IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY and DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION,

Petitioners,

vs.

THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF EUREKA, and THE HONORABLE GARY D. FAIRMAN, DISTRICT COURT JUDGE,

Respondents,

and

SADLER RANCH, LLC; JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; BAUMANN FAMILY TRUST; BURNHAM FARMS, LLC; GALEN BYLER; MARIAN BYLER; CONLEY LAND & LIVESTOCK, LLC; DAMELE FARMS, INC.; DIAMOND VALLEY HAY COMPANY, INC.; FRED L. ETCHEGARAY and JOHN J. ETCHEGARAY; MARY JEAN ETCHEGARAY; LW & MJ ETCHEGARAY FAMILY TRUST; EUREKA MANAGEMENT CO., INC.; GALLAGHER FARMS LLC; JAYME L. HALPIN; SANDI HALPIN; TIM HALPIN; HIGH DESERT HAY, LLC; J&T FARMS, LLC; J.W.L. PROPERTIES, LLC; MARK MOYLE

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Case No. _____

FARMS LLC; J.R. MARTIN TRUST; CHERYL MORRISON; MATT MORRISON; DEBRA L. NEWTON; WILLIAM H. NORTON; PATRICIA NORTON; D.F. & E.M. PALMORE FAMILY TRUST; STEWARDSHIP FARMING, LLC; SCOTT BELL; KRISTINA BELL; DON BERGNER; LINDA BERGNER; JAMES ETCHEVERRY; MICHEL & MARGARET ANN ETCHEVERRY FAMILY LIMITED PARTNERSHIP; MARK T. AND JENNIFER R. ETCHEVERRY FAMILY TRUST; MARTIN P. AND KATHLEEN A. ETCHEVERRY FAMILY TRUST; LAVON MILLER; KRISTI MILLER; LYNFORD MILLER; SUSAN MILLER; ALBERTA MORRISON; DONALD MORRISON; RUBY HILL MINING COMPANY, LLC; and ROGER and JUDITH ALLEN,

Real Parties in Interest.

_____/

VERIFIED PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, WRIT OF CERTIORARI OR MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner, Diamond Natural Resources Protection & Conservation Association is a Nevada non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of Diamond Natural Resources Protection & Conservation Association.

Partners and associates of McDONALD CARANO WILSON LLP have appeared for Diamond Natural Resources Protection & Conservation Association in the proceedings before the Seventh Judicial District Court of Nevada, in and for the County of Eureka, and will appear on behalf of Diamond Natural Resources Protection & Conservation Association in this Petition for Writ of Prohibition or in the Alternative, Writ of Certiorari or Mandamus.

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DATED this 7th day of February, 2017.

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Petitioners, EUREKA COUNTY, by and through its counsel of record, ALLISON MacKENZIE, LTD. and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY, and DIAMOND NATURAL RESOURCE PROTECTION & CONSERVATION ASSOCIATION ("DNRPCA"), by and through its counsel of record, McDONALD CARANO WILSON, LLP, petition this Court for a Writ of Prohibition, or in the alternative, Writ of Certiorari or Mandamus pursuant to Rule 21 of the Nevada Rules of Appellate Procedure ("NRAP") to halt the proceedings before Respondents, THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF EUREKA, and THE HONORABLE GARY D. FAIRMAN, DISTRICT COURT JUDGE, until notice and an opportunity to be heard have been provided to water right holders in the Diamond Valley Hydrographic Basin (153) ("Diamond Valley"), located in Eureka County, Nevada, prior to the District Court's show cause hearing set for May 15-19, 2017 on the District Court's Alternate Writ of Mandamus. At that hearing or thereafter the District Court has indicated that it may directly order curtailment of groundwater pumping in Diamond Valley on the basis of priority of right or may require JASON KING, P.E., NEVADA STATE ENGINEER ("STATE ENGINEER") to begin the required proceedings to order curtailment of groundwater pumping in Diamond Valley on the basis of priority of right.

The District Court denied a motion filed by the STATE ENGINEER, to which Petitioners joined, and denied a motion for reconsideration filed by EUREKA COUNTY requesting that notice of the District Court's show cause hearing be provided to water right holders in Diamond Valley whose water rights may be subject to curtailment before that hearing, and not at some indeterminate time thereafter.

This Verified Petition is based on the points and authorities below and Petitioners' Appendix ("Appendix") filed with this Verified Petition.

I.

RELIEF SOUGHT AND ROUTING STATEMENT

Petitioners, EUREKA COUNTY and DNRPCA, seek a Writ of Prohibition or in the alternative, a Writ of Certiorari or Mandamus against Respondents, THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF EUREKA, and THE HONORABLE GARY D. FAIRMAN, DISTRICT COURT JUDGE. This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(8) and (10)[1] as a water case involving the STATE ENGINEER and curtailment of water rights, and raises as its principal

[1] Effective January 1, 2017 per Order filed October 12, 2016 in ADKT 0501. Although not an "administrative agency case" per se, this case involves a challenge to the STATE ENGINEER's exercise of discretion to administer the state's water law and therefore should be retained by the Supreme Court. *See* NRAP 17(a)(8).

issue a question of first impression involving due process requirements under the United States and Nevada Constitutions for water right curtailment proceedings.

II.

ISSUE PRESENTED

Does procedural due process require potentially impacted water right holders to be notified prior to the beginning of a district court hearing where that court may order or direct that curtailment proceedings immediately commence?

III.

INTRODUCTION

The proceedings in the District Court involve a petition for curtailment in Diamond Valley filed on November 16, 2015 by SADLER RANCH, LLC ("SADLER RANCH") seeking a writ of mandamus from the District Court.[2] Appendix at Vol. 1, pp. 044-075. SADLER RANCH petitioned the Court to directly order curtailment of junior groundwater rights in all of the Diamond Valley Hydrographic Basin or to order the STATE ENGINEER to initiate curtailment proceedings Basin-wide by priority of right, without first making that request to the

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[2] SADLER RANCH filed its original petition for curtailment in Diamond Valley on April 27, 2015 and requested leave to amend its petition on or about September 25, 2015 as a result of the STATE ENGINEER's designation of Diamond Valley as a Critical Management Area ("CMA") pursuant to NRS 534.110(7). Appendix at Vol. 1, pp. 038-042. No one, including SADLER, appealed the CMA designation.

STATE ENGINEER. Appendix at Vol. 1, pp. 045, 071. On July 15, 2016, the District Court issued its Alternate Writ of Mandamus; Order Setting Briefing Schedule and Show Cause Hearing. Appendix at Vol. 1, pp. 123-124. The District Court determined SADLER RANCH's petition for curtailment stated a cause of action against the STATE ENGINEER and commanded:

> "that immediately upon receipt of this writ, the State Engineer begin the required proceedings to order curtailment of pumping in Diamond Valley on the basis of priority of right, or, that you show cause why you have not done so and why this Court should not order you to begin the required proceedings to order curtailment and why this Court should not order curtailment of pumping in Diamond Valley."

