

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; 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

Supreme Court No. 72317
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District Court No. 01150420187 11:42 a.m.
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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. & JENNIFER R.
ETCHEVERRY FAMILY TRUST;
MARTIN P. & KATHLEEN A.
ETCHEVERRY FAMILY TRUST;
LAVON MILLER; SUSAN MILLER;
ALBERTA MORRISON; DONALD
MORRISON; RUBY HILL MINING
COMPANY, LLC, and ROGER B. &
JUDITH B. ALLEN,

Real Parties in Interest.

**MOTION TO DISMISS PETITION FOR WRIT OF
PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF
CERTIORARI OR MANDAMUS**

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RESPONDENT'S 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.

None. The State Bar of Nevada was created under the authority of the Judicial Department of the State of Nevada and, as such, is a governmental party excepted from the disclosures required by NRAP 26.1(a).

DATED: March 1, 2017

PARSONS BEHLE & LATIMER

By:


Robert W. Marshall, SBN 1958
Gregory H. Morrison, SBN 12454
*Attorneys for Roger B. and
Judith B. Allen*

Intervenor and Real Party in Interest ROGER B. and JUDITH B. ALLEN (“Allen”), by and through its counsel of record, PARSONS BEHLE & LATIMER, hereby brings this Motion pursuant to Nevada Rule of Appellate Procedure 27, and requests that this Court dismiss the Petition for Writ of Prohibition or, in the Alternative, Writ of Certiorari or Mandamus (the “Writ Petition”) submitted by Petitioners Eureka County and Diamond Natural Resources Protection & Conservation Association (collectively “Petitioners”). Whether to entertain the Writ Petition is discretionary to the Court, and Petitioners have not identified any compelling reason why this Court should entertain their request for extraordinary relief. The Writ Petition should be dismissed because Petitioners fail to state an action to be taken by the Seventh Judicial District Court (“District Court”) that exceeds its jurisdiction or from which injustice is likely to follow, and the appeals process provides Petitioners with a plain, speedy, and adequate remedy at law.

This Motion is based on the points and authorities below, along with the Petitioners’ Appendix filed with the Writ Petition.

I. INTRODUCTION

The Writ Petition requests a writ of prohibition directing the District Court to halt proceedings in *Sadler Ranch, LLC v. Jason King*, Case No. CV-1504-218, until (i) notice is provided to all water right holders; and (ii) all water right holders have an opportunity to be heard. Writ Petition at 37. Alternatively, it seeks a writ of

mandamus requiring the District Court to invite participation from every Diamond Valley groundwater user in the proceedings, or a writ of certiorari to consider the notice issue before the matter proceeds any further.

The District Court matter was initiated by a petition filed by Sadler Ranch, LLC (“Sadler Petition”) alleging that (i) over-pumping in Diamond Valley has resulted in conflicts with senior water rights; and (ii) that the State Engineer is required by law to curtail junior groundwater users’ pumping. Petitioners’ Appendix (“Pet.App.”) at Vol. 1, pp. 044-075. It asks the Court to compel the State Engineer to begin proceedings required for curtailment in Diamond Valley Basin (“Diamond Valley”), or to issue an order curtailing pumping. *Id.*, at p. 2.

The State Engineer moved to dismiss the Sadler Petition based on designation of Diamond Valley as a critical management area (“CMA”). Pet.App., Vol. 1, pp. 076-085. The State Engineer argued that CMA designation is an alternative to curtailment, and that water users have 10 years to resolve overdraft issues before curtailment is required. The State Engineer reasoned that CMA designation rendered the Sadler Petition moot. The District Court rejected that argument, and found that CMA designation does not preclude the State Engineer from ordering immediate curtailment. Pet.App., V. 1, pp. 119-122. With curtailment available, the District Court issued an order requiring that:

Upon receipt of [the] writ, the State Engineer begin the required proceedings to order curtailment of pumping in Diamond

Valley on the basis of priority of right ... or show cause why you have not done do and why this Court should not order curtailment Pet.App., at Vol. 1, p. 124.

