

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

2
3 In Re:

NEVADA DIVISION OF
ENVIRONMENTAL PROTECTION'S
RESPONSE BRIEF

4 Appeal of Water Pollution Control Permit:
5 Permit No. NEV2009104
6 First Liberty Power Corp.

7 The Nevada Division of Environmental Protection (Division) renewed water
8 pollution control permit NEV2009104 (Permit) upon application by First Liberty Power
9 Company (First Liberty) for the Fencemaker mining project (Fencemaker) within the
10 clearly established authority under NRS 445A.300 through 445A.730, and NAC 445A.350
11 through 445A.447. Appellant Steve Vogle, Director of Silver Bell Mining & Development,
12 Inc. (Silver Bell), incorrectly asserts that the Division violated the law when renewing the
13 Permit. Rather, the law clearly permits the Division to issue a permit to an owner *or*
14 operator of a mining facility, and imposes that duty when the legal requirements for a
15 permit have been met.

16 The law does not support Silver Bell's complaints and Silver Bell fails to
17 demonstrate that the Division improperly renewed the Permit. Silver Bell does not
18 demonstrate a valid basis for the State Environmental Commission (Commission) to deny
19 or otherwise alter the Permit. Silver Bell's argument is based upon contention that First
20 Liberty is trespassing, converting personal property and has no legal right to be on
21 property. However, nowhere does Silver Bell identify how the Division's renewal of the
22 Permit is in error. This is a dispute between business entities, not a dispute regarding
23 the legality of the Permit renewal. Because the law clearly imposes upon the Division the
24 duty to issue a permit where the statutory and regulatory requirements are met, which is
25 the case here, and because Silver Bell only makes vague and unsupported assertions, this
26 appeal should be dismissed.

27 Alternatively, if the Commission does not dismiss the appeal, the Division refutes
28 Silver Bell's allegations. The Division conformed to its legal duty and renewed the Permit

1 in response to First Liberty's application. This renewal is justified based upon First
2 Liberty's fulfillment of the Permit requirements. The Division does not, and must not,
3 involve itself in business disputes where a mining operation is located on real property
4 not under the ownership or control of the operator. Rather, the Permit provides that no
5 property rights or such privileges are conveyed pursuant to the Permit. The Permit is
6 limited to allowing the specified mining conduct. Any access or other arrangements
7 required to be made between First Liberty and Silver Bell are private party arrangements
8 not within the jurisdiction of the Division.

9 The Division has complied with its statutory duties in renewing the Permit. Silver
10 Bell's grievances relating to the Permit renewal are beyond the jurisdiction of the
11 Division or the Commission. Accordingly, the Division respectfully requests that the
12 Commission uphold the renewal of the Permit.

13 I. FACTUAL SUMMARY

14 The Fencemaker project is an underground mine that produces antimony ore.¹ The
15 mine has been permitted since 2009 and operates under Permit NEV2009104. The
16 Permit allows the permit holder, First Liberty, to ship 36,500 tons per year of antimony
17 ore off site for processing by a separately permitted milling facility.² The Permit is for the
18 purpose of protecting the waters of the state of Nevada from contamination and harm
19 resulting from the mining activities occurring at the Fencemaker site.³

20 On or about April 22, 2016, First Liberty submitted an application for the purpose
21 of renewing the Permit for the Fencemaker site.⁴ Based upon the application, the
22 Division distributed a Notice of Proposed Action, a Draft Fact Sheet, and Draft Permit to
23 potentially interested parties both through mail notice as well as general notice through
24 publication in the local newspaper as well as on the Division website.⁵ Thus, Silver Bell
25 has constructive notice of First Liberty's application. All interested parties were afforded

26 ¹ Exhibit 6 at p. 1.

27 ² *Id.* at pp. 1-2.

28 ³ *See generally id.* See also NRS 455A.305, 445A.465, NAC 445A.387.

⁴ Exhibit 11.

⁵ Exhibit 7 at p. 1.

1 30 days to comment on First Liberty's application.⁶ No party, including Silver Bell or its
2 representatives, submitted any written comments to the Division regarding First
3 Liberty's application.