Appendix at Vol. 1, p. 124. The show cause hearing was originally set for November 21 and 22, 2016 and has been rescheduled to May 15-19, 2017. Appendix at Vol. 1, p. 124; Vol. 2, p. 408. The Court considered and rejected that SADLER RANCH could bring suit against specific junior appropriators, and instead, declared the issue of SADLER RANCH's curtailment petition a Basin-wide issue. Appendix at Vol. 1, p. 119.

Curtailment, also known as enforcement of priority, is a process where junior water rights in a basin or specific geographic region are cutoff on the basis of priority because overuse or short supply has caused senior rights to be unfulfilled. A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D.L. Rev. 881, 882 (2000) ("[I]n times of scarcity, the right to withdraw or pump water is curtailed

in reverse order of the manifestation of an intent to appropriate. The most junior user right holder must yield to the more senior and so on along a stream system or, in theory in some states, in a ground water basin."); *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1149 (Colo. 2001), *as modified on denial of reh'g* (Feb. 11, 2002) ("In times of short supply, water users depend on the State Engineer to curtail undecreed uses and decreed junior uses in favor of decreed senior uses. . . . To accomplish this, the amount and priority of rights drawing on the watershed's supply must be determined."). Effectively, a cutoff line is selected, and all appropriators with rights junior of the cutoff date are limited or can no longer use their water rights. The priority of Diamond Valley groundwater rights is determined by their statutory filing or "application" dates pursuant to NRS 533.355 and NRS 534.080(3). Adjudication, which for Diamond Valley is ongoing, does not impact groundwater priority dates. Thus, once a cutoff date is established, groundwater rights junior in priority to the cutoff date are curtailed; the junior rights "must reduce or halt their uses in order to leave water for" the senior right holder. Reed D. Benson, *Alive But Irrelevant: the Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. Colo. L Rev. 675, 682 (2012).

Water rights in Nevada are a form of real property, so constitutional due process protections require that water right owners be provided meaningful notice and an opportunity to be heard before potentially being deprived of their water rights.

If the District Court orders the STATE ENGINEER to initiate curtailment proceedings in Diamond Valley or directly orders that curtailment commence as a result of the upcoming hearing, only the cutoff date is left to be determined. At the very moment the District Court orders curtailment, junior water right holders will be deprived of a property interest. The District Court's refusal to provide notice to all water appropriators of the show cause hearing that determines whether the harsh immediacy of curtailment occurs in Diamond Valley denies Diamond Valley water right holders notice of the only meaningful hearing in which they can protect their water rights. While it may be true that not every appropriator in Diamond Valley will be affected by curtailment, it is certain that use of Diamond Valley's most junior water rights will be limited, halted, or completely eliminated if curtailment is ordered.

The District Court denied Petitioners' request that notice be provided prior to the District Court's hearing to all water right holders in Diamond Valley whose water rights may be subject to curtailment. EUREKA COUNTY even offered to offset some of the costs of providing notice. Because the denial of its motion for reconsideration is not an immediately appealable order, EUREKA COUNTY and DNRPCA have no plain, adequate and speedy remedy at law available to redress this due process violation and the District Court acting beyond its jurisdictional authority.

On August 25, 2015, the STATE ENGINEER designated Diamond Valley a Critical Management Area ("CMA") pursuant to NRS 534.110(7). No one, including SADLER RANCH, appealed the STATE ENGINEER's order designating Diamond Valley a CMA. Appendix at Vol. 1, p. 078. With NRS 534.110(7), the Legislature provided the STATE ENGINEER with an option to manage overappropriated groundwater basins such as Diamond Valley before resorting to the draconian remedy of immediate curtailment. Appendix at Vol. 1, pp. 147-204. Notwithstanding the STATE ENGINEER's CMA designation for Diamond Valley, the District Court determined that curtailment may be ordered immediately in Diamond Valley pursuant to NRS 534.110(6). Appendix at Vol. 1, pp. 120-121. Particularly in light of the District Court's determination that curtailment may be ordered immediately, notwithstanding the STATE ENGINEER's designation of the Diamond Valley hydrographic basin as a CMA, notice to potentially affected water right holders in Diamond Valley whose water rights may be immediately curtailed by the District Court's action is imperative.

IV.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

SADLER RANCH purchased its real property and water rights in Diamond Valley on September 26, 2011. Appendix at Vol. 1, pp. 136-146. SADLER RANCH claims vested surface water rights with a priority date that would make

SADLER RANCH's rights the most senior in Diamond Valley.[3] Appendix at Vol. 1, pp. 003, 046-047. SADLER RANCH filed a Petition for Curtailment in Diamond Valley on April 27, 2015, and a First Amended Petition for Curtailment in Diamond Valley ("Amended Petition") on November 16, 2015, after the STATE ENGINEER had designated the Diamond Valley basin a CMA. Appendix at Vol. 1, pp. 001-026, 033-037, 044-075. SADLER RANCH did not first file a petition for curtailment with the STATE ENGINEER. In the Amended Petition, SADLER RANCH requested that the District Court either "(1) direct the STATE ENGINEER to begin the proceedings required to order curtailment of pumping within Diamond Valley on the basis of priority of right, or (2) based on the STATE ENGINEER's knowing and intentional refusal to follow Nevada law and the lack of any indication that he will expeditiously move forward with curtailment proceedings, directly issue an order curtailing pumping in Diamond Valley." Appendix at Vol. 1, pp. 045, 071. EUREKA COUNTY, DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION, BAUMANN FAMILY TRUST, et al., SCOTT BELL et al., (collectively "DNRPCA"), RUBY HILL MINING

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[3] At the administrative level, the STATE ENGINEER is in the process of conducting an adjudication of the Diamond Valley Hydrographic Basin to determine the relative rights and priorities of vested rights in the Basin, including SADLER RANCH's claims of vested rights. Appendix at Vol. 1, p. 043.

COMPANY, LLC ("RUBY HILL") and ROGER AND JUDITH ALLEN ("ALLEN") were allowed to intervene in this matter by the District Court.[4] Appendix at Vol. 1, pp. 027-032, 125-126; Vol. 2, pp. 397-401.

