

1-1-2007

## Great Basin Mine Watch v. Hankins, 456 F.3d 955 (9th Cir. 2006)

Brandon Saxon

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Brandon Saxon, Court Report, Great Basin Mine Watch v. Hankins, 456 F.3d 955 (9th Cir. 2006), 10 U. Denv. Water L. Rev. 484 (2007).

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manded the case to the district court with instructions to apply this new test.

*Elizabeth Meyer*

## NINTH CIRCUIT

**Great Basin Mine Watch v. Hankins, 456 F.3d 955 (9th Cir. 2006)** (affirming the district court's decision that states may set minimum flow standards, but are not required to do so; reversing the district court's decision finding Great Basin Mine Watch's argument sufficiently exhausted and concluding that the Agency's cumulative impact analysis was insufficient).

In March of 1997, Appellee Newmont Mining Corporation ("Newmont") proposed an expansion of its open-pit gold mining facility ("South Project") to the Bureau of Land Management, the Department of the Interior, and Helen Hankins, manager of the BLM's local field office (collectively "BLM"). The proposed South Project was on the southern edge of Newmont's existing mine, which the BLM approved in 1993. The South Project would have disturbed an additional 1,392 acres of land, of which, 839 are public. The South Project proposed a deepening of the existing mine, along with continued dewatering and discharging excess groundwater into nearby Maggie Creek.

In April of 1997, Newmont also filed a proposal with the BLM for the Leeville Project ("Leeville"), which proposed a new open-pit gold mine 20 miles north. This project proposed disturbance of 486 acres of land, of which, 453 are public. Under the proposal, the South Project site received gold ore trucked in from Leeville for processing.

The BLM, pursuant to the National Environmental Policy Act ("NEPA"), found that there was a potential for significant environmental impacts, and required an Environment Impact Statement ("EIS") be prepared for both proposals. The BLM issued a final EIS for the South Project and Leeville in April of 2002 and July of 2002 respectively. The BLM then issued Records of Decision ("RODs") for the South Project and Leeville in July of 2002 and September of 2002 respectively.

In both RODs, the BLM permitted agency preferred alternatives to Newmont's plan, finding that the agency's alternatives would not cause unnecessary or undue degradation of the public lands." The alternatives provided for further mitigation of impacts related to dewatering. The BLM also required Newmont to post bonds for post-mine closure mitigation, and for groundwater and surface water monitoring.

In November of 2002, Great Basin Mine Watch ("Great Basin") filed suit in United States District Court in Nevada against the BLM. The complaint, citing violations under NEPA, the Clean Water Act ("CWA") and the Administrative Procedures Act ("APA"), sought review of the final EISs, the RODs, and the bonding requirements. Great

Basin argued that the BLM violated the CWA by failing to maintain “all beneficial uses” of the water as required under the act. Great Basin also argued that the discharged groundwater would violate state and federal water quality standards.

Great Basin attempted to introduce a document from the Nevada Division of Environmental Protection, arguing that the document was relevant as to whether the South Project and Leeville were connected actions and the BLM should have evaluated these proposals in a single EIS. The District Court refused admission of the document, and refused taking judicial notice of the facts contained in the document. The district court granted summary judgment for the BLM on all claims. The district court granted summary judgment on the CWA claim because it found those issues of water flow are questions of fact that lies within the technical knowledge of the BLM. Great Basin appealed to the United States Court of Appeals for the Ninth Circuit.

In affirming the district court’s CWA determination, the court found Great Basin’s claim failed as a matter of law. The Court found that the South Project and Leeville sites were not connected actions, and a single EIS was not required. Then, the court, in referring to the case law Great Basin relied upon, found that the case merely held that states may set minimum flow standards; it did not hold that states must do so. Because Nevada does not have an explicit provision requiring such enforcement, the provisions of the CWA are binding. Therefore, the court held the CWA’s anti-degradation provision was inapplicable and consequently Great Basin’s arguments regarding a potential drying effect fail as a matter of law.

The court next reviewed the district court’s decision that Great Basin had not properly exhausted the issue of groundwater discharge before the BLM prior to filing suit. The court held that Great Basin’s expressed concern during the comment period regarding the current and future levels of toxins in the discharged water was sufficient to preserve the claim for judicial review.

The court went on to state that general comments about groundwater, springs, and seeps did not suggest an argument that the BLM had failed to protect federally-reserved water rights under an eighty year old order; and therefore those claims were not exhausted. The court then concluded that the cumulative impacts analyses in the two projects final environmental impact statements were insufficient.

The court reversed the district court’s determination that Great Basin failed to exhaust the argument and the court concluded that the BLM’s cumulative impacts analysis was insufficient and reversed the district court. In all other aspects, it affirmed the judgment.

The dissent agreed in the majority determination that the cumulative effects analysis was insufficient, but found that the South Project and Leeville Project were connected actions, and required only a single, comprehensive EIS.

The dissent employed the “independent utility” test from a 2000 Ninth Circuit case. This benchmark test, the dissent argued, decides whether each of the two projects would take place with or without the other, and thus has independent utility. Here, because the South Project is an expansion of the existing Leeville mine, and split mine operations occurred between the two facilities, the two projects are interconnected and the appropriate evaluation of the two is a single EIS. Therefore, the dissent would have reversed the district court’s granting of summary judgment as to the sufficiency of the EIS, but affirms in all other respects.

*Brandon Saxon*

### FEDERAL CIRCUIT

**Colvin Cattle Co. v. United States, 468 F.3d 803 (Fed. Cir. 2006)** (holding that the revocation of Colvin’s grazing lease by the government did not affect a taking of its water or other property rights because Colvin did not own a vested grazing right in the federal land).

The United States Court of Appeals for the Federal Circuit reviewed a ruling by the United States Court of Federal Claims which dismissed the claims on all counts presented by the Colvin Cattle Company (“Colvin”) against the United States. Colvin held 520 acres of land adjacent to a 625,000 acre federal parcel called the Montezuma Allotment. The United States received the allotment by treaty in 1848 and owned it continuously from that time. In 1934, Congress enacted the Taylor Grazing Act (“TGA”) which governs administration of the land by the Bureau of Land Management (“BLM”). Under the TGA, Colvin applied for and received a grazing license which was subject to an annual fee of \$966.00. For over twenty years, Colvin paid the fee; but in February 1995, Colvin failed to do so. Ultimately, the BLM cancelled the grazing lease, assessed trespass damages, and issued a notice of intent to remove Colvin’s cattle. The actions culminated in November 2003 when the BLM issued a final decision to deny Colvin’s range improvement permits and to remove all constructed range improvements—except those necessary for Colvin to exercise its water rights vested under Nevada law. Colvin’s stockwatering rights in the federal land were not in dispute.

On August 18, 2003, Colvin filed suit in the United States Court of Federal Claims asserting takings claims on numerous theories, a breach of contract claim for cancellation of the grazing lease, and a compensation claim for improvements made by Colvin on the federal land. The trial court dismissed all claims in favor of the government and Colvin appealed.

The Court of Federal Claims first considered Colvin’s takings claims under each of its various theories. As an initial matter, the court noted that a taking cannot occur unless the aggrieved party held a