, No. CV-S-89-108-LDG (RJJ) (D. Nev.).
\textsuperscript{13} Motion for Reconsideration, Ex. E, Settlement Agreement (June 20, 1991).
\textsuperscript{14} Id. at 4 (citing Ex. B at 9).
\textsuperscript{15} Id.
\textsuperscript{16} Id. at 5.
\textsuperscript{17} Id., Exs. F-J, BLM Serial Register Pages.
confidential information in annual reports prepared by Rockwood Lithium (the predecessor-in-interest to Rockwood Holdings) as a requirement of the 1991 settlement agreement, and provided to the Board during the appeal proceedings. Mr. Barnes alleges that BLM's motion is moot because Albemarle Corporation provided this information in its presentation to the Nevada Legislature, which is attached as Exhibit B to his motion.\textsuperscript{18} The protective order, however, had no bearing on the merits of Mr. Barnes' appeal or our September 22, 2017, decision. We therefore deny Mr. Barnes' motion for reconsideration of the Board's September 12, 2017, order, and proceed to address only Mr. Barnes' arguments related to the Board's September 22, 2017, decision.

The New Evidence Provided by Mr. Barnes Does Not Warrant Reconsideration of the Board’s September 22, 2017, Decision

Under our regulations, when an appellant relies on new evidence in a motion for reconsideration of a Board decision, the appellant must explain why the evidence was not provided to the Board during the course of the original appeal.\textsuperscript{19} The appellant must also explain why the new evidence shows error in the Board's decision.\textsuperscript{20}

Here, Mr. Barnes has submitted information he obtained from internet research, attached to his motion as Exhibits B through J.\textsuperscript{21} Each of the documents labeled as Exhibits B through E pre-dates our September 22, 2017, decision. Exhibit B, Albemarle Corporation's presentation, is dated May 16, 2016; Exhibit C, the Nevada Legislative Committee on Public Lands, Bulletin No. 17-8, is dated January 2017; Exhibit D, the letter from BLM to the Nevada Legislative Committee on Public Lands, is dated July 14, 2016; and Exhibit E is the 1991 settlement agreement. In addition, the remaining documents – Exhibits F through J – are BLM serial register pages dated October 4, 2017, but all reflect the fact that Albemarle Corporation's subsidiary, Rockwood Holdings, has had potassium prospecting permit applications pending with BLM since before the Board’s decision.

None of this information, however, is "new" within the meaning of our reconsideration regulation. All of it was publicly-available during the course of

\textsuperscript{18} Id. at 4.
\textsuperscript{19} 43 C.F.R. § 4.403(d)(4) and (e).
\textsuperscript{20} Kathleen Ness (On Reconsideration), 188 IBLA at 65.
\textsuperscript{21} Motion for Reconsideration at 1 (stating that the documents were “only recently discovered . . . along with . . . an internet search of publicly-available documents”).
Mr. Barnes’ original appeal. While the information is new to Mr. Barnes, the fact that Mr. Barnes did not undertake research and find this information until after we issued our order is not a sufficient reason, under the regulations, justifying why Mr. Barnes did not provide this evidence to the Board during the course of his appeal.\textsuperscript{22}

Moreover, none of the information submitted by Mr. Barnes demonstrates error in the Board’s September 22, 2017, decision. Mr. Barnes asserts that the information he has provided demonstrates inappropriate communications that are evidence of Albemarle Corporation’s efforts to influence BLM’s decision on Mr. Barnes’ permit applications.\textsuperscript{23} But the documents provided demonstrate only the fact of the 1991 settlement agreement’s limitations on BLM in issuing prospecting permits while lithium operations are being conducted, and the existence of the competing business interests of Albemarle Corporation and Mr. Barnes. The 1991 settlement agreement was before the Board during the appeal proceedings and is not new either to Mr. Barnes or this Board. Nor is it evidence of any error in BLM’s decision denying Mr. Barnes’ prospecting permits; in our September 22, 2017, decision, we rejected Mr. Barnes’ argument that BLM’s decision violated a provision of the settlement agreement.\textsuperscript{24}

Further, the other documents provided by Mr. Barnes do not, as he alleges, show that Albemarle Corporation improperly influenced BLM’s decision. These documents show only that Albemarle Corporation communicated with BLM and the Nevada State Legislature about its lithium operations and its desire to process the salt stockpile resulting from its operations.\textsuperscript{25} In particular, Mr. Barnes points to Albemarle Corporation’s presentation (Exhibit B), in which the company acknowledges that BLM had “rejected [Albemarle Corporation’s] request to begin negotiations on the sale pending an appeal before the IBLA filed by Mr. Paul Barnes . . . .”; asserts that “the Barnes appeal is unrelated to our efforts to achieve a sale agreement with BLM . . . .”; and asks for “assistance” from the State of Nevada in obtaining a material sales agreement with BLM.\textsuperscript{26} Mr. Barnes also points to BLM’s letter to the Nevada Legislative Committee on Public Lands (Exhibit D) as evidence of Albemarle’s efforts to influence BLM’s decision. In that letter, BLM’s

\textsuperscript{22} See, e.g., Gabrielle Hampton, 190 IBLA 148, 150 (2017) (granting motion for reconsideration based on new evidence, not available or included in the administrative record at the time of the Board’s initial decision).
\textsuperscript{23} Motion for Reconsideration at 2.
\textsuperscript{24} 191 IBLA at 287-88.
\textsuperscript{25} See Motion for Reconsideration, Ex. B.
\textsuperscript{26} Id. at 10-11.
Nevada State Director explained to the Committee that although the bureau “could sell the stockpiled salts non-competitively because the minerals have been severed from the ground and stockpiled by the United States for its future use and that competition is impossible,” it was not going to proceed with any sale until Mr. Barnes’ appeal at IBLA was resolved. BLM stated that until the appeal was resolved, “there is nothing stopping Albemarle/Rockwood from submitting an application for a non-competitive purchase of stockpiled minerals.” We find no evidence of improper influence in these documents and reject Mr. Barnes’ argument that they show error in BLM’s decision.