The STATE ENGINEER opposed the Amended Petition by filing a motion to dismiss, arguing in part that SADLER RANCH's curtailment petition was moot in light of the STATE ENGINEER's designation of Diamond Valley as a CMA pursuant to NRS 534.110(7). Appendix at Vol. 1, pp. 076-085. The District Court entered an Order Granting in Part and Denying in Part the Motion to Dismiss First Amended Petition for Curtailment in Diamond Valley on July 15, 2016. Appendix at Vol. 1, pp. 112-122. In relevant part, the District Court found SADLER RANCH's complaint alleged sufficient facts to conclude the STATE ENGINEER had abused his discretion by not ordering curtailment in Diamond Valley, notwithstanding that NRS 534.110(7) gives the STATE ENGINEER a ten-year time period from the CMA designation before curtailment is required. Appendix at Vol. 1, pp. 121-122. On the same day, the District Court entered an Alternate Writ of Mandamus; Order Setting Briefing Schedule and Show Cause Hearing. The Alternate Writ states:

> Now, therefore, the court commands that immediately upon receipt of this writ, the State Engineer begin the required proceedings to order

[4] ROGER and JUDITH ALLEN were granted limited intervention on December 13, 2016. Appendix at Vol. 2, p. 401.

> curtailment of pumping in Diamond Valley on the basis of priority of right, or, that you show cause why you have not done so and why this Court should not order you to begin the required proceedings to order curtailment and why this Court should not order curtailment of pumping in Diamond Valley. The show cause hearing shall be at the Eureka County Courthouse, Eureka, Nevada, on November 21, and 22, 2016, at the hour of 10:00 a.m.[5]

Appendix at Vol. 1, p. 124.

Subsequently, the STATE ENGINEER filed a motion contending that SADLER RANCH must provide notice to all appropriators in Diamond Valley who may be affected by the District Court's decision at the show cause hearing. Appendix at Vol. 1, pp. 127-135. The STATE ENGINEER argued that unaware appropriators in Diamond Valley would be deprived of their due process rights if they were not notified about the show cause hearing. Appendix at Vol. 1, pp. 130-132. EUREKA COUNTY, DNRPCA, and RUBY HILL each joined the STATE ENGINEER's motion. Appendix at Vol. 2, pp. 317-319, 334-339.

On October 24, 2016, the District Court denied the STATE ENGINEER's motion without oral argument or hearing, concluding that appropriators in Diamond Valley were not entitled to notice of the proceedings. Appendix at Vol. 2, pp. 346-350. The District Court reasoned the property interests of unnotified, unrepresented, unaware Diamond Valley appropriators would not actually be curtailed at the show

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[5] The hearing to show cause has been rescheduled to May 15-19, 2017. Appendix at Vol. 2, p. 408.

cause hearing, and in any event, according to the District Court, their interests would be adequately represented at the show cause hearing by EUREKA COUNTY and others. Appendix at Vol. 2, pp. 348-350.

EUREKA COUNTY, concerned that subsequent proceedings would be constitutionally deficient if the appropriators were not notified before any evidentiary hearing, filed a motion for reconsideration with the District Court. Appendix at Vol. 2, pp. 351-366. The STATE ENGINEER and DNRPCA joined relevant portions of EUREKA COUNTY's motion for reconsideration. Appendix at Vol. 2, pp. 367-372. The District Court without oral argument or a hearing denied the motion for reconsideration on November 17, 2016, again concluding that appropriators would not actually have their rights curtailed at the show cause hearing and thus, notice to all water rights holders in Diamond Valley of the show cause hearing was not necessary. Appendix at Vol. 2, pp. 389-396.

V.

LEGAL AUTHORITY

A writ of prohibition arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. NRS 34.320. It does not serve to correct errors; rather, its purpose is to prevent courts, corporations, boards or persons from transcending the limits of their jurisdiction in

the exercise of their power. *See Mineral Cty. v. State, Dept. of Conservation and Nat. Res.*, 117 Nev. 235, 243-44, 20 P.3d 800, 805-06 (2001).

A writ of prohibition is appropriate when a court acts in excess of or without jurisdiction. *Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289–90, 607 P.2d 1140, 1141 (1980). A writ of prohibition's purpose is to restrain a district court from "acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action." *Gladys Baker Olsen Family Trust By & Through Olsen v. Eighth Judicial Dist. Court*, 110 Nev. 548, 552, 874 P.2d 778, 781 (1994). This Court has recognized that a writ of prohibition is a proper vehicle in which to challenge a district court's violation of due process notice principles. *See Matter of Two Minor Children*, 95 Nev. 225, 228, 592 P.2d 166, 168 (1979).

A writ of certiorari "shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." NRS 34.020(2). "An application for a writ of certiorari to review the exercise of judicial functions by an inferior tribunal shall be granted whenever that lower body exceeds its jurisdiction. NRS 34.020(2). In this context, jurisdiction has a broader meaning than the concept of jurisdiction over the person and subject matter: it includes constitutional limitations." *Watson v. Housing Authority of City of N. Las Vegas*, 97 Nev. 240, 242, 627 P.2d 405, 406

(1981). In *Watson*, this Court issued a writ of certiorari restraining a district court's jurisdiction because an employee's due process rights were violated when she was terminated from her job without first being provided specific allegations of misconduct to support the termination. *Id.* at 243, 627 P.2d at 407.

A writ of mandamus may be entered by this Court to compel the performance of an act which the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *State, Dep't. of Pub. Safety v. Coley*, 132 Nev. Adv. Op. 13, 368 P.3d 758, 760 (2016) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)). All three forms of writ should issue when no plain, speedy, and adequate remedy at law exists. *Del Papa v. Steffen*, 112 Nev. 369, 372, 915 P.2d 245, 247 (1996). "While an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. 77, 383 P.3d 246, 248 (2016) (internal quotations omitted).

Petitioners do not have a plain, speedy, or adequate remedy at law because the District Court's denial of EUREKA COUNTY's motion for reconsideration is not an appealable, final determination, and Diamond Valley water right holders are in

immediate danger of the Court acting beyond its authority and impacting their property rights without first providing the constitutionally based safeguard of notice. If notified, "other water appropriators might . . . participate[ ] and ma[ke] contributions which might" produce a different result. *Campbell Ranch, Inc. v. Water Res. Dept.*, 558 P.2d 1295, 1298 (Or. Ct. App. 1977). Accordingly, if EUREKA COUNTY and DNRPCA wait to appeal a final determination until after the hearing and the District Court orders curtailment proceedings be initiated, unnotified appropriators will have already had their due process rights violated, and their ability to contribute to the question of curtailment in a meaningful way will have disappeared. EUREKA COUNTY and DNRPCA will also specifically be harmed by expending considerable resources on a week-long show cause hearing that is constitutionally deficient. Therefore, this Court should exercise its discretion to intervene and grant this petition under these circumstances of urgency and strong necessity as the procedural due process issue here is an important issue of law which needs clarification to promote sound judicial economy and administration.