4 Because no comments or objections to the renewal of the Permit to First Liberty
5 were received by the Division during the notice and comment period, the Permit was
6 renewed on June 8, 2016, effective from June 23, 2016, through October 3, 2019.⁷ While
7 the Permit authorizes First Liberty to conduct mining operations at the Fencemaker site,
8 the Permit expressly states in relevant part:

9 Issuance of this Permit does not convey property rights of any
10 sort or any exclusive privilege; nor does it authorize any injury
11 to persons or property, any invasion of other private rights, or
any infringement of Federal, State or local law or regulations.⁸

12 Following the renewal of the Permit, on June 8, 2016, Silver Bell, among others, was
13 provided a copy of the Permit and Notice of Decision.⁹

14 Marlene Vogel, President of Silver Bell, by letter of June 13, 2016, notified the
15 Division of its objections to the issuance of the Permit to First Liberty.¹⁰ In the June 13th
16 letter, Silver Bell identified as a basis for its objections the contact disputes between
17 Silver Bell and First Liberty.¹¹ Silver Bell then filed its request for an appeal hearing
18 challenging the renewal of the Permit on June 16, 2016.¹² Silver Bell specifies that the
19 basis for its appeal is that the final decision of the Division was affected by other error of
20 law.¹³ In its statement supporting its appeal, Silver Bell stated that:

21 First Liberty lied to the Nevada EPA and State agency's [sic].
22 Silverbell [sic] Mining and Developing [sic] has had the mineral
23 rights and [b]usiness licence since 1985 or later. First Liberty
24 Power INC [sic] does not have a contract with Silverbell [sic]
Mining. At one time Stockpile Reserves had a contract but was
never valid. From information from miners that mined it

25 ⁶ NAC 445A.402. See also Exhibit 6 at p. 4.

26 ⁷ Exhibit 5.

27 ⁸ *Id.*, p. 11, Section II(C)(8).

28 ⁹ Exhibits 3-4.

¹⁰ Exhibit 2.

¹¹ *Id.*

¹² Exhibit 1.

¹³ *Id.* at p. 1.

1 without our consent stated that First Liberty had no clue in
2 what they were doing. At this time we do not know how much
3 damage they have caused. We do know First Liberty never paid
4 any of their bills. Their [sic] is a lein [sic] on the Fencemaker
5 that holds First Liberty and Silverbell [sic] Mining liable. We
6 told First Liberty that they would have to pay there [sic] bills
7 and a new contract would be needed. First Liberty abandoned
8 the project and left Silverbell [sic] Mining holding the bag.
9 History shows reckless disregard by First Liberty Power Corp.
10 and should not be trusted. Our [l]awyer is aware and will be
11 going to court soon to end all forward movement of First Liberty
12 Power Corp.¹⁴

7 **II. SILVER BELL MINING & DEVELOPMENT'S APPEAL SHOULD BE**
8 **DISMISSED FOR FAILING TO IDENTIFY A VALID BASIS FOR THE**
9 **STATE ENVIRONMENTAL COMMISSION TO DENY OR MODIFY THE**
10 **PERMIT**

11 The Division first requests that Silver Bell's appeal be dismissed for failing to state
12 a claim upon which relief may be granted.

13 **A. Standard For Dismissal**

14 While neither the rules of practice before the Commission nor the state
15 Administrative Procedures Act specify the standard for dismissal, the Commission may
16 look at the rules of practice before the Nevada District Courts. Nevada Rules of Civil
17 Procedure (NRCP) Rule 12(b) provides in relevant part that:

18 Every defense, in law or fact, to a claim for relief in any pleading
19 . . . shall be asserted in the responsive pleading thereto if one is
20 required, except that the following defenses may at the option of
21 the pleader be made by motion: . . . (5) failure to state a claim
22 upon which relief can be granted.

23 The court must draw every fair inference in favor of the nonmoving party and must
24 construe the pleading liberally.¹⁵ Dismissal is only appropriate where no set of facts can
25 be proven which would entitle the plaintiff to relief.¹⁶

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¹⁴ *Id.* at p. 2.

¹⁵ *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

¹⁶ *Id.* See also *Bergmann v. Boyce*, 109 Nev. 670 (1993).

1 **B. Dismissal Of The Appeal Is Appropriate As Silver Bell Fails To State**
2 **A Valid Basis Upon Which The Commission May Grant Its Requested**
3 **Relief**

4 Silver Bell alleges that the Division has violated its rights through an error of
5 law;¹⁷ however, Silver Bell fails to identify either in Form 3 or its Opening Brief which
6 laws have been violated by the Division.¹⁸ Silver Bell merely asserts that the basis for the
7 appeal is their contention that First Liberty is trespassing, converting property, and that
8 there are existing contract disputes between Silver Bell and First Liberty.¹⁹ Silver Bell's
9 appeal must be dismissed for two reasons.

