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BEFORE THE NEVADA STATE ENVIRONMENTAL COMMISSION

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IN THE MATTER OF THE
APPEAL HEARING RE:

PERMIT NUMBER NV2006504,
BEVERLY HILLS DAIRY
(A.K. CORAL CAY TRUST)

TRANSCRIPT OF AUDIO-RECORDED PROCEEDINGS

APPEAL HEARING

MONDAY, OCTOBER 30, 2006

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APPEARANCES:

The SEC Appeal Panel:

COMMISSIONER ALAN COYNER,
Appeal Panel Chairman

COMMISSIONER LEW DODGION,
Member

COMMISSIONER STEPHANNE ZIMMERMAN,
Member

For the Panel:

JOHN B. WALKER, Executive Secretary

ROBERT PEARSON, Recording Secretary

DAVID NEWTON, Deputy Attorney General

For the State:

BILL FREY, Deputy Attorney General
Nevada Division of
Environmental Protection

LEO DROZDOFF, Administrator

TOM PORTA, Deputy Administrator

BRUCE HOLMGREN, NDEP,
Bureau of Water Pollution Control

For the Appellant:

BILL BARRACKMAN, Appellant
JOHN MARSHALL

The Appellants:

BRUCE CRATER
CURTIS STENGEL
CHRISTIE TERRANEO
ANNIE BELL

Intervenors:

JIM BUTLER
JOHN ZIMMERMAN, of Parsons
BAILEY and LATTIMER, for
Beverly Hills Dairy

JAY LAZARUS, Consultant
Glovesta Geoscience

Member of the Public:

ISAAC HENDERSON

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1 CARSON CITY, NEVADA, MONDAY, OCTOBER 30, 2006, 10:00 A.M.

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3
4 CHAIRMAN COYNER: Good morning. Welcome to
5 this hearing, this appeal hearing of the State
6 Environmental Commission. This appeal hearing is for the
7 matter of Beverly Hills Dairy.

8 And for the record the Commission Members
9 present are Alan Coyner. I'll be chairing the hearing.
10 I'm the Administrator of the Nevada Division of Minerals.
11 To my right is Lew Dodgion, who represents the public and
12 is a person familiar with reclamation law, and in Las
13 Vegas, Stephanie Zimmerman, a member of the public.

14 First of all let's check our AV and audio.
15 David Newton, I know you're there. Could you confirm for
16 me that the AV is good on your end?

17 MR. NEWTON: Yes. Just a little bit of
18 breakup, but not enough to where we can't hear what you're
19 saying. And you can see all the interested parties are
20 (unintelligible).

21 CHAIRMAN COYNER: We can see you and hear you
22 quite well. Do I need to speak more slowly?

23 MR. NEWTON: Possibly. (Unintelligible) break
24 up (unintelligible).

25 CHAIRMAN COYNER: I'm checking with the Court

1 Recorder here in off -- on our end to make sure that he's
2 receiving a good signal, and he says that he is.

3 So let me do with the formal introduction.

4 This hearing is open, and the public is -- open and the
5 public, as required by the Nevada Open Meeting Law, written
6 notice stating the time, place, location, and agenda of
7 this hearing was given at least three working days before
8 today's date. A copy of the Notice was posted outside this
9 building, and the building in Las Vegas, and at three other
10 separate permanent places within this Commission's
11 jurisdiction. Copies of the Notice were mailed to all
12 persons requesting such notice.

13 Before I get to the procedures of the hearing
14 or the appeal today, I'd like the members at the table here
15 in Carson City to introduce themselves.

16 MR. BARRACKMAN: Yes, my name is Bill
17 Barrackman. I'm an Appellant.

18 MR. MARSHALL: John Marshall, and I represent
19 Bill Barrackman.

20 MR. FREY: Bill Frey for the Division of
21 Environmental Protection.

22 MR. BUTLER: Jim Butler and John Zimmerman. We
23 are with Parsons, Bailey and Lattimer in Reno, and we
24 represent the Permittee, Beverly Hills Dairy.

