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7 APPEAL HEARING  
8 BEFORE THE STATE ENVIRONMENTAL COMMISSION  
STATE OF NEVADA

9 In Re: )  
10 Appeal of Water Pollution Control Permit: )  
11 **NEV0087001, Big Springs Mine** )  
12 \_\_\_\_\_ )

**NOTICE OF NDEP'S  
INTENT TO CHALLENGE GREAT  
BASIN MINE WATCH'S STANDING  
PURSUANT TO NRS 233B.127(4)**

13 The State of Nevada, Division of Environmental Protection ("NDEP"), by and through its  
14 counsel of record, GEORGE J. CHANOS, Attorney General, and WILLIAM FREY, Senior  
15 Deputy Attorney General, provides this notice of intent to challenge Great Basin Mine Watch's  
16 standing to proceed with this appeal pursuant to NRS 233B.127(4).

17 The 2005 session of the Nevada Legislature passed Senate Bill 428 which modified the  
18 jurisdictional limits of a contested case. The bill was codified at Nevada Revised Statutes  
19 (NRS) 233B.127(4) (*Exhibit A attached hereto*) and became effective on October 1, 2005.

20 The relevant portion of the statute states:

21 4. Except as otherwise provided in this subsection, a person must  
22 not be admitted as a party to an administrative proceeding in a  
23 contested case involving the grant, denial or renewal of a license<sup>1</sup>  
unless he demonstrates to the satisfaction of the presiding hearing  
officer that:

24 (a) His financial situation is likely to be maintained or to improve  
as a direct result of the grant or renewal of the license; or

25 (b) His financial situation is likely to deteriorate as a direct result of  
the denial of the license or refusal to renew the license.

26 The provisions of this subsection do not preclude the admission,  
27 as a party, of any person who will participate in the administrative  
proceeding as the agent or legal representative of an agency.  
[Footnote added.]

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<sup>1</sup> NRS 233B.034 defines license to include a permit.

1 NDEP requests that the State Environmental Commission (“Commission”), acting in its  
3 capacity as the presiding hearing officer, require Great Basin Mine Watch (“Great Basin”) to  
4 demonstrate that it meets the requirements of section 4 (a) or (b). If Great Basin fails to make  
5 such a demonstration then the Commission should not admit it as a party. NDEP files this  
6 notice to provide Great Basin with an opportunity to be ready to respond.

7 Chapter 233B of the NRS is commonly referred to as Nevada’s Administrative  
8 Procedures Act. The purpose of at least a portion of this chapter is to provide state boards  
9 and commissions with the legal procedures they should follow in conducting contested cases.  
10 This chapter is applicable to Great Basin’s appeal of the Big Springs Mine water pollution  
11 control permit.

12 Even though NRS 233B.127(4) became effective on October 1, 2005, and the appeal in  
13 this matter was filed on August 5, 2005, there are no concerns of retroactive application. The  
14 statute on its face did not change any of Great Basin’s rights. It changed the jurisdictional  
15 limits of the Commission regarding who can appear before it. The statute requires that the  
16 hearing officer not admit as a party anyone who cannot demonstrate a direct financial interest  
17 in the outcome. That determination must be made at the time of the hearing and not at the  
18 time of filing the appeal. Even if the Commission concludes that the determination is made at  
19 the time of filing the appeal, the application of NRS 233B.127(4) is still not retroactive.

20 The United States Supreme Court (“Court”) has addressed, and upheld, intervening  
21 procedural changes even when the application of the new rule operates to a party’s  
22 disadvantage in a particular case. See e.g., *Dobbert v. Florida*, 432 U.S. 282, 293-294  
23 (1977). In particular the Court has held “[a]pplication of a new jurisdictional rule usually ‘takes  
24 away no substantive right but simply changes the tribunal that is to hear the case.’” *Landgraf*  
25 *v. USI Film Products*, 511 U.S. 244, 274 (1994) citing *Hallowell v. Commons*, 239 U.S. 506,  
26 508 (1916). *Attached hereto as Exhibit B*. The Court has regularly “applied intervening  
27 statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying  
28 conduct occurred or when the suit was filed.” *Id.* The Court relied on its “‘consistent’  
practice,” in ordering “an action dismissed because the jurisdictional statute under which it had

1 been (properly) filed was subsequently repealed.” *Id.* citing *Bruner v. United States*, 343 U.S.  
3 506, 508-509 (1952).

4 Most relevant for Great Basin’s appeal is the Court’s rejection of the presumption of  
5 statutory retroactivity by stating “a court should ‘apply the law in effect at the time it renders its  
6 decision.’” *Id.* citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974).

7 Finally, the Court stated that where the intervening statute affects the propriety of  
8 prospective relief, which is exactly the relief Great Basin seeks, application of the new  
9 provision is not retroactive. *Landgraf*, at 273.

10 Thus, for Great Basin to remain a party to this proceeding, it must demonstrate either  
11 that: (a) its financial situation is likely to be maintained or improved as a direct result of  
12 NDEP’s renewal of the permit; or (b) its financial situation is likely to deteriorate as a direct  
13 result of NDEP’s denial of the permit renewal. We believe that, as an initial matter in this  
14 proceeding, Great Basin should be required to present facts relevant to its standing under the  
15 current statute. Once those facts are before the Commission, we would like the opportunity to  
16 argue for dismissal of the appeal on the grounds that Great Basin does not satisfy the criteria  
17 necessary for “party” status.

18 DATED this 22nd day of March, 2006.

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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 22<sup>ND</sup> day of March 2006, I deposited for mailing a true and correct copy of the foregoing **NOTICE OF NDEP'S INTENT TO CHALLENGE GREAT BASIN MINE WATCH'S STANDING PURSUANT TO NRS 233B.127(4)** on the following parties by first class mail, postage prepaid:

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