A State Engineer motion, joined by Petitioners, requested that the District Court require Sadler to provide notice to all appropriators in Diamond Valley. Pet.App., at Vol. 1, pp. 127-133 (State Engineer); Vol. 2, pp. 317-318 (Eureka County); and, pp. 334-335 (DNRPCA). The District Court denied the motion, reasoning that even if it ordered the State Engineer to begin curtailment proceedings, “the ‘how’ and ‘who’ of curtailment could not be decided until a future proceeding.” Pet.App., at Vol. 2, p. 349. “[N]otice is not mandatory until specific parties’ rights are implicated,” and no specific party’s rights are implicated in the current litigation. *Id.* at 350. At any future proceeding determining the specifics of curtailment, due process rights would be implicated and notice would be required. *Id.*

Petitioners now attempt to appeal the District Court’s findings through the Writ Petition. Petitioners also attempt to appeal a District Court order interpreting NRS 534.110 to allow immediate curtailment (Pet.App., Vol. 1, pp. 112-122) by loosely tying the availability of curtailment to the issue of due process and notice. Petitioners fail to identify how the District Court exceeds its jurisdiction or a duty in which it is derelict. Petitioners have a plain, speedy, and adequate remedy at law, through an appeal, for both the notice issue and the interpretation of NRS 534.110. The Writ Petition should therefore be dismissed.

II. LEGAL STANDARDS

Petitioners have requested writ relief in the form of (i) prohibition; (ii) certiorari; or (iii) mandamus. A writ of prohibition “is a proper remedy to restrain a district judge from exercising a judicial function without or in excess of its jurisdiction.” *Smith v. Eighth Judicial Dist.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (citing NRS 34.320; NRS 34.330). Mandamus is proper to compel performance of an act which the law requires as a duty resulting from office. *Id.* (citing NRS 34.160; NRS 34.170). “A writ of certiorari may be granted where an inferior tribunal ... exercising judicial functions exceeds its jurisdiction.” *Dangberg Holdings Nevada, LLC v. Douglas County*, 115 Nev. 129, 137, 978 P.2d 311, 316 (1999) (citing NRS 34.020(2)). Any form of writ relief is available only when “there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.” *Dangberg Holdings*, 115 Nev. at 138, 978 P.2d at 316. Each of the three writs is “an extraordinary remedy” and the decision to entertain such a petition is within this court's discretion. *See Smith*, 107 Nev. at 677 (prohibition); *Poulos v. District Court*, 98 Nev. 453, 652 P.2d 1177 (1982) (mandamus); *Zamarripa v. First Judicial Dist.*, 103 Nev. 638, 640, 747 P.2d 1386, 1387 (1987) (certiorari). A court may choose to address a writ petition when it “raise[s] important issues of law in need of clarification, involving significant public policy concerns, of which [the] Court’s review would promote sound judicial economy.” *Pacific Western Bank v.*

Eighth Judicial Dist., 132 Nev. Adv. Op. 78, ___, 383 P.3d 252, 254 (2016).

III. DISCUSSION

Petitioners cannot meet the standard to obtain any of the alternative writs, and do not raise an important issue of law in need of immediate clarification. Therefore, this Court should choose to refrain from entertaining the Writ Petition.

A. PROHIBITION: PETITIONERS FAIL TO IDENTIFY A JUDICIAL FUNCTION EXERCISED BY THE DISTRICT COURT WITHOUT OR IN EXCESS OF ITS JURISDICTION.

A writ of prohibition can issue to prevent the District Court from transcending the limits of its jurisdiction in the exercise of its power. *Mineral Cty. v. State, Dept. of Conservation and Nat. Res.*, 117 Nev. 235, 243044, 20 P.3d 800, 805-06 (2001); *Smith*, 107 Nev. at 677, 818 P.2d at 851. Petitioners fail to identify how consideration of a writ of mandate against the State Engineer exceeds or transcend the limits of the District Court's jurisdiction or authority.