25 CHAIRMAN COYNER: And the people at the table

1 in Las Vegas, please.

2 UNIDENTIFIED SPEAKER: (Unintelligible)
3 Division of Environmental Protection.

4 UNIDENTIFIED SPEAKER: I'm David
5 (unintelligible) on behalf of Beverly Hills Dairy.

6 UNIDENTIFIED SPEAKER: (Unintelligible).

7 UNIDENTIFIED SPEAKER: (Unintelligible).

8 UNIDENTIFIED SPEAKER: Bruce Crater
9 (unintelligible) United States registered (unintelligible).

10 CHAIRMAN COYNER: Thank you all very much.

11 I just want to confirm which of the Appellants
12 are present or not. I know Bill is here in Carson City.
13 Mary Carter, did I hear your name down there? Because we
14 can't see all of you. Mary Crater is not present?

15 UNIDENTIFIED SPEAKER: (Unintelligible).

16 CHAIRMAN COYNER: Ms. Crater is there.

17 MR. CRATER: (Unintelligible).

18 CHAIRMAN COYNER: Okay. That's Bruce Crater
19 that's speaking.

20 MR. CRATER: Yes.

21 CHAIRMAN COYNER: Thank you.

22 UNIDENTIFIED SPEAKER: (Unintelligible).

23 UNIDENTIFIED SPEAKER: He's in there, and he's
24 on (unintelligible).

25 VOICE:

1 UNIDENTIFIED SPEAKER: (Unintelligible).
2 CHAIRMAN COYNER: I -- I understand, David.
3 Thank you. I just want make sure I know which Appellants
4 are present. Are any of the -- are any of the Bells
5 present?
6 UNIDENTIFIED SPEAKER: No.
7 CHAIRMAN COYNER: That's a no?
8 UNIDENTIFIED SPEAKER: (Unintelligible).
9 CHAIRMAN COYNER: No Bells. Okay. Thank you.
10 And I heard Curtis Stengel's name. I assume
11 Curtis is present. David Steel?
12 UNIDENTIFIED SPEAKER: (Unintelligible).
13 CHAIRMAN COYNER: Is not present?
14 UNIDENTIFIED SPEAKER: David Steel is not here.
15 CHAIRMAN COYNER: And Christie Terraneo?
16 MS. TERRANEO: Yes, I'm here, sir.
17 CHAIRMAN COYNER: Thank you, Christie.
18 Okay. Let me make a few opening remarks.
19 First of all, the focus of today's appeal hearing is on the
20 matter of standing. It's on the motion to dismiss from the
21 Attorney General's Office, based on the fact of --
22 potentially lack of standing from the Appellants.
23 The way that we will proceed -- that will be
24 the focus of today's hearing, and the determination we make
25 as to whether any or all of the Appellants have standing.

1 If we do find that they have standing, then we will set
2 another date to hear the actual merits of the permit, "yes"
3 or "no."

4 So, again, today's hearing is focused merely on
5 determining whether we can go forward from this point. If,
6 in fact, we determine that the Appellants do not have
7 standing, the Appellants have the option of asking for
8 reconsideration from this SEC, this body, or they can
9 proceed directly to a judicial means if they so desire.

10 As you're probably aware, we had a similar
11 hearing, not exactly similar, because the appellant's
12 situation was somewhat different, this summer, before this
13 body. This body found that that particular appellant did
14 not have standing. They asked for reconsideration. It was
15 confirmed that they did not have standing by a second panel
16 of the SEC, and that appellant is now considering judiciary
17 review or has filed?

18 UNIDENTIFIED SPEAKER: (Unintelligible).

19 CHAIRMAN COYNER: Filed. That appellant has
20 filed for judiciary view.

21 With regards to judiciary view, I can say that
22 anything that's said or put into the record here at this
23 hearing can be considered later by the courts. So you want
24 to be aware of that as we make the official recording of
25 this hearing.