Compounding the due process issue is the District Court's erroneous interpretation of NRS 534.110(6) and (7). Appendix at Vol. 1, pp. 119-122. When these statutory provisions are interpreted by their plain meaning, and when considering the corresponding legislative history, it is clear the Legislature intended to provide the STATE ENGINEER with discretionary authority, beyond mandatory

and immediate curtailment, to designate a basin such as Diamond Valley a CMA, which allows groundwater users a 10-year window to develop a suitable groundwater management plan before curtailment is required. Appendix at Vol. 1, pp. 147-204. The District Court divested the STATE ENGINEER of any such discretion when the Court declared it may order the STATE ENGINEER to begin immediate proceedings to curtail pumping in Diamond Valley on the basis of priority of right, or the District Court may directly order curtailment of pumping in Diamond Valley. Appendix at Vol. 1, pp. 123-124. The District Court's action exceeds its authority and inserts itself into the functions reserved to the STATE ENGINEER, which compounds the lack of notice problem by making the CMA process meaningless if the Court orders immediate curtailment. For these reasons Petitioners cannot wait for a final appealable order to raise the constitutional due process notice issue.

Finally, both the due process issue and the statutory interpretation issue are matters of first impression for this Court that are pure issues of law. These issues will be raised again, as there are other over-appropriated hydrographic basins in the State that the STATE ENGINEER can bring back into balance under the authority granted to him by NRS 534.110(6) and (7). Accordingly, this Court should consider this petition because no adequate or speedy remedy at law exists for Petitioners, and judicial economy weighs in favor of immediately considering the important

questions of law presented in this petition. Petitioners request that this Court issue the requested writ prohibiting the District Court from proceeding to an evidentiary hearing until notice and an opportunity to be heard are provided to all water appropriators in Diamond Valley who may have their water rights subject to curtailment as a result of the District Court's show cause order.

VI.

ARGUMENT

A. STANDARD OF REVIEW.

"This court applies a de novo standard of review to constitutional challenges," including challenges regarding the sufficiency of service in the context of due process. *Grupo Famsa v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. 29, 371 P.3d 1048, 1050 (2016) (internal quotations omitted); *see also Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (applying a de novo standard to a due process dispute).

This Court also reviews issues of statutory interpretation de novo. *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 825, 192 P.3d 730, 733 (2008); *Pankopf v. Peterson*, 124 Nev. 43, 46, 175 P.3d 910, 912 (2008). Petitioners are unaware of any factual disputes regarding this writ petition, as the question of notice is a purely legal one. Thus, no deference is due the District Court's order denying EUREKA COUNTY's motion for reconsideration.

B. WATER RIGHTS ARE REAL PROPERTY SUBJECT TO PROCEDURAL DUE PROCESS SAFEGUARDS.

Water rights in Nevada are treated as real property. *Application of Filippini*, 66 Nev. 17, 21–22, 202 P.2d 535, 537 (1949). Accordingly, procedural due process safeguards, as provided in both the United States Constitution and Nevada Constitution, protect individuals against the deprivation of their water rights without notice and a hearing. U.S. Const. amend. XIV, § 1; Nev. Const. art. I, § 8;[6] *see also Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998) ("The fundamental requisite of due process is the opportunity to be heard."); *Dedeke v. Rural Water Dist. No. 5 Leavenworth County, Kan.*, 623 P.2d 1324, 1331 (Kan. 1981) (holding that, pursuant to due process protections, water rights cannot be terminated without notice and a hearing); Joseph Sax et al., *Legal Control of Water Resources: Cases and Materials* 139 (4th ed. 2006) ("[W]ater rights are property rights protected by the due process clause of the federal constitution . . . ."). "A central tenet of our legal system is the concept of notice and hearing. Justice is served only when parties are given adequate notice and an appropriate opportunity to respond in open court. This court has reiterated this concept over and over as long ago as 1871." *Clark Cty.*

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[6] *See Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op. 54, 287 P.3d 305, 310 (2012) ("[T]he similarities between the due process clauses contained in the United States and Nevada Constitutions, . . . permit us to look to federal precedent for guidance.").

Sports Enterprises, Inc. v. Kaighn, 93 Nev. 395, 396, 566 P.2d 411, 412 (1977). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Browning*, 114 Nev. at 217, 954 P.2d at 743 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 657 (1950) holding no due process violation for unknown beneficiaries (because of published notice), but due process violation for known beneficiaries).

No party to the District Court proceedings disputed nor did the District Court dispute that a water right is a property interest protected by due process. Appendix at Vol. 1, pp. 129-130, 328, 348.

C. PROVIDING NOTICE AFTER THE SHOW CAUSE HEARING DEPRIVES WATER RIGHT HOLDERS OF THE ONLY MEANINGFUL OPPORTUNITY TO BE HEARD PRIOR TO BEING DEPRIVED OF THEIR WATER RIGHTS.

The District Court determined that due process protections do not attach until *after* curtailment proceedings are initiated. Appendix at Vol. 2, pp. 348-349. The District Court, in concluding that due process concerns are not implicated now, stated that appropriators in Diamond Valley will not have their individual rights curtailed at the show cause hearing—rather, the "hearing will merely determine whether or not this Court will order future proceedings." Appendix at Vol. 2, p. 349.

The District Court also stated that "the 'how' and 'who' of curtailment could not be decided until a future proceeding." Appendix at Vol. 2, p. 349.

In the Order Denying Eureka County's Motion for Reconsideration, the District Court reaffirmed this position, stating "the next stage of this case will be to adjudicate all claims of vested water rights, determine priority, quality, and when curtailment would occur together with related issues. In this event, notice will be provided to all affected appropriators and . . . [t]hose who are affected may then appear in this action and protect their individual interest . . . ." Appendix at Vol. 2, pp. 392-393. Accordingly, it is clear that if the District Court chooses to order curtailment at or following the show cause hearing, the STATE ENGINEER will be divested of any discretion to determine whether curtailment should occur; rather, only the cutoff date will be left for the STATE ENGINEER or the District Court to decide. The District Court's decision not to provide notice to all water right holders in Diamond Valley prior to the hearing misapprehends the nature of curtailment proceedings and the impact any order to begin curtailment proceedings will necessarily have.

"It is . . . fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (1972) (internal quotations omitted). The United States Supreme Court stated:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."