A writ of mandate to compel the State Engineer to perform a duty, or ordering him to show cause why that duty was not performed, is within the jurisdiction of the District Court. NRS 34.160, *see also Diaz v. Eighth Judicial Dist.*, 116 Nev. 88, 93, 993 P.2d 50, 53 (2000).¹ Curtailment is a duty within the purview of the State

¹ Petitioners acknowledge that a writ of mandamus is proper to control an arbitrary or capricious exercise of discretion. *See* Writ Petition, at p. 13. Petitioners therefore recognize that the District Court has the statutory authority to issue a writ of mandamus to the State Engineer.

Engineer. NRS 534.120. The Sadler Petition asked the District Court to compel the State Engineer to initiate curtailment. Pet.App., V.1, p. 44. As the result of the Sadler Petition, the District Court ordered the State Engineer to institute curtailment proceedings or show cause why curtailment should not be ordered. Pet.App., V.1, p. 124. A hearing to determine whether a writ of mandate should issue is also within the District Court's jurisdiction. Thus, every action the District Court has taken to date or has stated that it intends to take is within its statutory jurisdiction.

Petitioners allege that the District Court will exceed its authority by proceeding with the show cause hearing without inviting all groundwater users to participate. *Id.* at p. 14. That is a due process argument that this Court can entertain on appeal if and when the District Court orders the State Engineer to begin curtailment. Petitioners also argue that by requiring curtailment, the District Court will "insert itself into the functions reserved to the State Engineer." Writ Petition, at p. 15. The argument that a writ of mandate exceeds the court's authority because it "inserts itself" into a function of an administrative agency argues generally against mandamus as a remedy for abuse of administrative discretion. Yet, the Legislature has recognized mandamus as a proper vehicle to compel administrative action. NRS 34.160. Petitioners provide no reasonable explanation why exercise of that discretion would result in the District Court exceeding its authority.

B. MANDAMUS: PETITIONERS FAIL TO IDENTIFY A DUTY THE DISTRICT COURT FAILED TO PERFORM.

“[A] writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion.” *Hickey v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 105 Nev. 729, 731, 782 P.2d 1336, 1337 (1989) (citing NRS 34.160 & 34.170). Petitioners have not identified a duty of office which the District Court failed to perform; nor have they sufficiently alleged any abuse of discretion.

To boil Petitioners’ arguments down to their essence, Petitioners allege that due process requires the District Court to provide notice to every groundwater right holder in Diamond Valley prior to considering whether to order the State Engineer to initiate curtailment proceedings. The District Court has correctly determined twice that due process does not attach to all water rights holders at this stage of the litigation. Pet.App., V.2, pp. 346-350; 389-396. The District Court found, citing precedent from *Desert Valley Water Co. v. State*, 104 Nev. 718, 766 P.2d 886 (1988), that the show cause hearing would only determine *if* curtailment is necessary, and the *how* and *who* would be determined in a later proceeding. *Id.* at p. 349. If due process rights attach, it will be at that later proceeding. Allen does not dispute the fact that water rights are a form of real property. Allen *does* dispute that any individual can or will be deprived of real property at this stage of the litigation. Petitioners repeatedly argue that individual water rights will be impacted by a District Court order mandating the State Engineer to initiate curtailment, but that is

simply not the case.

Allen further disputes that administrative curtailment of permitted water rights constitutes deprivation of a real property interest. Every groundwater permit issued in Nevada states on its face that it is issued *subject to existing rights*. NRS 534.020 (groundwater appropriations are “subject to all existing rights to the use thereof”). If conditions warrant, “the State Engineer may order that withdrawals...be restricted to conform to priority rights.” NRS 534.110(6). Therefore, every groundwater permit requires the appropriator to understand that the State Engineer can order the permittee to cease pumping if conditions warrant. A water right is essentially a real property right *subject to availability*. Enforcement of express permit terms which are essential to the very property right is not a deprivation of that right. The District Court is considering whether the State Engineer *must* enforce the express terms of water permits, not whether he *may*.