1 So, again, to all the participants, today's
2 appeal focuses solely on the motor -- the motion to dismiss
3 that was made by the Attorney General's Office and
4 consideration whether each of the -- each or any of the
5 Appellants have standing.

6 Also, with regards to procedure, I'm going to
7 ask each of the Appellants if they want to make a
8 statement. Again, that is for the record during our
9 opening statements. You don't have to if you don't want
10 to. There is the option to make statements during the time
11 of public comment by anyone, whether you're an Appellant or
12 otherwise, but public comment will be carried on after the
13 decision is rendered by the panel. So you need to consider
14 that if you're going to make a statement. You should make
15 it at the beginning rather than at the end if you want it
16 considered as part of the decision of the panel.

17 Any questions from anyone before I proceed?
18 Did I cover everything, Mr. Walker, do you think?

19 Okay. This one is a little bit more
20 complicated than usual because we have multiple appellants.
21 In fact this is at most appellants I've ever heard in an
22 appeal hearing. So you'll have to forgive me if sometimes
23 during the mechanics of calling for the next person -- I've
24 got Commissioner Dodgion on my right here to help me, so
25 that we can wade through this, because we have interveners

1 and we have multiple appellants. So I ask your indulgence
2 as far as procedure goes. I also have a cold. So I'm
3 having Commissioner Dodgion stand ready to chair if I run
4 out of voice.

5 Okay. Normally at this point in the
6 proceedings we would have pleadings and briefs which we
7 have none other than the motions that were filed. We have
8 no subpoenas. We'd like to move to accept the Interveners'
9 status for the record. Is there an issue with accepting
10 Parsons, Bailey, Lattimer as Intervener for Beverly Hills
11 Dairy?

12 UNIDENTIFIED SPEAKER: (Unintelligible).

13 CHAIRMAN COYNER: Issues on your side with
14 regards to that?

15 COMMISSIONER DODGION: No.

16 CHAIRMAN COYNER: Okay.

17 COMMISSIONER DODGION: Do you need a motion?

18 CHAIRMAN COYNER: I think so.

19 COMMISSIONER DODGION: I so move.

20 CHAIRMAN COYNER: Commissioner Dodgion motions.
21 I second for the exception of -- yeah, to accept Parsons,
22 Bailey, Lattimer as Intervener for Beverly Hills Dairy.

23 I'll call for the vote. All in favor say,
24 "aye." Aye.

25 (Motion carries with unanimous vote)

1 UNIDENTIFIED SPEAKER: (Unintelligible).

2 CHAIRMAN COYNER: And I assume -- thank you,
3 Ms. Zimmerman.

4 We don't need exclusion of witnesses. We don't
5 have any exhibits other than the motions. We move to
6 opening statements. And with regards to that, the Attorney
7 General's Office -- Attorney General for the Division is
8 the mover, so we will let him present his opening
9 statement. Mr. Frey?

10 MR. FREY: Do you want me to stand or should we
11 sit for this?

12 CHAIRMAN COYNER: Sit. This is Nevada.

13 MR. FREY: All right. As -- well, to begin
14 with, I think as a matter a of law --

15 CHAIRMAN COYNER: Let me check for the
16 microphone for Mr. Frey in Las Vegas. David, could you
17 confirm that you hear Mr. Frey okay?

18 MR. NEWTON: Yeah, and he's fine.

19 CHAIRMAN COYNER: Thank you.

20 MR. FREY: Okay. I'm Bill Frey for the
21 Division of Environmental Protection.

22 As a matter of law I think at this point the
23 Bells -- Appellants Annabel Bell, Annie Bell, and Chip
24 Bell, and Appellant David Steel, by their failure here to
25 attend the hearing and oppose the motion to dismiss are

1 acquiescing in the granting of that motion, and that they
2 should be dismissed summarily as they've expressed no
3 opposition or no even willingness to participate in today's
4 hearing.