Id. at 81-82, 92 S. Ct. at 1994-95; *see also Turner v. Saka*, 90 Nev. 54, 62, 518 P.2d 608, 613 (1974). In *Fuentes*, the Supreme Court was considering replevin laws in Florida and Pennsylvania that did not provide notice and a hearing until after property was taken. *Id.* at 80, 92 S. Ct. at 1994. The Court concluded that such laws were unconstitutional as they did not provide meaningful due process before the property was taken. *Id.* at 96, 92 S. Ct. at 2002.

The STATE ENGINEER discussed the standard curtailment process at length in his motion for SADLER RANCH to provide notice:

> Outside of this litigation, if the State Engineer issued an order curtailing water rights in Diamond Valley, the State Engineer would, pursuant to his duty, have provided notice to potentially affected parties within Diamond Valley, which would include an opportunity to examine and challenge the evidence presented in support of curtailment, before the State Engineer issued a curtailment order in the basin. NRS 533.360; NRS 534.110(6). . . .
>
> However, as this matter is being pursued as a writ of mandamus and the State Engineer is not the party seeking curtailment . . . the procedure, which ensures the due process rights of water right holders affected by the potential order are protected, has not occurred. . . .

> Even if the Court orders the State Engineer to begin the process of curtailment in Diamond Valley, Sadler seeks an order from the Court directing curtailment to occur at the end of the writ petition process, foregoing any discretion that the State Engineer would typically exercise. That is, the State Engineer will not be proceeding in his usual and customary manner wherein the State Engineer would issue a draft order, provide notice and an opportunity to those potentially affected to review the evidence relied upon and provide additional evidence and information during the hearing, all before he determines whether or not to proceed with curtailment. . . . If the State Engineer proceeds with the customary process, but forgoes curtailment, [he] will undoubtedly face action by Sadler seeking contempt . . . . Alternatively, if the State Engineer proceeds in the customary manner despite curtailment being a foregone conclusion, the process allowing appropriators to participate in a hearing would be inconsequential, in that the outcome of curtailment has been pre-determined and cannot be changed.

Appendix at Vol. 1, pp. 130-132.

If the District Court begins curtailment or orders the STATE ENGINEER to begin curtailment, property interests will be injured at that time—only the extent of injury will be left for a future hearing (what the District Court identifies as the "how" and the "who"; Appendix at Vol. 2, p. 349). When the District Court orders the STATE ENGINEER to begin such proceedings, there is no question that curtailment will occur because the District Court will have entered an order that divests the STATE ENGINEER of any authority to not order curtailment. The deprivation will have already occurred prior to notice and an opportunity for absent, unrepresented, and unaware Diamond Valley water right holders to be heard. The District Court has further determined that SADLER RANCH has no adequate remedy at law by

filing a direct cause of action for curtailment against any specific group of junior appropriators since the over-appropriation "involves the entire Diamond Valley aquifer and requires a basin wide resolution." Appendix at Vol. 1, p. 119. If all water right holders subject to basin-wide curtailment are not notified until some later proceeding, they are deprived of their only meaningful opportunity to challenge interference with their property rights—the evidentiary hearing in front of the District Court that determines whether curtailment will occur in the first instance.

While it is true that perhaps not every appropriator in Diamond Valley will be affected if curtailment proceedings are initiated and curtailment occurs, it is certain that some appropriators will be affected. There is no question that junior priorities will fall below whatever cutoff date is established if curtailment is ordered. These junior appropriators only have a meaningful opportunity to protect their water rights at the stage of the process determining if rights in Diamond Valley will be curtailed at all. Notice to these junior priorities of the subsequent curtailment proceedings is illusory as it would have been predetermined in the show cause hearing that their water rights will be limited or taken. Therefore, while the hearing outcome may not result in an immediate deprivation of water rights, such deprivation is certain to befall junior appropriators who were not notified of the hearing, and that is all that is required for a due process violation.

Contrary to the District Court's statement in footnote 6 on page 4 of its Order denying the STATE ENGINEER's motion to provide notice (Appendix at Vol. 2, p. 349), if curtailment of junior groundwater rights is ordered to begin, there is never an opportunity in future proceedings to dispute the priority of water rights or raise other defenses. The priority dates of all junior groundwater rights in Diamond Valley are set by NRS 533.355 and NRS 534.080(3) as the application date, and such dates are not subject to dispute. Adjudication does nothing to change these priority dates. Likewise, if curtailment is ordered, there are no defenses; junior water right holders will be ordered to stop pumping water based on the statutory priority date of their water rights. For example, if the District Court orders curtailment with a 1965 priority cutline, all water rights with a priority (i.e., application) date more recent than 1965 will be ordered to stop pumping. The only meaningful hearing for an appropriator will be the show cause hearing where it is determined whether curtailment will occur at all.

D. THE DISTRICT COURT'S CASE LAW DOES NOT SUPPORT NOTICE PROVIDED AFTER THE HEARING IS SUFFICIENT.

The District Court relied on *Desert Valley Water Co. v. State*, 104 Nev. 718, 721, 766 P.2d 886, 887 (1988), to support its position that notice before the hearing is not required.[7] In *Desert Valley*, this Court determined jurisdictional requirements

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[7] EUREKA COUNTY raised its concerns regarding *Desert Valley Water Co. v.*

for judicial review pursuant to NRS 533.450 did not require notice to every right holder in the Tonopah area who may be affected by an application to use groundwater. *Id.* However, this Court went on to note the district court, in reviewing the STATE ENGINEER's decision, has the authority to affect the rights of many water users within the system. *Id.* The opinion states:

> The district court may therefore order that other parties be joined in the action. N.R.C.P. 19(a). Notice to persons or entities who might be affected by the decision and their ensuing participation in the proceedings should be encouraged.

Id. The District Court's orders in this matter do not provide notice and do not encourage participation by persons or entities who might be affected by its curtailment decision so the orders are contrary to *Desert Valley.*

Furthermore, the hearing at issue here is intrinsically different than the application to use groundwater at issue in *Desert Valley.* Any curtailment will undoubtedly affect many water rights throughout Diamond Valley. The very nature of curtailment guarantees an injury to junior water right holders in Diamond Valley because use will be limited or prohibited. It is also notable the *Desert Valley* opinion only considered notice under NRS 533.450, not once mentioning constitutional due

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State in its motion for reconsideration, but the District Court did not address these concerns in its order denying reconsideration. Appendix at Vol. 2, pp. 360-361, 389-394. The District Court did not cite any case law in its order denying EUREKA COUNTY's motion for reconsideration. Appendix at Vol. 2, pp. 389-394.

process requirements. *See* 104 Nev. at 720-21, 766 P.2d at 887. Therefore, while notice and participation were encouraged in *Desert Valley*, the federal and state constitutions require it here because any order initiating curtailment proceedings means that curtailment must occur and that junior water rights will be lost—this outcome is inevitable at any future "noticed" proceeding.