C. CERTIORARI: THE DISTRICT COURT HAS NOT EXCEEDED ITS JURISDICTION IN ORDERING THE STATE ENGINEER TO SHOW CAUSE WHY CURTAILMENT IS NOT PROPER.

“A writ of certiorari may be granted where an inferior tribunal ... exercising judicial functions exceeds its jurisdiction and ‘there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.’” *Dangberg Holdings*, 115 Nev. at 137, 978 P.2d at 316 (citing NRS 34.020(2)).

This [C]ourt has often stated that the inquiry upon a petition for a writ of certiorari is limited to whether the inferior tribunal

acted in excess of its jurisdiction...[i]f it is determined that the act complained of was within the jurisdiction of the tribunal, *our inquiry stops even if the decision or order was incorrect.* *Id.* at 138, 978 P.2d at 316.

There is no need to repeat the jurisdictional arguments in section III(A), *supra*, in full. The writ of mandate requested by the Sadler Petition is indisputably within the District Court's jurisdiction.

D. PETITIONERS HAVE A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW THROUGH AN APPEAL.

None of alternative writs requested is appropriate “where the petitioner has a plain, speedy and adequate remedy, **such as an appeal**, in the ordinary course of law. *Hickey*, 105 Nev. at 731, 782 P.2d at 1337 (citing NRS 34.160 & 34.170) (emphasis added); *see also Dangberg Holdings*, 115 Nev. at 138, 978 P.2d at 316. All final judgments of District Court are appealable. NRAP 3A(b)(1). A district court decision on a petition for a writ of mandamus is a final order subject to appeal. *Ashokan v. State, Department of Insurance*, 109 Nev. 662, 665, 856 P.2d 244, 246 (1993) (a district court order denying writ of mandamus is a “final judgment within the meaning of NRAP 3A(b)(1)”). Administrative appeals involving water are retained by this Court. NRAP 17(a)(9). Therefore, Petitions have an appeal available to them in this Court.

Petitioners also attempt to shoehorn a premature appeal of the District Court's interpretation of NRS 534.110 into the Writ Petition. The District Court had

determined that NRS 534.110(6) and (7), read together, do not preclude curtailment proceedings within 10 years of CMA designation. Whether that conclusion is proper is irrelevant to whether the District Court must require notice to every groundwater user in Diamond Valley before issuing a writ of mandate requiring the State Engineer to begin curtailment proceedings. Petitioners plead their interpretation of NRS 534.110, even delving into the legislative history of the statute, and simply state at the end of their arguments that because the District Court rejected their interpretation of NRS 534.110 “notice must now be provided to all water right holders in Diamond Valley.” The arguments are unconnected and inappropriate in a writ petition on the issue of due process.

IV. CONCLUSION

Petitioners are simply attempting a pre-emptive appeal of the District Court before it issues a final order on the Sadler Petition. The statement that junior groundwater users will be deprived of a real property interest at the very moment that the District Court determines that the State Engineer must initiate curtailment proceedings is untrue. The matter at hand will determine if the State Engineer has been remiss in a duty to curtail groundwater pumping to date. If the District Court determines that he has neglected his duty, then the State Engineer can begin the process of determining the “how” and the “who” of curtailment. The Writ Petition should not be considered by this Court at this time.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 27(d), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point font.

I further certify that this brief complies with the page limitations of NRAP 27(d)(2) because, excluding the parts of the brief exempted by NRAP 27(d)(1)(D), it does not exceed 10 pages.

Finally, I hereby certify that I have read this motion, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 1, 2017

PARSONS BEHLE & LATIMER

By: 

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Judith B. Allen*

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 1st day of March, 2017 I caused to be delivered via the Clerk of the Court's ECF filing system and by mailing, first class, postage prepaid, a true and correct copy of the foregoing document, addressed as follows:

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