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Case No. 06-01181A
Dept No. I

SEP 27 2006

ENVIRONMENTAL PROTECTION

'06 SEP 25 P4:05

C. ROMESBURG
CLERK

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR CARSON CITY

GREAT BASIN MINE WATCH,

Petitioner

vs.

STATE OF NEVADA DEPARTMENT OF
CONSERVATION AND NATURAL RESOURCES;
DIVISION OF ENVIRONMENTAL PROTECTION;
BUREAU OF MINING REGULATION AND
RECLAMATION; STATE
ENVIRONMENTAL COMMISSION; AND
ANGLOGOLD ASHANTI (NEVADA) CORPORATION

Respondents.

GBMW'S RESPONSE
TO NDEP'S MOTION
TO DISMISS

On September 5, 2006 Great Basin Mine Watch (GBMW) filed a petition for judicial review and alternative request for writ relief with this Court regarding the Nevada Department of Conservation and Natural Resources Division of Environmental Protection (NDEP), State Environmental Commission (SEC)'s July 10, 2006 Order (attached) dismissing GBMW's appeal of NDEP's renewal of Water Pollution Control Permit (WPCP) NEV0087001 for the Big Springs Mine. On September 13, 2006, NDEP filed a motion to dismiss GBMW's request for judicial review and alternative request for writ relief for lack of jurisdiction. GBMW now, by and through its undersigned attorney, files this response and, based on the points and authorities outlined herein, respectfully

avers that jurisdiction for this matter is properly before this Court and, accordingly, requests that this Court deny NDEP's motion.

NDEP argues that this Court lack jurisdiction over the underlying matter because GBMW did not timely file its petition for judicial review as required by the Administrative Procedures Act (APA), NRS 233B.030 et seq. The APA requires that a petition for judicial review be filed "within 30 days after service of the final decision of the agency." NRS 233B.130(2)(c). The APA also expressly provides that, "[w]here appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute." NRS 233B.130. The SEC's regulations expressly and specifically provide that where a petition for rehearing or reconsideration is filed, "[a] modified final decision of the Commission or the affirmation of an original decision of the Commission is a final decision for the purposes of judicial review." NAC 445B.899(10). Here, it is uncontested that GBMW filed its petition for judicial review on September 5, 2006, within thirty days of the SEC's August 4, 2006 decision upon rehearing.

NDEP nevertheless argues, based upon another section of the APA, that the filing of a petition for reconsideration, if it is ultimately unsuccessful, does not toll the thirty day period for filing a petition for judicial review. NDEP's Motion, at 3. Specifically, NDEP relies on NRS 233B.130(4), which states that,

A petition for rehearing or reconsideration must be filed within 15 days after the date of service of the final decision. An order granting or denying the petition must be served on all parties at least 5 days before the expiration of the time for filing the petition for judicial review. If the petition is granted, the subsequent order shall be deemed the final order for the purpose of judicial review.

NDEP's Motion, at 3, citing NRS 233B.130(4).

NDEP argues that “[t]he entirety of subsection (4) can only be read to require the filing, and the decision, regarding a Petition for judicial review to occur prior to the running of the 30-day appeal period as contemplated by subsection (2)(c).” NDEP’s Motion, at 3. Contrary to NDEP’s argument, however, that conclusion is not compelled by the statutory language of NRS 233B.120(4) and, likewise, does not comport with the APA’s overall statutory scheme, the SEC’s own regulations (which NDEP fails to address or acknowledge in its motion), the SEC’s own practice, or principles of judicial economy.¹

The statute’s express terms are silent as to whether or not the time for filing a petition for judicial review is tolled where a petition for reconsideration is denied. While the interpretation advanced by NDEP - that an ineffective petition for reconsideration does not toll the time period allowed for judicial review – may be somewhat plausible, the inference is not compelled by the plain language of the statute. Rather, to arrive at that conclusion, the court must infer it, by negative implication, from the ambiguous terms of the statute.

Here, the legislature did not specifically deal with the situation at hand. The legislature specifically provided that where a petition for reconsideration is granted, the thirty day period for filing a petition for judicial review is tolled. The legislature did not, however, expressly address the inverse situation, at issue here, where a petition for reconsideration is denied. Nevada law provides that omissions of subject matter from

¹ To the extent that this court determines that the underlying appeal is not governed by the APA, as averred in GBMW’s petition for judicial review at ¶¶ 17, 23, 24, 121, 122, NDEP’s motion to dismiss, which is premised on the APA, is of no effect.

statutory provisions are presumed to be intentional. Department of Taxation v. DaimlerChrysler Services North America, LLC, 121 Nev. 77, 119 P.3d 135, 139 (2005).