The District Court's order denying the STATE ENGINEER's motion requesting notice also states that even if appropriators are notified, they cannot intervene in the current proceeding because the existing intervenors adequately represent the interests of all appropriators in Diamond Valley, and particularity "Eureka County is presumed to represent the interest of all its citizens," citing to *Hairr v. First Jud. Dist. Court*, 132 Nev. Adv. Op. 16, 368 P.3d 1198, 1202 (2016). Appendix at Vol. 2, p. 350. The District Court restated this position in its order denying reconsideration, finding that unnotified parties "are being adequately represented by existing parties" and "[a]t this juncture the [unnotified] appropriators . . . are not so situated that the disposition of the issues to be heard at the evidentiary hearing will as a practical matter impair or impede their ability to protect their interests." Appendix at Vol. 2, p. 392.

The *Hairr* case supports the proposition that existing intervenors cannot adequately represent the interests of all Diamond Valley appropriators at the show cause hearing. In *Hairr*, parents were attempting to intervene in a pending challenge

to the constitutionality of the educational savings account program adopted by the Legislature in 2015. *Id.* at 1199-1200. This Court concluded the State Treasurer adequately represented the interests of the parents because they "share[d] the same goal of having the education grant program . . . declared constitutional." *Id.* at 1199, 1202. Importantly, in *Hairr,* the parents wishing to intervene were not trying to protect unique property rights in which they held title or a deed—rather, they were trying to uphold the constitutionality of a law that would potentially entitle them to money in the future. *Id.* at 1202.

Real property generally, and water rights specifically, are unique forms of property that are entitled to protection. *See Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) ("[R]eal property and its attributes are considered unique and loss of real property rights generally results in irreparable harm . . . ."); *Aranci v. N. Weld Cty. Water Dist.*, 485 P.2d 884, 885 (Colo. 1971) (deciding that water rights are unique and irreplaceable in the context of granting equitable relief). Since an individual appropriator's water rights may be impacted by the District Court's order after the hearing to show cause, and given the uniqueness of water rights, no current party to this litigation can be said to "adequately represent" unnotified appropriators within the meaning of NRCP 24. When a party may potentially have a property interest impaired at a hearing, no other party can adequately represent them.

It was error for the District Court to assume the specific and diverse interests of the many rights holders in Diamond Valley who are not involved or aware of the ongoing proceedings are not entitled to be notified their water rights may be curtailed, and not entitled to an opportunity to be heard, because they are adequately represented by the current parties to the litigation. Accordingly, unnotified Diamond Valley appropriators must be provided notice prior to the show cause hearing, not at some later undetermined time, and be provided an opportunity to be heard at any evidentiary hearing, including the show cause hearing now set for May, 2017, if they desire to participate.

E. THE DISTRICT COURT'S CONSTRUCTION OF NRS 534.110 UNDERSCORES WHY NOTICE TO POTENTIALLY AFFECTED WATER RIGHT HOLDERS IS REQUIRED NOW AND THE LEGISLATIVE HISTORY MAKES CLEAR THAT THE STATE ENGINEER MAY DESIGNATE A BASIN A CMA RATHER THAN IMMEDIATELY ORDER CURTAILMENT.

1. The District Court's Construction of NRS 534.110.

The District Court determined in its Order on the STATE ENGINEER's motion to dismiss that when read together, NRS 534.110(6) and (7) do not preclude curtailment by the STATE ENGINEER prior to the expiration of ten years after the basin's designation as a CMA. Appendix at Vol. 1, pp. 119-121. As a result of this statutory analysis, the District Court determined that SADLER RANCH pled adequate facts to conclude "the State Engineer has manifestly abused his discretion

or exercised his discretion arbitrarily or capriciously" in not immediately ordering curtailment. Appendix at Vol. 1, pp. 121-122. On the same day, the District Court entered an alternate writ of mandamus ordering the STATE ENGINEER to immediately order curtailment or show cause why he has not done so. Appendix at Vol. 1, pp. 123-124. The District Court's statutory analysis and the corresponding conclusion the STATE ENGINEER abused his discretion ignores the plain disjunctive language of NRS 534.110(6) and (7), the discretionary authority of the STATE ENGINEER to designate basins as CMAs, and the Legislature's intent to allow the STATE ENGINEER to designate basins as CMAs rather than resorting to harsh curtailment measures.

NRS 534.110(6) and (7) provide:

> 6. **Except as otherwise provided in subsection 7**, the State Engineer **shall conduct** investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants, and if the findings of the State Engineer so indicate, the State Engineer **may order** that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.
>
> 7. The State Engineer:
>
> (a) **May designate** as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin.
>
> (b) **Shall designate** as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of

> the basin upon receipt of a petition for such a designation which is signed by a majority of the holders of certificates or permits to appropriate water in the basin that are on file in the Office of the State Engineer.
>
> →The designation of a basin as a critical management area pursuant to this subsection **may be appealed** pursuant to NRS 533.450. **If a basin has been designated as a critical management area for at least 10 consecutive years, the State Engineer shall order** that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights, unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037.

(Emphasis added.) No NRS 534.110(7)(b) petition to designate was ever filed with the STATE ENGINEER; rather, the STATE ENGINEER invoked his discretionary NRS 534.110(7)(a) authority to designate Diamond Valley a CMA. Appendix at Vol. 1, p. 037.

In interpreting statutes, the primary consideration is the Legislature's intent. *Cromer v. Wilson,* 126 Nev. 106, 109, 255 P.3d 788, 790 (2010). When a statute is unambiguous, courts must give effect to the plain and ordinary meaning of the language. *Id.* "An agency charged with the duty of administrating an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.,* 112 Nev. 743, 747-48, 918 P.2d 697, 700 (1996) (internal quotations omitted). This Court has repeatedly stated "great deference should be given to the [administrative] agency's interpretation when it is within the language of the statute." *Id.* (internal quotations omitted). The

STATE ENGINEER's decisions are presumed correct, and the party challenging the decision has the burden of proving error. *U.S. v. State Engineer,* 117 Nev. 585, 589, 27 P.3d 51, 53 (2001).

"'[I]t is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies generally.'" *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) (quoting *Sierra Life Ins. Co. v. Rottman,* 95 Nev. 654, 656, 601 P.2d 56, 57-58 (1979)). If statutory language is capable of more than one meaning, it is ambiguous and the language should be construed in accord "with what reason and public policy would indicate the legislature intended," and the court's interpretation should not produce an absurd or unreasonable result. *Stockmeier v. Psychological Review Panel,* 122 Nev. 534, 539-40, 135 P.3d 807, 810 (2006).

