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

District Court No. CV1604-081

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.

ANSWER OF ROGER B. AND JUDITH B. ALLEN, REAL PARTIES IN INTEREST, TO VERIFIED 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: April 6, 2017

PARSONS BEHLE & LATIMER

By: _____

Robert W Marshall, SBN 1249
Gregory H. Morrison, SBN 12454
Attorneys for Roger B. and Judith B. Allen

Pursuant to the March 16, 2017 Order of the Honorable Court, Roger B. and Judith B. Allen, Real Parties in Interest ("Allen"), hereby submit this Answer to the Petition for Writ of Prohibition or, in the Alternative, Writ of Certiorari or Mandamus ("Petition") filed by Petitioners Eureka County and Diamond Natural Resources Protection & Conservation Association ("Petitioners").

I. INTRODUCTION

The fundamental premise relied upon by the Petition – that a District Court order requiring the State Engineer to initiate curtailment proceedings can or will result in a deprivation of a real property interest – is flawed. No person's water rights will be curtailed by any order which may be entered by the Seventh Judicial District Court of the State of Nevada in and for the County of Eureka ("District Court") in Case No. CV1504-218 ("District Court Case") (not identified in the Petition). That will require a further proceeding of the State Engineer. Even when the individual rights subject to curtailment are identified by a subsequent proceeding, that subsequent curtailment order will not deprive any individual of a real property interest. Thus, Petitioners' hyperbolic statement that "[a]t the very moment the District Court orders curtailment, junior water right holders will be deprived of a property interest" (Petition, at p. 6), is patently false on multiple levels.

Petitioners seek, by way of the requested writs, to require that all water right holders in the Diamond Valley Basin No. 153 ("Diamond Valley") be given notice of the District Court Case and the opportunity to intervene in that case. Petitioners couch their petition in due process protection of property rights. This is misleading. Nothing in the District Court Case triggers "due process requirements under the United States and Nevada Constitutions for water right curtailment proceedings." Petition, at p. 3. No party is threatened with harm in the District Court Case, much less imminent harm that that might warrant writ relief.

The District Court Case will determine whether the State Engineer should be ordered to commence curtailment proceedings with respect to groundwater pumping in Diamond Valley. All hydrographic records show a steady groundwater decline in the basin due to over pumping. The petition that initiated the District Court Case alleges that, because of those groundwater declines, the State Engineer must be ordered to curtail pumping as needed to comply with Nevada's priority system of water rights. (*See* V.1, pp. 044-075.)[1]

It is simply not true that ". . . junior water right holders will be deprived of a property interest" the "very moment" the District Court orders the State

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[1] References to Petitioners' Appendix to the Petition herein will refer to the volume number ("V") and page(s).

Engineer to initiate curtailment. Petition, p. 6. It is similarly not true that the show cause hearing before the District Court is "the only meaningful hearing in which they (the water right holders) can protect their water rights." *Id.* The further statement in the Petition that the District Court acted beyond its "jurisdictional authority" – constituting a "due process violation" – by denying the motion to require all water rights holders be given notice of the show cause hearing is also not true. *Id.*

The District Court Case does not seek to establish which rights may be curtailed nor does it seek to establish the amount of curtailment or the timing of any curtailment. Those are all questions for the State Engineer to determine in a separate and subsequent proceeding. When the subsequent proceeding begins, notice will be given to all water right holders who will then be free to offer evidence or testimony regarding what rights should be curtailed and the extent of such curtailment. The District Court Case is limited to determining whether the State Engineer has satisfied his duty under Nevada water law to protect senior water rights.

The order sought would require only that the State Engineer begin proceedings to execute the foundational Nevada water law principle of "first in time, first in right" – the doctrine of prior appropriation. All water permits issued for the last 100 years under Nevada's water law are issued "subject to existing

rights." NRS 534.020. Vested water rights – those rights obtained by actual use prior to enactments of the water statutes in 1905 – were also based on prior appropriation. Thus, enforcing the bedrock principle of Nevada's water law, which has been in place for over 100 years, is not a "draconian remedy." Petition, p. 7.

