

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
FARMS LLC; J.R. MARTIN TRUST;

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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.

**PETITIONER, EUREKA COUNTY'S RESPONSE IN
OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT
OF PROHIBITION OR, IN THE ALTERNATIVE,
WRIT OF CERTIORARI OR MANDAMUS**

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EUREKA COUNTY and DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION (“DNRPCA”) filed a Petition for Writ of Prohibition or, in the Alternative, Writ of Certiorari or Mandamus (“Petition” or “Writ application”) on February 8, 2017. This Writ application is based on the District Court’s refusal to provide notice to all water users before an evidentiary hearing on SADLER RANCH, LLC’s (“Sadler Ranch”) petition to the SEVENTH JUDICIAL DISTRICT COURT (“District Court”) demanding curtailment of pumping in the entire Diamond Valley Basin (“Diamond Valley”), or in the alternative ordering JASON KING, P.E., NEVADA STATE ENGINEER (“State Engineer”) to initiate curtailment proceedings. Petition at 8. The Writ application was sought because water appropriators in Diamond Valley will have their due process rights violated if they are not notified about and given a meaningful opportunity to participate in the upcoming District Court show cause hearing set to begin May 15, 2017, that will determine whether curtailment is to occur. Petition at 18-23. Intervenor and Real Party in Interest, ROGER B. and JUDITH B. ALLEN (“Allens”) have filed a Motion to Dismiss the Writ application which asks this Court to require due process protections for the unaware water rights holders in Diamond Valley before any evidentiary hearing in

District Court. EUREKA COUNTY hereby files this Response in opposition to the Allens' Motion to Dismiss.

I. This Court has discretionary jurisdiction to hear the Writ application.

Nevada Rules of Appellate Procedure (“NRAP”) 27 allows parties to file motions, but the Rule does not specifically provide the standard for motions to dismiss. However, authority from this Court is clear on this point—a motion to dismiss should only be granted if the Supreme Court is without jurisdiction to proceed. NRAP 14(f) (“If respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss.”); *Albert D. Massi, Ltd. v. Bellmyre*, 111 Nev. 1520, 1521, 908 P.2d 705, 706 (1995) (granting a motion to dismiss an appeal because appellant was not aggrieved by the judgment and therefore did not have standing, so his “proper recourse is through a petition for extraordinary writ”); *Chateau Vegas Wine, Inc. v. S. Wine & Spirits of Am., Inc.*, 64598, 2015 WL 1794698, at *1 (Nev. Apr. 14, 2015) (granting a motion to dismiss an appeal because the Court was without jurisdiction due to a bankruptcy stay); *Landcor Properties v. Ryland Homes Nevada, LLC*, 126 Nev. 731, 367 P.3d 791 (2010) (granting a motion to dismiss as the Court lacked jurisdiction because the appeal was filed outside of the required 33-day window); *San Antonio Mgmt., LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 128 Nev. 943, 381

P.3d 673 (2012) (granting a motion to dismiss because appellant appealed an interlocutory order).

As the Allens admit in their Motion, the Court's decision to entertain a writ is discretionary; thus, the Court can issue the writ sought by EUREKA COUNTY and DNRPCA if the requirements for issuance of a writ have been met. Motion at 1; *see also Valladares v. Second Judicial Dist. Court In & For County of Washoe*, 112 Nev. 79, 81, 910 P.2d 256, 258 (1996). The requirements for issuance of a writ have been met by Petitioners as set forth in their Writ application and there are no issues in this case involving standing, a bankruptcy stay, failure to meet an appeal deadline, appeal of an interlocutory order, or any other issue that would divest this Court of jurisdiction in this Writ application.

The Allens cite no authority indicating that a motion to dismiss is the proper vehicle to challenge whether an adequate legal remedy exists when considering a Writ application before this Court or any court. The question of whether an adequate legal remedy exists is inextricably intertwined with the merits of the due process arguments in the Writ application. This Court cannot know whether such a legal remedy exists until it hears what is at stake and what the relevant legal authority directs. This is why the Court typically independently reviews a writ, then either orders an answer or denies the writ. *See* NRAP 21(b). The Allens'

Motion to Dismiss is an attempt to argue the merits of the Writ application prior to being ordered by the Court to file an Answer. The Allens attempt to submit their purported challenges to the Writ application prior to being asked by the Court to do so should be disregarded by the Court. The Allens' Motion to Dismiss should be denied.

II. Petitioners do not have an adequate remedy at law; circumstances of urgency exist, judicial economy weighs in favor of considering the Writ application, and important issues of law in need of clarification are presented.

The Allens argue that Petitioners have not met the standard to obtain writ relief. Motion at 4. “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). The Allens argue that the due process claim can be appealed “if and when the District Court orders the State Engineer to begin curtailment.” Motion at 6. If EUREKA COUNTY is to wait for a final curtailment determination by the District Court, unnotified appropriators will have already had their due process right to notice violated, and they will have been

unable to participate in the critical question of **whether curtailment should be initiated at all**. Junior water right holders in Diamond Valley will have had their rights taken before being notified that judicial proceedings have even commenced. Petition at 19-24. This issue of notice is urgent and must be considered before curtailment is ordered.

To undercut the assertion of urgency, the Allens contend, without support, that junior groundwater users will not be deprived of a property interest at the very moment the District Court determines that curtailment will occur. Motion at 10. This is not true. As set forth in the Writ application, *see* Petition at 18-23, when the District Court orders that curtailment must occur, it is guaranteed that at least some junior appropriators in Diamond Valley will be injured. This is an inescapable conclusion, and the Allens' statement to the contrary should be disregarded.