Subsections 6 and 7 of NRS 534.110 are not ambiguous. Subsection 6 is a general discretionary curtailment provision for groundwater basins except as provided for in Subsection 7. Subsection 7 is a specific legislative grant of authority to the STATE ENGINEER to designate basins as CMAs. The STATE ENGINEER is only required to curtail under Subsection 7 if a groundwater management plan has not been approved for the basin pursuant to NRS 534.037[8] and the basin has been

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[8] Substantial reductions in groundwater pumping must be part of a groundwater management plan approved pursuant to NRS 534.037. NRS 534.037(1) requires

designated a CMA for at least 10 consecutive years. Subsection 7 is a special statute authorizing CMAs, and controls over the general Subsection 6 in basins designated as CMAs. *See Nevada Power Co.*, 115 Nev. at 364, 989 P.2d at 877.

Given the plain mandate in Subsection 7 that the STATE ENGINEER need not order curtailment for 10 years following designation of a basin as a CMA, the District Court erred by determining that it has the authority to immediately order curtailment or require the STATE ENGINEER to immediately commence curtailment proceedings, notwithstanding the STATE ENGINEER's designation of Diamond Valley as a CMA under NRS 534.110(7)(a). The District Court has inserted itself into the over-appropriation issues in Diamond Valley that the Legislature has already addressed.[9] Groundwater right holders have relied upon the

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that any groundwater management plan submitted to the State Engineer for approval "must set forth the ***necessary steps*** for removal of the basin's designation as a critical management area." (Emphasis added.) Only basins where "withdrawals of groundwater consistently exceed the perennial yield of the basin" may be designated as a CMA. NRS 534.110(7)(a). Therefore, in order for a groundwater management plan to meet the necessary steps for removal as a CMA, the plan must ensure that withdrawals of groundwater eventually do not "consistently exceed the perennial yield of the basin."

[9] It appears the District Court is usurping the functions of an administrative agency in violation of the separation of powers doctrine. *See Galloway v. Truesdell*, 83 Nev. 13, 20-21, 422 P.2d 237, 242-43 (1967); *First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690, 700-703 (3rd Cir. 1979). In addition, because the STATE ENGINEER was given the power first over the curtailment of water rights, courts lack subject-matter jurisdiction except upon review as provided in NRS 533.450. *See Nevada Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 959, 102 P.3d 578, 586 (2004); *First Jersey Securities, Inc.*, 605 F.2d at 700-703. SADLER chose not to appeal the

STATE ENGINEER's CMA designation of Diamond Valley to address the over-appropriation issue in lieu of immediate curtailment under NRS 534.110(6), and are working to develop a groundwater management plan to be approved by the STATE ENGINEER pursuant to NRS 534.037. Appendix at Vol. 1, pp. 205-208; Vol. 2, pp. 209-316. The District Court's determination that it could order commencement of curtailment proceedings right now in Diamond Valley, notwithstanding the STATE ENGINEER's CMA designation, accentuates why notice of the District Court's hearing on SADLER RANCH's Amended Petition for curtailment should be provided now to groundwater right holders that may be impacted by immediate curtailment. The STATE ENGINEER's discretion (and related proceedings which provide notice and an opportunity to be heard) to resolve over-appropriation in Diamond Valley have been taken away by the District Court's Alternate Writ of Mandamus issued on SADLER RANCH's Amended Petition. Thus, notice now is an absolute necessity for all water holders in Diamond Valley. Had SADLER RANCH filed its petition for curtailment first with the STATE ENGINEER, rather than circumventing proper administrative procedures as it does with its petition

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CMA designation, and instead amended its already filed Petition for Curtailment. Neither SADLER (by not appealing the CMA) nor the District Court (by not requiring notice) should be permitted by this Court to skip necessary steps to the detriment of water rights holders.

directly to the District Court, notice of any curtailment proceedings would have been provided to all affected groundwater users.

2. **Legislative History of NRS 534.110(6) and (7).**

If this Court deems NRS 534.110(6) and (7) ambiguous, it remains clear the Legislature intended to grant the STATE ENGINEER broad authority to designate over-appropriated basins as CMAs rather than ordering immediate curtailment. Subsection 7 was enacted in 2011, providing the STATE ENGINEER for the first time with the power to designate CMAs. The legislative history of Assembly Bill 419, Ch. 265 § 3, 2011 Nevada Statutes 1386-1387 declares the Legislature's intent of the Critical Management Area designation and the 10-year period.

At the Assembly Committee on Government Affairs held on March 30, 2011, Assemblyman Pete Goicoechea testified as follows:

> We have a number of groundwater basins in this state that are overappropriated and I think that number is growing, probably quicker than we would like to see. The State Engineer does not want to be heavy-handed and have to go into these basins and regulate by priority, which means junior permits, where the pumping is curtailed or suspended. Ultimately, you bring that basin back into balance, with only the senior water rights being held.
>
> Assembly Bill 419 does two things. It allows the State Engineer to designate a critical management area in a basin that has shown significant water declines. What that does it would start a ten-year clock at that point. The appropriators in this critical management area would have to work forward and develop a water conservation plan that actually brings that water basin back into some compliance. I am not saying they would ever get it completely back there. They surely would

not get there in ten years, but as long as it was on its way to recovery, I think the State Engineer would feel comfortable with that.

. . . . At the end of the ten-year period, whether it was petitioned or brought forward by the State Engineer, you have a ten-year window to address the issues in an overappropriated basin, started on its way to recovery, or he would be required to regulate by priority.

. . . . Again, you have ten years to accomplish your road to recovery.

Appendix at Vol. 1, pp. 150-151, 153.

Assemblyman Goicoechea testified on May 23, 2011 before the Senate Committee on Government Affairs as follows:

. . . . If the water management plan results are not achieved in ten years, it requires the State Engineer to start regulating the water basin by priority. We have groundwater basins that are declining.

The Legislature has established a gradient of decline and the State Engineer does not want to regulate those basins by priority. Assembly Bill 419 requires that, after a ten-year period with a water management plan in place, the State Engineer regulates by priority if water management goals are not met. Water management plans will come into place; with a water management plan, the bill allows the State Engineer to waive criteria under law, especially forfeiture laws, to bring the basins back in balance whether it be by planting alternative crops, water conservation or using different irrigation methods. Almost every basin in the State that has real development is on the verge of becoming overappropriated or is overappropriated.

Assembly Bill 419 is another tool in the toolbox for the State Engineer.

Appendix at Vol. 1, pp. 192-193.