Water rights are a property right, protected under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 8.6, of the Nevada Constitution. Petitioners' position, that curtailment of a junior water right deprives a junior appropriator of a property right, inverts the law. It is the *failure to curtail* junior appropriators' pumping in shortage situations is that will result in deprivation of senior property rights. Curtailment of junior appropriators in shortage situations *upholds* property rights, is consistent with Nevada's water law, and the possibility of curtailment is included in the terms of each permit.

The District Court has authority to order the State Engineer to do his duty, and there is no due process violation of anyone's rights by doing so. However, failure to issue such an order most certainly will deprive senior water right holders of their water rights.

II. RELEVANT FACTS

Allen generally admits Petitioners' factual recitation in Section IV of the

Petition (pp. 7-11), except as follows: In their discussion of the District Court's October 24, 2016 order denying the State Engineer's motion to require notice to all water right holders in Diamond Valley of the Show Cause Order hearing, Petitioners portray the District Court's ruling as a deprivation of due process rights of water right holders in the basin. Petitioners refer to "unnotified, unrepresented, unaware" appropriators who will immediately lose property rights because of the Show Cause hearing and potential order. This mischaracterization of the ruling is not accurate.

The District Court clearly recognized the due process rights of a water right holder, and ensured that water right holders will have an opportunity to be heard in a proceeding in which water use might be curtailed. The District Court, citing *Desert Valley Water Co. v. State*, 104 Nev. 718, 766 P.2d 886 (1988), held that "notice is not mandatory until specific parties' rights are implicated." Footnote 10 follows by stating that notice will be served on potentially affected water right owners "during any possible future proceedings to determine the 'how' and 'who' of curtailment."

In other words, the District Court Case is NOT the proceeding at which a curtailment of any specific water use will be determined. The District Court Case will determine only if the State Engineer must start such proceedings. What rights might be curtailed, to what degree, the timing, and all other specifics of

curtailment will be the subject of a later State Engineer proceeding if one is ordered by the Court. The District Court stated:

> [E]ven if this Court were to grant Sadler Ranch's request and decide that some curtailment must occur – either through the State Engineer or directly – the 'how' and 'who' of curtailment could not be decided until a future proceeding. At this future proceeding, due process rights would necessarily attach and all possibly affected appropriators would have a constitutional right to receive notice of the action. Possible affected appropriators could then appear and argue why their specific water rights should not be curtailed. . . . this hearing will merely determine whether or not this Court will order future proceedings. Hence, due process rights do not attach at this point. (V.2, p. 349.)

The District Court's Order on this point was correct.

Petitioners would require two generally noticed proceedings, greatly expanding the length, cost and complexity of this process to the detriment of all parties involved, including the State Engineer.

III. APPLICABLE LAW

Petitioners seek one or more of three alternative forms of writ. Writ relief is an "extraordinary remedy" to be granted at the discretion of the Court. *Smith v. Eighth Judicial Dist.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (prohibition); *Poulos v. District Court*, 98 Nev. 453, 652 P.2d 1177 (1982) (mandamus); *Zampirra v. First Judicial Dist.*, 103 Nev. 638, 747 P.2d 1386 (1987) (certiorari). 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, 243-44, 20 P.3d 800, 805-06 (2001). 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). "A writ of certiorari may be granted where an inferior tribunal ... exercising judicial functions exceeds its jurisdiction...." *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.

Any of the forms 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 Nevada, LLC v. Douglas County*, 115 Nev. 129, 137, 978 P.2d 311, 316. All final judgments of the District Court are appealable. NRAP 3A(b)(1). A district court order denying a writ of mandamus has been held to be a final judgment within the meaning of NRAP 3A(b)(1). *Ashokan v. State, Dep't*

of Ins., 109 Nev. 662, 856 P.2d 244 (1993). Appeals involving water law decisions by are retained by this Court. NRAP 17(a)(9).