The urgency associated with this case is highlighted by the District Court's erroneous construction of NRS 534.110(6) and (7),¹ contrary to the Allens' assertion that this argument is "unconnected" to the due process claim. Motion at

¹ This erroneous construction by the District Court exacerbates the injury of no notice, because a plain reading of the consequence of the State Engineer's CMA designation is that junior water users have up to 10 years to organize their affairs and water use, and prepare for a drastic change in their water practices, but the erroneous construction by the District Court means they have a much shorter timeframe under the District Court's curtailment proceedings.

10. Had Sadler Ranch properly petitioned the State Engineer to curtail rights in Diamond Valley, the State Engineer would have notified all potentially affected parties and provided them with an opportunity to examine and challenge evidence supporting curtailment. Petition at 21. However, Sadler Ranch instead directly petitioned the District Court for curtailment, and the District Court has now issued an Alternate Writ of Mandamus.² The notice typically provided in curtailment proceedings has not been provided to potentially affected appropriators in Diamond Valley. Appropriators must be given notice now, so that they have an opportunity to review and challenge the evidence before the District Court enters an order stating that curtailment is required. Petition at 33-34. After the District Court orders that curtailment must occur in Diamond Valley, many appropriators, especially junior right holders, will have no meaningful opportunity to prevent deprivation of a property right. Thus, they will be deprived of their property without constitutionally sufficient notice.

Judicial economy also weighs in favor of considering the Writ application, and an important issue of law needs to be clarified. There are a number of overappropriated basins in Nevada. Petition at 34. Thus, it is likely that due

² Contrary to the Allens' contention, the Writ application does not challenge that the District Court has the right to issue an Alternate Writ of Mandamus. Motion at 5, 9.

process questions regarding curtailment, and more specifically, what notice appropriators in a water basin are entitled to for curtailment proceedings in District Court and when that notice is required to be given, may occur again in coming years. Sound judicial economy favors, at a minimum, considering the merits of the Writ application, and issuing an opinion to clarify the law in this area. This appears to be an issue of first impression in Nevada and around the country.

III. Petitioners have clearly identified the District Court lacks jurisdiction until sufficient notice is provided.

The Allens argue that “Petitioners fail to identify how the District Court exceeds its jurisdiction or a duty in which it is derelict.” Motion at 3. The Allens are wrong. Specifically, on pages 12-13 of the Writ application, Petitioners cite cases indicating that writs of prohibition or certiorari are the proper vehicles to challenge due process violations, as a District Court lacks jurisdiction to hear cases that are constitutionally deficient. Specifically, in *Matter of Two Minor Children*, the Court considered and issued a writ of prohibition when an issue of jurisdiction was presented by challenging, on due process grounds, the competency of two juveniles. 95 Nev. 225, 228, 592 P.2d 166, 168 (1979). The Court held that “the juvenile court had psychiatric evaluations indicating that neither minor could competently assist legal counsel in preparing defenses to the delinquency charges.

As a matter of constitutional law, the trial court could go no further with the proceedings.” *Id.* at 231, 592 P.2d at 169.

In *Watson v. Housing Authority of City of N. Las Vegas*, the appellant was given a termination letter containing four reasons for her dismissal, but the letter lacked sufficient specificity. 97 Nev. 240, 241-42, 627 P.2d 405, 406 (1981). A hearing was held at the administrative level, but no evidence was taken and the agency determined that the letter did not violate her due process rights. *Id.* at 242, 627 P.2d at 406. In considering the lack of specific notice given to the employee supporting her termination, this Court stated that a writ of certiorari should be granted “whenever the lower body exceeds its jurisdiction.” *Id.* “In this context, jurisdiction has a broader meaning than the concept of jurisdiction over the person and subject matter: it includes constitutional limitations.” *Id.* at 242, 627 P.2d at 406–07. “If the [agency’s] approval of [employee’s] termination violated her due process rights, the [agency] exceeded its jurisdiction and the writ should have been granted.” *Id.* at 242, 627 P.2d at 407.

Here, the same reasoning applies—if the District Court does not order constitutionally sufficient notice, it lacks jurisdiction to continue. Failing to provide notice to appropriators in Diamond Valley who have a property interest impaired as a result of the upcoming show cause hearing presents a question of the

failure to satisfy constitutional due process. Contrary to the Allens' assertion, the Writ application does specifically identify how the District Court exceeded its jurisdiction.

The Allens' assertion that Sadler Ranch's request is "indisputably within the District Court's jurisdiction" wholly misses the point. Motion at 9. The District Court is without jurisdiction because it is violating due process requirements, not because it considered the petition for curtailment filed by Sadler Ranch.

IV. Conclusion.

The Allens cite no authority for their proposition this Court is without jurisdiction to consider the Writ application. Their Motion to Dismiss is an improper vehicle by which to challenge the Writ application. Further, the Writ application demonstrates that an adequate legal remedy does not exist, circumstances of urgency are apparent, judicial economy weighs in favor of considering the Writ application, and important issues of law are in need of clarification. The Writ application should be granted and the appropriate writ issued. The Allens' Motion to Dismiss should be denied.

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DATED this 3rd day of March, 2017.

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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 the following parties as outlined below:

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