5 As to the remaining Appellants, they have not,
6 in their opposition, identified that they complied with
7 the -- with the statute 233B.127(4) which requires that
8 financial situation -- a showing of a financial situation
9 be maintained or improved as a result of the issuance of a
10 permit, and that failing to show that, they need to be
11 dismissed, as well.

12 What I'd like to just suggest to the Commission
13 is that there's already been one hearing where the panel
14 has voted to dismiss an appellant based upon this statute.
15 And what I'd like to avoid is inconsistent rulings of the
16 panel that there -- that would create, I believe, a --
17 certainly unequal treatment of appellants, that some --
18 some are allowed in and some aren't, where there aren't --
19 been no showing as a financial condition of the appellants.

20 I'd like to just then talk about a couple of
21 things that were raised in the Opposition filed by
22 Mr. Barrackman. None of the other appellants filed an
23 opposition. Again, I would suggest to the panel that
24 failing to file an opposition should be deemed as
25 acquiescing in the motion.

1 But the Appellant has suggested that they have
2 a constitutional right to challenge this permit, and I
3 think they've mistaken the law. They don't have a
4 constitutional right to challenge the permit. They have
5 statutory right to challenge the permit.

6 Now, if your right is not constitutional, it's
7 that it's created by statute, that right can be taken away
8 by statute, as well. And what the Legislature has done
9 here is taken the 233B, which is not the environmental of
10 statute -- it's the -- it's the statute governing appeals
11 hearings and modified it.

12 Contrary to the argument, that's the specific.
13 That's not a general statute. That's the specific statute
14 that governs today's hearing. And the specific statute
15 that governs this hearing says you can't come into the
16 hearing unless you demonstrate your financial condition has
17 been improved or maintained by this permit. Okay?

18 And that's all I have to say. The rest is in
19 my argument in the motion. Thank you.

20 CHAIRMAN COYNER: Thank you, Mr. Frey.

21 Do the Interveners come next or is that open in
22 terms of procedure?

23 UNIDENTIFIED SPEAKER: I think the
24 procedure is --

25 CHAIRMAN COYNER: I have opposing Counsel

1 first. Then, Mr. Marshall, it's all yours.

2 MR. MARSHALL: Thank you. John Marshall for
3 Bill Barrackman. And I think where I'd like to start is to
4 first kind of draw some distinctions that may be relevant
5 to -- I mean, that you alluded to, Commissioner, regarding
6 the prior appeal in which Great Basin Mine Watch was found
7 not to have standing, and that has to do, of course, with
8 the issue of financial interest.

9 I think all the Appellants here are situated
10 differently because they have a financial interest in the
11 granting or denial of the permit. We can talk a little bit
12 about how those things play out, but that's a critical
13 difference here.

14 And next I'd like to talk about choice. You,
15 as Commissioners, have a choice here to determine how you
16 desire to interpret this -- these statutes. I think if you
17 look at the Attorney General's opinion, and you look at
18 233B.174(4) -- I'm going to shorthand for all that, so I'm
19 basically going to say "the APA section." Okay? And then
20 we have the NRS 458A.605(1), and I'm going to call "the SEC
21 section."

22 So we have the generic APA section, and we have
23 the SEC specific section on who can file an appeal,
24 basically. And the SEC specific section says any
25 person aggrieved can file, and the NRS section, that is

1 giving everyone fits, says that only people who are
2 financially helped or maintained by the action of granting
3 of the permit or are financially hurt by the denial of the
4 permit should be admitted as parties in a contested case.

5 Okay? Those two things conflict. Those two
6 statements conflict. You can't, on the face of them,
7 reconcile them both, because they say if it -- if you do
8 not fall within the provisions of the APA statute, the
9 generic statute, and you do within the SEC statute, then
10 there's a conflict there. Okay? And what the opinion --
11 in -- in the A.G.'s opinion what they try to do is they try
12 to resolve that conflict. They say, "Look, there's a
13 conflict between these two," and they come out to one
14 recommendation as to how it should resolve those two
15 conflicting statutes using standards of statutory
16 construction. All right? Mr. Barrackman, in his brief,
17 articulates -- articulates to you another interpretation
18 why you should interpret the SEC provision as governing, as
19 saying that any person means any person aggrieved on the
20 face of it. Okay?