We addressed a similar argument made by Mr. Barnes in his original appeal. There, he had argued “that e-mails from BLM geologists demonstrated BLM’s “bias” against him. We said in our September 22, 2017, decision that the e-mails showed “only that BLM recognized the potentially competing interests of the lithium operator and Barnes . . . .” The documents now provided by Mr. Barnes do not alter this conclusion. As we stated above, a motion for reconsideration cannot be used as “a vehicle to revisit issues already addressed or to advance arguments that could have been raised in prior briefing, but were not.”

We also reject Mr. Barnes’ argument that the reports required by the 1991 settlement agreement “lack both valuation and locations from where [the salt] stockpiles were mined with no documentation from a chemical engineer or calculations used to derive values.” There is no requirement in the regulations that such information is necessary before BLM makes a determination about the existence of a known valuable deposit. More important, however, the Board considered these reports, along with a BLM affidavit explaining the basis for the bureau’s determination that known valuable deposits of potassium existed in the area covered by Mr. Barnes’ prospecting applications, in Mr. Barnes’ original appeal, and concluded that BLM’s determination had a rational basis supported by the record. These reports do not constitute new information. And Mr. Barnes has provided no explanation as to why he did not raise his assertion that the reports lack certain information during his original appeal. He therefore has presented no extraordinary circumstances warranting reconsideration of our decision.

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27 Id., Ex. D. at 1.
28 Id.
29 191 IBLA at 289.
30 Kathleen Ness (On Reconsideration), 188 IBLA at 65.
31 Motion for Reconsideration at 4.
32 191 IBLA at 284-85.
We similarly reject Mr. Barnes’ argument that we erred in our September 22, 2017, decision because BLM has not yet denied the permit applications filed by Rockwood Lithium.\textsuperscript{33} The fact that these applications have been pending with BLM since before the Board’s decision does not constitute new information and again, Mr. Barnes has provided no explanation as to why he did not make this argument during his original appeal. In any event, the status of Rockwood Lithium’s applications is not material to Mr. Barnes’ appeal or this Board’s decision.

In addition to the substance of his arguments, Mr. Barnes alleges that some of the information provided with his motion for reconsideration constitutes prohibited \textit{ex parte} communications. Mr. Barnes argues that Albemarle Corporation qualifies as an “interested person” within the meaning of the regulation at 43 C.F.R. § 4.27(b), which prohibits communications between “any party to the proceeding or any person interested in the proceeding . . .”\textsuperscript{34} This is incorrect. Our regulations prohibit \textit{ex parte} communication “concerning the merits of a proceeding between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any Office [of Hearings and Appeals] personnel involved or who may reasonably be expected to become involved in the decisionmaking process on that proceeding . . .”\textsuperscript{35} This means that prohibited communications are those that occur with employees of the Interior Board of Land Appeals once a proceeding has been initiated.\textsuperscript{36}

The communications submitted by Mr. Barnes as evidence of inappropriate \textit{ex parte} communications occurred between BLM and Albemarle Corporation, and Albemarle Corporation and the Nevada Legislature. None involved personnel from the Interior Board of Land Appeals. And none occurred after Mr. Barnes filed his

\textsuperscript{33} Motion for Reconsideration, Exs. F·J, BLM Serial Register Pages.

\textsuperscript{34} \textit{Id.} at 3; Reply at 2.

\textsuperscript{35} 43 C.F.R. § 4.27(b)(1).

\textsuperscript{36} \textit{See Brock Livestock Co., Inc.}, 101 IBLA 91, 96 (1988) (explaining that the rule at 43 C.F.R. § 4.27(b) “serves only to bind employees of the Office of Hearings and Appeals (OHA) to insure that private conversations concerning the merits of pending appeals are not carried on between OHA employees and a party to an appeal without the knowledge and participation of other concerned parties”); \textit{see also National Wildlife Federation v. Bureau of Land Management}, 140 IBLA 85, 103 n.13 (1997) (finding no prohibited \textit{ex parte} communication when the BLM Director communicated with representatives of the National Wildlife Federation since the BLM Director “was not an employee of OHA who was involved or reasonably expected to become involved in the decisionmaking regarding the appeal pending before the judge at the time of the reported communications”).
appeal with the Board. Therefore, none constituted prohibited *ex parte* communications under the Board’s regulations.

**Conclusion**

Because none of the evidence submitted by Mr. Barnes constitutes new evidence within the meaning of our reconsideration regulation, he has not demonstrated any extraordinary circumstance warranting reconsideration of our decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, we deny Mr. Barnes’ motion for reconsideration of the Board’s September 12, 2017, order, and September 22, 2017, decision.

/s/
Amy B. Sosin
Administrative Judge

I concur:

/s/
James F. Roberts
Deputy Chief Administrative Judge

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37 43 C.F.R. § 4.1.