

1 Case No. 06-01181A
2 Dept. No. I

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

4 GREAT BASIN MINE WATCH,)
5)
6 Petitioner,)
7 vs.)
8)
9 STATE OF NEVADA DEPARTMENT OF)
10 CONSERVATION AND NATURAL)
11 RESOURCES; DIVISION OF)
12 ENVIRONMENTAL PROTECTION;)
13 BUREAU OF MINING REGULATION AND)
14 RECLAMATION; STATE)
15 ENVIRONMENTAL COMMISSION; AND)
16 ANGLOGOLD ASHANTI (NEVADA))
17 CORPORATION,)
18 Respondents.)

NDEP'S MOTION TO DISMISS

14 Comes now, the State of Nevada Division of Environmental Protection (NDEP), by and
15 through Attorney General George J. Chanos and Senior Deputy Attorney General William
16 Frey, and hereby moves this Court to dismiss this matter for lack of jurisdiction. This Motion is
17 based on the attached Memorandum of Points and Authorities, all papers on file, NRS
18 233B.130, together with any additional argument this Court may require.

19 Dated this 13th day of September, 2006.

20 GEORGE J. CHANOS
21 Attorney General

22
23 By: _____
24 WILLIAM J. FREY
25 Sr. Deputy Attorney General
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. Background**

3 On July 6, 2006, the State Environmental Commission (SEC), at a duly noticed
4 hearing, dismissed an administrative appeal brought by Great Basin Mine Watch (Great
5 Basin). The administrative appeal was dismissed pursuant to NRS 233B.127(4). A written
6 decision of the Order of Dismissal was issued on July 10, 2006. On July 25, 2006, Great
7 Basin filed a Petition for Reconsideration and Rehearing (Petition). NDEP filed an Opposition
8 to the Petition on August 1, 2006. The SEC held a hearing on August 4, 2006, at which it
9 denied the Petition. The thirty-day period in which a party has an opportunity to file a Petition
10 for Judicial Review of an administrative proceeding ended on August 9, 2006. That thirty-day
11 period is unchanged by the filing of a Petition for Reconsideration and Rehearing. Great
12 Basin filed its Petition for Judicial Review and Alternative Request for Extraordinary Writ Relief
13 (Petition for Judicial Review) on September 5, 2006, twenty-seven days late. This Court must
14 dismiss the Petition for Judicial Review since it was filed in excess of the statutory time limit.
15 A review of NRS 233B.130, the governing statute, dictates this outcome.

16 **B. Argument**

17 NRS 233B.130 contains the requirements for judicial review of administrative
18 proceedings. Specifically, NRS 233B.130 (2) (c) requires a petition for judicial review be filed
19 within 30 days after service of the final decision of the agency. The plain language of
20 233B.130 (2) (c) required Great Basin to have filed its Petition for Judicial Review no later
21 than August 9, 2006.

22 NRS 233B.130 is jurisdictional in nature and is designed to place limits on the
23 substantive rights of parties to seek review in an action commenced before an agency. A
24 district court is divested of jurisdiction if the petition is not timely filed. *Bing Construction Co.*
25 *of Nevada v. Nevada Department of Taxation*, 107 Nev. 630, 631 (1991).

26 The fact that Great Basin filed a Petition for Reconsideration and Rehearing provides
27 no support for Great Basin's untimely filing. NRS 233B.130(4) provides that such a petition be
28

1 filed within 15 days after service of a final decision. The final decision was served on July 10,
2 2006. Great Basin had until July 25, 2006 to file its Petition for Reconsideration and
3 Rehearing. Great Basin met this deadline. The SEC was required to grant or deny the
4 Petition “at least 5 days before the expiration of the time for filing the petition for judicial
5 review.” NRS 233B.130 (4). On August 4, 2006, five days prior to expiration of the time for
6 filing a Petition for Judicial Review, the SEC at a public hearing, with Great Basin in
7 attendance, denied the Petition. The entirety of subsection (4) can only be read to require the
8 filing, and the decision, regarding a Petition for Judicial Review to occur prior to the running of
9 the 30-day appeal period as contemplated by subsection (2)(c). Confirming this interpretation
10 is the last sentence of subsection (4) which states, “[i]f the petition is granted, the subsequent
11 order shall be deemed the final order for the purpose of judicial review.” Therefore, only if the
12 petition is granted is a new time established for calculating judicial review.

13
14 Great Basin makes the alternative argument that it is entitled to an extraordinary writ
15 either certiorari or mandamus. Consistent with normal procedure, NDEP will not reply to the
16 merits of the Petition for a Writ unless ordered to do so by the Court. However, it is settled
17 law that certiorari will not lie if a right to appeal exists. *State ex rel. Schumacher v. First*
18 *Judicial District Court*, 77 Nev. 408 (1961). Additionally, mandamus should not be used
19 unless the usual and ordinary remedies failed to afford relief, and there would be a failure of
20 justice. *State v. Storey County*, 22 Nev. 263,264 (1895). There was a remedy available to
21 Great Basin. Instead of timely filing its Petition for Judicial Review, it sat on its hands. Now,
22 twenty-seven days late, it asserts that the Court must hear the judicial review because to fail
23 to do so would leave Great Basin with no remedy and therefore, the Court must issue a writ.
24 The Court should ignore Great Basin’s alternative request.

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D. Conclusion

NDEP respectfully requests this Court dismiss the Petition for Judicial Review filed by Great Basin Mine Watch for lack of subject matter jurisdiction.

Dated this 13th day of September, 2006.

GEORGE J. CHANOS
Attorney General

By: _____
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 13th day of September, 2006, I served a copy of the foregoing, **NDEP'S MOTION TO DISMISS**, by mailing, via U.S. Post Office, postage pre-paid, a true copy to the following:

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