10 First, NAC 445A.394 expressly contemplates that an owner *or* operator of a mining
11 facility may submit an application for a water pollution control permit for mining.
12 Specifically, the regulation states in relevant part:

13 To obtain a permit to . . . operate . . . a facility, the *owner or*
14 operator of the proposed facility or the designated agent of the
15 owner or operator must submit to the Department a written
16 application signed by the owner or, *if the owner does not operate*
17 *the facility, the operator of the facility* or his or her designated
18 agent.²⁰

19 Silver Bell has failed to refute this very plain provision that authorizes the Division to
20 accept an application and issue, or renew, a permit to an operator of a facility. Further,
21 as provided for by this regulation, the Division looks to the operator where the owner is
22 not the operator of the mining facility.

23 Second, Silver Bell's dispute surrounding the issuance of the Permit is based upon
24 contractual disputes between itself and First Liberty as well as claims of trespass and
25 conversion.²¹ There is no law authorizing the Division to be the adjudicator of civil
26 disputes between parties, and without such authority, it would be improper to interject
27 itself into those disputes. Further, the Division expressly disclaims the use of a Permit
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26 ¹⁷ *Id.* at p. 1, Section 3 (checked box).
27 ¹⁸ *Id.* at p. 1, Section 4 ("I do not have the full list of broken laws[,] but they will add up.");
28 Appellant's Opening Brief at p. 4, ll. 17-22.
 ¹⁹ Exhibit 1 at p. 2, Section 5; Appellant's Opening Brief at p. 4, ll. 17-18.
 ²⁰ NAC 445A.394(1) (emphasis added).
 ²¹ Exhibit 1; Appellant's Opening Brief at p. 4, ll. 17-22.

1 for the purpose of conveying any property right or exclusive privilege, or authorize any
2 injury to persons or property.²²

3 Yet, an injury to person and property is the very claim being advanced by Silver
4 Bell. Silver Bell claims damages arising from contract, trespass and conversion of
5 property. However, the Permit issued to First Liberty by the Division does not authorize
6 such conduct, nor does it allow the permit holder to cite to the Permit to ratify such
7 conduct. In short, the Permit preserves Silver Bell's property interests and rights to the
8 extent it has a legally defensible interest at the Fencemaker site.

9 The Division is authorized under NAC 445A.300 through 445A.730 to renew
10 Permit NEV2009104, and the Division has the duty to renew that Permit when the
11 application by the operator satisfies the statutory and regulatory requirements. There is
12 no violation of any law in this case because First Liberty is the operator of record and is
13 an applicant allowed to seek the renewal of the Permit. Silver Bell has not demonstrated
14 that there is any violation of the laws or regulations governing the issuance or renewal of
15 the Permit. Therefore, Silver Bell has failed to state a claim upon which this Commission
16 may grant the requested relief and this appeal should be dismissed.

17 **III. THE ISSUANCE OF PERMIT NEV2009104 SHOULD BE AFFIRMED AND**
18 **THE APPEAL DENIED**

19 The Division incorporates its arguments set forth in support of dismissal. Just as
20 Silver Bell has failed to demonstrate what laws and/or regulations the Division has
21 violated in the issuance of the Permit, Silver Bell has failed to demonstrate that the
22 issuance of the Permit was improper.

23 **A. Standard Of Review**

24 An appeal of a final decision of the Division to the Commission must be based upon
25 the final decision being: (a) in violation of any constitutional or statutory provision; (b) in
26 excess of the statutory authority of the Department; (c) made upon unlawful procedure;
27 (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative,
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²² Exhibit 5, p. 11, Section II(C)(8).

1 and substantial evidence on the whole record; or (f) arbitrary or capricious or
2 characterized by abuse of discretion.²³ Silver Bell as the appellant must demonstrate that
3 it is entitled to the relief sought by a preponderance of the evidence.²⁴ “Preponderance of
4 the evidence means such evidence as, when weighed with that opposed to it, has more
5 convincing force and the greater probability of truth.”²⁵ The Commission must review the
6 Division’s issuance of the Permit under an abuse of discretion standard, and the Division
7 as the expert is entitled to deference to its permitting decisions and the evidence before it
8 when it engaged in its decision-making process.²⁶

9 **B. The Division Did Not Commit An Error Of Law In Issuing The**
10 **Permit To First Liberty Power Corp.**

11 As previously discussed, the Division is expressly permitted to accept an
12 application and issue a permit to an owner or operator of a mining facility.²⁷ The express
13 language within NAC 445A.394 explicitly contemplates an owner *or* operator of a mining
14 facility be permitted to seek and obtain a water pollution control permit for mining.²⁸
15 Thus, the Division did not commit an error of law in renewing the Permit.