In the presence of the gap left by the legislature, the SEC addressed the situation in its own regulations providing, again, that “the affirmation of an original decision of the Commission is a final decision for the purposes of judicial review.” NAC 445B.899(10). This interpretation is not inconsistent with the plain terms of the statute and should, therefore, prevail. The Nevada Supreme Court has repeatedly held that agency’s receive substantial deference when interpreting statutes, particularly where the statute is ambiguous and their interpretation is within the terms of the statutory language. See e.g., Department of Taxation v. DaimlerChrysler Services North America, LLC, 121 Nev. 77, 119 P.3d 135, 139 (2005); State, Dept. of Business and Industry, Office of Labor Com'r v. Granite, 118 Nev. 83, 90, 40 P.3d 423, 428 (2002); Imperial Palace v. State. Dep't Taxation, 108 Nev. 1060, 1067, 843 P.2d 813, 818 (1992).

Deference is particularly appropriate where, as here, the legislature has acquiesced to the agency’s interpretation. See State ex rel. Tax Comm'n v. Saveway, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983) (“the Legislature's acquiescence in an agency's reasonable interpretation indicates that the interpretation is consistent with legislative intent”). All regulations passed by an agency are required, pursuant to the APA, to be reviewed and approved by the legislature. See e.g., NRS 233B.067(1) (“[a]fter adopting a permanent regulation, the agency shall submit the informational statement prepared pursuant to NRS 233B.066 and one copy of each regulation adopted to the Legislative Counsel for review by the Legislative Commission to determine whether the regulation conforms to the statutory authority pursuant to which it was adopted and whether the

regulation carries out the intent of the Legislature in granting that authority. “). The legislature has, therefore in this case, acquiesced that the SEC has the authority to designate when the SEC’s decisions are deemed final for purposes of judicial review.

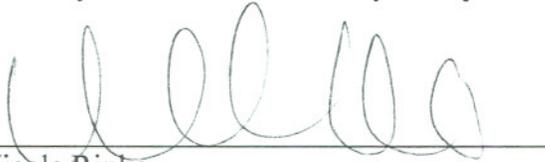
Within this authority, the SEC has, in no uncertain terms, determined that its decisions are only final once a petition for reconsideration or rehearing has been properly filed and ruled upon. NAC 445B.899(10). This approach is not only consistent with the APA, but is likewise consistent with the historic practice of the SEC and the sound principles underlying administrative law. GBMW has previously filed two petitions for judicial review with this Court regarding decisions made by the State Environmental Commission (Case No. 03-01140A and 03-00571A). In both cases, GBMW, as it did here, filed a timely petition for reconsideration with the SEC and upon denial of the petition, filed its petition for judicial review within thirty days. In neither case, did the SEC (or the NDEP or the Attorney General’s Office) object to this practice.

Finally, it is a well-established rule that administrative remedies must be exhausted prior to seeking judicial relief. See e.g., Malecon Tobacco, LLC v. State Dept. of Taxation, 118 Nev. 837, 839, 59 P.3d 474, 475 - 476 (2002); State v. Sadler, 21 Nev. 13, 23 P. 799 (1890); First Am. Title Co. of Nevada v. State, 91 Nev. 804, 543 P.2d 1344 (1975). It has been repeatedly recognized throughout the federal courts that exhaustion promotes accuracy, efficiency, agency autonomy and judicial economy. Cudjoe v. Independent School Dist. No. 12, 297 F.3d 1058, 1065-66 (10th Cir. 2002); Detroit Newspaper Agency v. N.L.R.B., 286 F.3d 391, 396 -397 (6th Cir. 2002); Ray v. Kertes, 285 F.3d 287, 292 (3rd Cir. 2002); Amerco v. N.L.R.B., 458 F.3d 883, 888 (9th Cir. 2006). As the Nevada Supreme Court itself has explained, “[t]he exhaustion doctrine is

sound judicial policy. If administrative remedies are pursued to their fullest, judicial intervention may become unnecessary.” First Am. Title Co. of Nevada v. State, 91 Nev. 804, 543 P.2d 1344 (1975).

Consistent with the promotion of judicial economy, the SEC’s own practice and regulations, and the APA, GBMW respectfully avers that it timely filed its petition for judicial review and, accordingly, requests that this court deny NDEP’s motion to dismiss GBMW’s appeal for lack of jurisdiction.

Respectfully submitted this 25th day of September, 2006 by,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

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CERTIFICATE OF SERVICE

I, Nicole Rinke, hereby certify that I served the foregoing upon the following individuals via the United States Postal Service, 25th day of September, 2006:

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