Andy Belanger for the Southern Nevada Water Authority and the Las Vegas Valley Water District testified that same day:

> I am neutral on A.B. 419. We understand the need to manage groundwater basins and to give people a soft landing to get basins back into balance. We understand and support the concept of groundwater management plans. The plan in the Las Vegas Valley has worked well. We are concerned with some language in the bill, but we are willing to work over the next two years as the bill is implemented to make sure those concerns are addressed, specifically the petition process. We understand the process is critical to giving local groundwater users say in whether basins need to be defined as critical management areas and to the development of groundwater management plans.
>
> Assemblyman Goicoechea went on to state:
>
> This bill allows people in overappropriated basins ten years to implement a water management plan to get basins in balance. People with junior rights will try to figure out how to conserve enough water under these plans. Water management plans will also limit litigation that occurs before the State Engineer regulates by priority. When the State Engineer regulates by priority, it starts a water war and finger-pointing occurs. This bill gives water right owners ten years to work though those issues.

Appendix at Vol. 1, p. 196; *See also* Appendix at Vol. 1, pp. 176, 179, 183, 185, 189.

There is no doubt NRS 534.110(7) was enacted to give the STATE ENGINEER the option to designate over-appropriated basins as CMAs instead of resorting to the harsh immediacy of the curtailment process under Subsection 6 of NRS 534.110. The STATE ENGINEER construes NRS 534.110(6) and (7) in this manner. Appendix at Vol. 1, pp. 078-079. If the STATE ENGINEER is not provided the statutory time period after designating a CMA to approve a groundwater management plan, the legislative intent is violated as the STATE

ENGINEER will be unable to, in practice, designate a CMA and presumably limit pumping.

Here, the STATE ENGINEER's conduct has conformed precisely with the Legislature's grant of authority in enacting Subsection 7. After considering the evidence of over-appropriation in Diamond Valley, the STATE ENGINEER designated the basin a CMA on August 25, 2015. Appendix at Vol. 1, pp. 033-037. No party appealed that Order, including SADLER RANCH. Instead, SADLER RANCH filed a First Amended Petition for Curtailment in Diamond Valley in the District Court. Appendix at Vol. 1, pp. 044-075. Proponents of a groundwater management plan met prior to the STATE ENGINEER's CMA designation and have met regularly since the designation. Appendix at Vol. 1, pp. 205-208; Vol. 2, pp. 209-308. There have been 19 formal workshops. Appendix at Vol. 1, pp. 205-208; Vol. 2, pp. 209-308. A groundwater management plan is being timely developed. Appendix at Vol. 2, pp. 309-316. The water right holders developing the groundwater management plan agree it will not diminish vested water rights. Appendix at Vol. 2, p. 310. The STATE ENGINEER has not and is not abusing his discretion by allowing the appropriators in Diamond Valley to develop a groundwater management plan according to the Legislature's directive. That is exactly what the STATE ENGINEER is supposed to do when he designates a basin as a CMA.

The District Court's conclusion that it can enter a writ of mandamus that orders curtailment now in Diamond Valley, or that orders the STATE ENGINEER to initiate the curtailment process in Diamond Valley when it was designated a CMA in 2015 (well within the 10-year statutory window), deprives the STATE ENGINEER of the discretion afforded by the CMA designation. Because the District Court has inserted itself into the over-appropriation issue in Diamond Valley, and determined that SADLER RANCH has no remedy against individual or specific junior groundwater rights holders in Diamond Valley, and determined SADLER RANCH's remedy is against the entire basin of groundwater right holders, notice must be provided now to all water right holders in Diamond Valley who may be affected by an order from the District Court initiating immediate curtailment proceedings.

VII.

CONCLUSION

EUREKA COUNTY and DNRPCA respectfully request this Court grant this petition and issue its writ prohibiting the District Court from proceeding with the evidentiary show cause hearing presently set to begin May 15-19, 2017 until all Diamond Valley appropriators are provided constitutionally sufficient notice and an opportunity to be heard at the show cause hearing.

///

DATED this 7th day of February, 2017.

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VERIFICATION

I, J. J. GOICOECHEA, under penalty of perjury, state the following assertions are true:

I am the Chairman of the Eureka County Board of Commissioners, acting for EUREKA COUNTY, the Petitioner in the above-entitled action; that I make this Verification on behalf of Petitioner, EUREKA COUNTY; I have read the foregoing Verified Petition for Writ of Prohibition or in the Alternative, Writ of Certiorari or Mandamus and know the contents thereof; that the same are true and correct to the best of my knowledge, save and except those matters therein stated on information and belief, and as to those matters I believe them to be true.

DATED this 6th day of February, 2017.

J. J. GOICOECHEA, DMV
Chairman of the Eureka County Board of Commissioners

STATE OF NEVADA)
: ss.
EUREKA COUNTY)

On February 6, 2017, personally appeared before me, a notary public, J. J. GOICOECHEA, personally known (or proved) to me to be the person whose name is subscribed to the foregoing Verification, who acknowledged to me that he freely and voluntarily executed the foregoing document as the Chairman of the Eureka County Board of Commissioners, on behalf of EUREKA COUNTY.

Rhonda J. Brown
NOTARY PUBLIC

RHONDA J. BROWN
Notary Public - State of Nevada
Appointment Recorded in Eureka County
No: 12-8019-8 - Expires April 18, 2020

VERIFICATION

I, MARK MOYLE, under penalty of perjury, state the following assertions are true:

I am the president and chairman of the board of directors of Diamond Natural Resources Protection and Conservation Association ("DNRPCA"), a Petitioner in the above-entitled action; that I make this Verification on behalf of DNRPCA; I have read the foregoing Verified Petition for Writ of Prohibition or in the Alternative, Writ of Certiorari or Mandamus and know the contents thereof; that the same are true and correct to the best of my knowledge, save and except those matters therein stated on information and belief, and as to those matters I believe them to be true.

DATED this 7 day of February, 2017.

Mark Moyle

MARK MOYLE, President
Diamond Natural Resources Protection and
Conservation Association

STATE OF NEVADA)
: ss.
Churchill
~~EUREKA~~ COUNTY)

On February 7th, 2017, personally appeared before me, a notary public, MARK MOYLE, personally known (or proved) to me to be the person whose name is subscribed to the foregoing Verification, who acknowledged to me that he freely and voluntarily executed the foregoing document as the President of Diamond Natural Resources Protection and Conservation Association.

Kimberly A. Hamman

NOTARY PUBLIC

KIMBERLY A. HAMMAN
Notary Public - State of Nevada
Appointment Recorded in Churchill County
No: 10-10643-4 - Expires May 6, 2017

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

✓ Email and Personal Delivery

✓ Email and U.S. Mail

as follows:

VIA Email and Personal Delivery:

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DATED this 7th day of February, 2017.

/s/ Nancy Fontenot
NANCY FONTENOT

4834-1748-7169, v. 1