16 Silver Bell has failed to present any argument or evidence of legal error committed
17 by the Division.²⁹ Silver Bell’s grievance is not against the Division. Silver Bell did not
18 raise any ground for its appeal other than its unsupported belief that the Division’s
19 decision was “affected by other error of law.”³⁰ However, the preponderance of the
20 evidence does not support this position.

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23 ²³ NAC 445B.890(2).
24 ²⁴ See, e.g., *Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487, 491 (2014).
25 ²⁵ See, e.g., *Corbin v. State*, 111 Nev. 378, 892 P.2d 580, 581 (1995).
26 ²⁶ *State Indus. Ins. Syst. v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996).
27 ²⁷ NAC 445A.300 through 445A.730.
28 ²⁸ NAC 445A.394(1).
²⁹ The Division expressly reserves its right to seek leave to file a surreply should Silver Bell raise
new arguments or present new evidence not otherwise presented in Appellant’s Opening Brief or in its
submission of Form 3, Form Requesting An Appeal Hearing, when submitting any reply briefing in this
matter.

³⁰ Exhibit 1.

1 As permitted by law, the Division accepted, processed, and renewed the Permit for
2 First Liberty, the operator of the Fencemaker mining project.³¹ Silver Bell received notice
3 of the proposed decision of the Division and was afforded an opportunity to submit
4 comments regarding the proposed decision to issue the Permit.³² However, neither Silver
5 Bell, nor any other person, submitted a comment regarding the proposed issuance of the
6 Permit.³³ Based upon the information available to the Division when acting upon the
7 application, the Division, within its discretion, renewed the Permit.³⁴ The decision of the
8 Division was not affected by some unspecified “other error of law.”

9 Silver Bell’s only arguments against the Division’s decision are based upon private
10 party disputes, which are not relevant or germane to the Division’s duties under the
11 NRS 445A.300 through 445A.730, and NAC 445A.350 through 445A.447. Resolution of
12 whether Silver Bell has existing contract disputes and/or claims of trespass or
13 conversation are not for the Division to consider or to decide. There is simply no law
14 giving the Division, or this Commission for that matter, such authority.

15 Rather, the Permit is actually protective of any legally defensible personal and
16 private rights Silver Bell may have with respect to the Fencemaker site. As previously
17 discussed, the Permit does not “convey property rights of any sort or any exclusive
18 privilege; nor does it authorize any injury to persons or property, [or] any invasion of
19 other private rights”³⁵ This language is protective of any person, or entity, that has a
20 legal entitlement to the mining site and/or the minerals which are being mined. The
21 Permit cannot be used by a permit holder, here First Liberty, to make a claim of a
22 superior right or claim in a private dispute. Therefore, contrary to Silver Bell’s position,
23 the renewal of the Permit does not facilitate any unlawful acts by First Liberty or any
24 other party. Accordingly, there is no basis to direct the Division to consider new evidence

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31 Exhibits 3 through 11.

27 32 Exhibits 7 through 10.

28 33 Exhibit 3.

34 Exhibit 5.

35 *Id.* p. 11, Section II(C)(8).

1 regarding First Liberty's rights or otherwise reconsider the Permit renewal and the
2 Division's decision should be affirmed.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the decision by the Division to renew the Permit as
5 applied for by First Liberty was not affected by an error of law. Silver Bell has failed to
6 demonstrate by a preponderance of the evidence that the Division's decision was an
7 improper exercise of its authority under the law. The Division respectfully requests that
8 the Commission dismiss this appeal on the basis that Silver Bell has failed to
9 demonstrate any legal basis to support the appeal, or alternatively uphold the Division's
10 decision to renew the Permit.

11 DATED this 20th day of October, 2016.

12 ADAM PAUL LAXALT
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 20th day of October, 2016, I served a true and correct copy of the foregoing NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S RESPONSE BRIEF, by placing said document in the U.S. Mail, postage prepaid, addressed to:

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Appellant


Dorene A. Wright

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