

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

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

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

**NDEP'S REPLY TO GBMW'S
RESPONSE TO NDEP'S
MOTION TO DISMISS**

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REPLY

A. Background

On July 6, 2006, the State Environmental Commission (SEC) dismissed an administrative appeal brought by Great Basin Mine Watch (Great Basin). The written decision of the Order of Dismissal was issued on July 10, 2006. On July 25, 2006, Great Basin filed a Petition for Reconsideration and Rehearing. The SEC held a hearing on August 4, 2006, at which it denied the Petition for Reconsideration and Rehearing. The thirty-day period in which Great Basin had to file a Petition for Judicial Review of the SEC decision ended on August 9, 2006, and was unchanged by the filing of a Petition for Reconsideration and Rehearing. Great Basin filed its Petition for Judicial Review and Alternative Request for Extraordinary Writ Relief (Petition) on September 5, 2006, twenty-seven days late.

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1 On September 13, 2006, the Nevada Division of Environmental Protection (NDEP)
2 filed a Motion to Dismiss Great Basin Mine Watch's Petition (Motion). Great Basin's Petition
3 was made "pursuant to the State Administrative Procedure Act (APA), NRS 233B.010 et seq."
4 Petition p. 1, l. 29. NDEP's Motion was grounded upon NRS 233B.130(2)(c) which requires
5 the filing of a petition for judicial review be filed within 30 days of the final decision of an
6 agency. Great Basin filed its Petition for Judicial Review twenty-seven days late. Great
7 Basin's failure to comply with the statutory requirements for timely filing deprives this Court of
8 subject matter jurisdiction to proceed with judicial review.

9 **B. Argument**

10 NRS 233B.130 contains the requirements for judicial review of administrative
11 proceedings. Specifically, NRS 233B.130(2)(c) requires a petition for judicial review be filed
12 within 30 days after service of the final decision of the agency. Great Basin does not dispute
13 the 30-day requirement. The plain language of 233B.130(2)(c) required Great Basin to have
14 filed its Petition for Judicial Review no later than August 9, 2006.

15 Great Basin argues that its filing a Petition for Reconsideration and Rehearing tolled
16 the 30-day requirement of NRS 233B.130(2)(c), even though the SEC denied the Petition. By
17 denying the Petition, the SEC did not issue a new final decision nor did it affirm its decision of
18 July 10, 2006. That original decision remained untouched.

19 Only if the SEC had granted the Petition for Reconsideration and Rehearing, would the
20 30-day clock have been reset.

21 Confirming this interpretation is the last sentence of subsection (4) which states, "[i]f
22 the petition is granted, the subsequent order shall be deemed the final order for the purpose of
23 judicial review." Therefore, only if the petition is granted, is a new time established for
24 calculating judicial review.

25 Although conceding that NDEP's interpretation of the State APA is "plausible," Great
26 Basin argues that such an interpretation is not "compelled." Response at p. 3. Rather,
27 according to Great Basin, the APA is ambiguous and the Court should focus on the SEC's
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1 regulations. Great Basin argues that deference to these regulations "is particularly
2 appropriate where, as here, the legislature has acquiesced to the agency's interpretation." *Id.*

3 Referring to the SEC's regulations only further confirms the Court's lack of jurisdiction
4 in this matter. These regulations explicitly state that "the filing of a petition for reconsideration
5 ... or the granting of such a petition does not excuse compliance with, or suspend the
6 effectiveness of, the challenged decision." NAC 445B.899(6). Thus, for purposes of judicial
7 review, the challenged decision was never stayed and, as such, Great Basin had to file its
8 Petition for Judicial Review within thirty (30) days of the date that decision was made. There
9 is no question that Great Basin failed to comply with that deadline and as such, its case must
10 be dismissed.

11 Great Basin rests its argument on the mistaken notion that the denial of its Petition for
12 Rehearing and Reconsideration was an affirmation of the original decision. The SEC
13 regulatory provision Great Basin refers to -- NAC 445B.899(10)-- is not applicable in this
14 case. That provision states that a "modified final decision" or the "affirmation of an original
15 decision" by the SEC is a final decision for purposes of judicial review. These terms refer to
16 the actions that the SEC would take *only if* the SEC had granted the Petition for
17 Reconsideration. See NAC 445B.899(7) ("If the Commission grants a petition for
18 reconsideration, it will reexamine the record and decision with regard to the issues on which
19 reconsideration was granted and issue a *modified final decision* or *affirm its original decision*
20 within twenty (20) days after the petition is granted") (emphasis added). In this case, the SEC
21 simply denied the Petition for Reconsideration. It neither modified the final decision nor did it
22 affirm the original decision. As such, and consistent with the applicable provisions in the SEC
23 regulations, the time for filing a petition for judicial review was never extended.

24 NAC 445B.899(10) never comes into play. Section (10) concerns a modified final
25 decision or an affirmation of an original decision, both of which require the predicate act of
26 granting a Petition for Reconsideration.

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C. 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 2nd day of October, 2006.

GEORGE J. CHANOS
Attorney General

By: _____
WILLIAM J. FREY
Sr. Deputy Attorney General
100 North Carson Street
Carson City NV 89701
(775) 684-1229

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 2nd day of October, 2006, I served a copy of the foregoing, **NDEP'S REPLY TO GBMW'S RESPONSE TO NDEP'S MOTION TO DISMISS**, by mailing, via U.S. Post Office, postage pre-paid, a true copy to the following:

Nicole Rinke
Western Mining Action Project
505 South Arlington Avenue Suite 110
Reno NV 89509

John Walker
Executive Secretary
State Environmental Commission
333 West Nye Lane Room 138
Carson City NV 89706-0851

David Newton
Deputy Attorney General
Attorney General's Office
555 East Washington Suite 3900
Las Vegas NV 89101

Eugene J. Riordan
Vranesh & Raisch, LLP
1720 14th Street Suite 200
Post Office Box 871
Boulder CO 80306-0871

Jim Butler
Parsons Behle & Latimer
One East Liberty Street 6th Floor
Reno NV 89504

Peter O'Connor
General Counsel
AngloGold Ashanti (Nevada) Corp.
7400 East Orchard Road Suite 350
Greenwood Village CO 08111
