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BEOFRE THE STATE OF NEVADA ENVIRONMENTAL COMMISSION

In Re: Appeal of Water Pollution Control Permit **NV0022269, Big Springs Mine**	**APPELLANT GREAT BASIN MINE WATCH'S OPPOSITION TO NDEP'S NOTICE OF INTENT TO CHALLENGE GBMW'S STANDING PURSUANT TO NRS 233B.127(4)**

Great Basin Mine Watch (GBMW), by and through its undersigned attorney, hereby provides this opposition to NDEP's notice of intent to challenge GBMW's standing to bring the underlying appeal before the State Environmental Commission (Commission or SEC). NDEP relies on NRS 233B.127(4), passed by the Nevada Legislature in 2005, effective October, 2005, for its challenge to GBMW's standing. For the reasons set-forth herein, however, NRS 233B.127(4) does not preclude GBMW from bringing the underlying appeal before the Commission.[1]

[1] GBMW objects to NDEP's undue delay in raising this issue just one week before the scheduled hearing in the underlying matter. NDEP's delayed filing of the motion does not comport with the briefing schedule established by the SEC's August 31 and October 24, 2005 Order. Nor is there any apparent reason for NDEP's delay in raising this issue. NRS 233B.127(4) became effective in October, 2005, before any briefing

NDEP argues that according to NRS 233B.127(4) GBMW cannot appeal NDEP's renewal of Water Pollution Control Permit (WPCP) NEV0087001 to the SEC if it does not have a financial interest in the outcome of the appeal. As an initial matter, it is highly questionable whether NRS 233B.127(4) has the meaning NDEP attempts to ascribe to it or whether the provision would, as NDEP argues, apply retroactively to GBMW's appeal that was filed well-before the legislature adopted this new provision.[2] Despite NDEP's attempt to assert otherwise, "[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent." McKellar v. McKellar, 110 Nev. 200, 203 (Nev.,1994); see also Gilman v. Nevada State Board of Veterinary Medical Examiners, 120 Nev. 263, 89 P.3d 1000, 1008 (2004) (holding that a statutory amendment did not apply retroactively "because the legislature did not clearly show that it intended the statute to apply retroactively"). Here, the plain language of NRS 233B.127(4) does not evince a clear legislative intent to apply the provision retroactively. As such, according to the precedent of the Nevada Supreme Court, the general rule against retroactivity applies.

Notably, even Landgraf v. USI Film Products, the case NDEP relies heavily upon to support its argument, sets forth the general presumption against retroactive application of statutory amendments.

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occurred in the underlying matter, providing NDEP ample opportunity to raise the issue as part of the SEC's mandated briefing schedule.

[2] Notably, NRS 445A.610(1) requires that appeal hearings be held within twenty days of the filing of the notice of appeal. Here, more than seven months have passed since GBMW filed its notice of appeal (GBMW filed the underlying appeal on August 5, 2005). Had the SEC held the hearing within the statutory time frame, application of NRS 233B.127(4) would not have been an issue as it had not yet been passed by the Legislature.

> As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.

511 U.S. 244, 265 (1994). Landgraf likewise recognized with support the general rule, well-established in Nevada, that statutes should only apply retroactively if the legislature evinced a clear intent for retroactive application.

> Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

Id. at 271.

Rather than acknowledge this general presumption, the State narrowly and misleadingly focuses on the Landgraf Court's recognition that jurisdictional rules are often applied retroactively. State's Motion, at 2-3. The State, however, ignores the Court's expressed caveat to that trend. As the Court explained, "[t]his jurisdictional rule doe not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." Landgraf, 511 U.S. at 274 n. 27 (internal quotation omitted). Thus, while the Court in Landgraf recognized that jurisdictional rules have often been applied retroactively, it retained the general presumption against retroactivity even for changes to jurisdictional statutes.

Finally, the Court in Landgraf plainly stated that while there are situations where deviation from the general rule against retroactivity may be appropriate, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of

the new provision is not retroactive." Id. at 274 (emphasis added). As the State itself asserts in its Motion, prospective relief "is exactly the relief Great Basin seeks." Motion, at 3. As such, under the plain language of the holding in Landgraf, contrary to the State's argument, there is no question that NRS 233B.127(4) does not apply retroactively to the underlying appeal.