21 And we can argue to you about which canons of
22 construction should be the ones that you use. You know,
23 the A.G. talks about, "Well, you should give effect to
24 every single word." We talk about the specific controls
25 over the general. We also talk -- and I think Mr. Frey

1 twisted our position slightly. We don't say that they have
2 got a constitutional right to challenge. We say that if
3 you deny a financial interested person over here the
4 ability to participate but you grant someone with a
5 financial interest over here the ability to participate,
6 you have to have a rational basis for making that
7 distinction between those two similarly situated people.
8 That's the need for the protection clause of the
9 constitution. And the way that you avoid that constitution
10 inequality is to say, "Okay. We're are going to follow the
11 specific statute that governs SEC appeals," and that allows
12 any person aggrieved. Okay?

13 So that's -- our -- our basic issue today is
14 that fact that you have a choice between which provision
15 you're going to put our appeals under. Now, we think the
16 choice is relatively -- I mean, it's a stark one. You can
17 say, "We're not going to allow these people who are
18 financially affected to participate -- (unintelligible)
19 we're not going to allow them to participate and challenge
20 this permit." Okay?

21 So that they're -- what we're talking -- I
22 think that you can appreciate that we're talking about the
23 basic ability of affected citizens with financial interest
24 to participate in their government decision making. All
25 right? And that's the heart of what we're talking about.

1 And how -- which set of statutory constructions you should
2 be able to choose from. We think it's the one that expands
3 the ability of citizens to challenge, and we think there's
4 a rational basis for you to do that, and we urge that you
5 do that. Okay?

6 I think you can all appreciate that if you
7 basically take the position that (unintelligible) -- or
8 that the generic standard applies, that basically you won't
9 have any more appeals like this. All right?

10 And if you go back and look -- (unintelligible)
11 on the list, and it's your -- it's your -- you have a
12 history of all your appeals and that history on the
13 website, and basically there's things like the homestead.
14 You know, there's a where a bunch of -- I'm not sure if you
15 were involved in that or not, but --

16 UNIDENTIFIED SPEAKER: (Unintelligible).

17 MR. MARSHALL: -- or somebody who was, but then
18 there's a bunch of -- I think that the NDEP put out a
19 (unintelligible) permit that limited the ability of -- or
20 had to do with, I think, draining of the homestead. And
21 the -- the -- basically, I think, the (unintelligible) that
22 had responsible parties (unintelligible), that -- and
23 the -- you know, that were polluting the homestead while
24 they were there -- contested that permit, because they had
25 a vital interest. It was going to cost them money, right?

1 It was going to -- this permit was going to be
2 financially -- it affected them in a negative way.

3 So that appeal could not happen if you choose
4 to interpret -- in your choice between these two competing
5 canon constructions which one you choose, that appeal could
6 not happen.

7 All the appeals by adjacent property owners --
8 now, this is going to affect me. All those appeals can't
9 happen if you choose to accept the rationale of the
10 Attorney General here. So the consequences are real, and I
11 think you can appreciate, and that's why so many people
12 here, you know, a record number of appellants.

13 I kind of want to get to the last thing that
14 Bill and I talked about on the way down, and if you accept
15 this -- the APA generic statute as being controlling,
16 here's the conundrum that you fall into. The State and, in
17 fact, the Intervener, the Dairy, itself, has had this to
18 say about the permit. Okay? So the Permittee's rights
19 were to authorize the Dairy, basically, to undertake an
20 action that might have an impact to groundwater. All
21 right?

22 And the people that you have around you, the
23 Appellants, are users of that groundwater, some for
24 household uses, some residential uses. Mr. Barrackman uses
25 it to irrigate his pistachio orchard, and crop land, and