However, regardless of the intent and applicability of NRS 233B.127(4), GBMW's right of appeal to the SEC exists under the separate statutory provisions that apply directly to the SEC. Nevada's Water Pollution Control Law plainly establishes the right of appeal to the SEC for "any person aggrieved by: (a) the issuance, denial, renewal, suspension or revocation of a permit; or (b) the issuance, modification or rescission of any other order." NRS 445A.605(1).[3] This provision applies specifically to the SEC and the APA, by its plain terms, does not in anyway supersede or abrogate this more specific grant of jurisdiction.[4]

The APA expressly provides that,

> The provisions of this chapter are intended to supplement statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.

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[3] The SEC's own regulations reiterate this right of appeal. NAC 445A.388 ("[a]ny person aggrieved by an action taken by the department pursuant to NAC 445A.350 to NAC 445A.447, inclusive, may appeal to the Commission").

[4] In addition, it is a well-accepted canon of statutory construction that when two statutory provisions are in conflict the more specific of the two should apply. See Mineral County v. State, Bd. of Equalization, 2005 WL 2233558, *4 (Nev.) (2005) (discussing and applying the "canon of statutory construction that requires statutes to be read in harmony but promotes the use of a specific statute over that of a general statute where they pertain to the same topic"); Western Realty Co. v. City of Reno, 63 Nev. 330, 337, 172 P.2d 158, 161 (1946) ("[i]t is a well settled rule of statutory construction that a special provision, dealing expressly and in detail with a particular subject, is controlling, in preference to a general provision relating only in general terms to the same subject").

NRS 233B.020(2). Here, the legislature has specifically provided any aggrieved person with the right to appeal NDEP's permitting decision to the SEC, regardless of financial interest. This right, by the plain terms of the APA, is undisturbed by the legislature's adoption of NRS 233B.127(4).

The contrary argument advanced by the State would, if adopted, strip the SEC of its statutory responsibility to oversee decisions made by NDEP. This result would utterly belie the longstanding policies and principles of administrative review. It is well-understood that, administrative agencies are better equipped than courts to deal with technical matters that lie within their scope of expertise. See McCarthy v. Madigan, 503 US 140, 144-45 (1992). As a result, in administrative review cases such as this, the courts generally refrain from exercising jurisdiction where jurisdiction could first be had within the administrative agency. See 2 Am. Jur. 2d Administrative Law § 513 (discussing the doctrine of primary jurisdiction, which applies to claims that "are properly cognizable in court but which contain some issue within the special competence of an administrative agency."); White Mtn. Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988) (describing exhaustion, which requires "parties to pursue all administrative remedies prior to judicial review in order to allow agencies to develop a complete factual record and to apply their expertise"). This approach promotes judicial economy and effective resolution of factually complex matters that the agency is better able to address. See McCarthy v. Madigan, 503 US 140, 145 (1992) ("Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.").

As the United States Supreme Court has explained, allowing the administrative agency to review a matter first,

> promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct it own errors, a judicial controversy may well be mooted ... [a]nd even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.

McCarthy v. Madigan, 503 U.S. at 145.

Thus, in addition to the plain language of the relevant statutes, the common-sense principles of administrative law further support the conclusion that GBMW has standing to bring the underlying appeal of Water Pollution Control Permit NEV0087001 to the SEC. The State's attempt to argue otherwise, runs counter to the plain language of the Nevada Administrative Procedure Act, the Nevada Water Pollution Control Law, and the well-accepted principles of administrative law, and must be rejected. As such, for the foregoing reasons, GBMW strongly opposes NDEP's notice of intent to challenge GBMW's standing and respectfully urges the SEC to find that GBMW has standing to bring the underlying appeal.

Respectfully submitted this ____ day of March, 2005,

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CERTIFICATE OF SERVICE

I, Nicole Rinke, hereby certify that I served the foregoing upon the following individuals via hand delivery or First Class Mail this _____ day of March, 2006:

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