NRS 534.110(6) and (7) are statutory sections dealing, respectively, with investigations and orders of curtailment and designation of critical groundwater management areas. Those statutory sections have nothing to do with the subject of the Petition, which is whether or not due process requires notice of the District Court Case to be provided to all water right holders in Basin 153. Therefore, NRS 534.110 is irrelevant to the issues presented by the Petition.

IV. ARGUMENT

Allen does not dispute the de novo standard of review discussed by Petitioners. Petition, at p. 16. Allen also agrees that water rights constitute real property rights subject to constitutional due process safeguards. Petition, at pp. 17-18. However, for the reasons detailed below, Allen disagrees with Petitioners' statement that the Show Cause hearing is the "only meaningful opportunity to be heard prior to being deprived of their water rights." Petition, at p. 18. Petitioners are attempting to add a second generally noticed proceeding to the process of controlling the over pumping in Diamond Valley, and are attempting to greatly expand the cost and time involved in the process in an effort to slow the process of enforcing Nevada's water law.

A. Involving every Diamond Valley Water Right Holder in a Hearing to Determine a Pure Question of Law will not Help to Resolve that Question.

The reality of overpumping in Diamond Valley and the effects thereof are not in dispute. *See State Eng'r Order No. 1264* (V.1, at pp. 033-037); *see also* Petition, at p. 7 (noting that "[n]o one…appealed the State Engineer's order designating Diamond Valley as a CMA"). The issue in the District Court Case is what Nevada statute requires of the State Engineer *when faced with those facts*. (*See* V.1, at pp. 044-075.) The pure question of law in the District Court Case is how and when the State Engineer must address overpumping, if at all. Petitioners insinuate that allowing all Diamond Valley appropriators to participate in the District Court Case will somehow alter the underlying facts that may or may not require curtailment. Petitioners do not identify any question of fact in issue in the District Court Case that would warrant participation of every water right holder in Diamond Valley.

Petitioners use emotionally charged phrases and state that a District Court order that the State Engineer initiate curtailment will result in a "deprivation" or will be "draconian." Petition, at p. 7. But Petitioners neglect to clarify how hundreds of additional participants might lend the District Court insight on what Nevada water law requires. The reality is that Petitioners are stalling – trying to delay inevitable curtailment – while they, as junior appropriators, attempt to

determine how they might circumvent the doctrine of prior appropriation.

B. Petitioners Fail to Meet the Criteria for any of the Alternate Writs Requested.

Petitioners have not identified a duty of office which the District Court failed to perform; nor have they sufficiently alleged any abuse of discretion. Boiled down to its essence, Petitioners' argument is that due process requires the District Court to provide notice to every groundwater right holder in Diamond Valley prior to considering whether the State Engineer is required by law to initiate curtailment proceedings. Petitioners allege that the District Court either abused its discretion or exceeded its jurisdiction by not noticing and inviting every Diamond Valley appropriator to participate.

1. The District Court has not Exceeded the Limits of its Power, so Prohibition and Certiorari are Unavailable.

Prohibition and certiorari are not appropriate here. A writ of prohibition can issue to prevent the District Court from transcending the limits of its jurisdiction in the exercise of its power. NRS 34.320; *Mineral Cty.*, 117 Nev. at 243-44, 20 P.3d at 805-06. "A writ of certiorari may be granted where an inferior tribunal ... exercising judicial functions exceeds its jurisdiction...." NRS 34.020(2); *Dangberg Holdings*, 115 Nev. at 137, 978 P.2d at 316. The District Court is not exceeding the limits of its jurisdiction.

The Sadler Petition sought a writ of mandamus from the District Court

compelling the State Engineer to satisfy the duties of his office. (V.1, at p. 44.) A district court may issue a writ of mandate to compel the performance of an act which the law specifically enjoins as a duty resulting from an office. NRS 34.160. Curtailment is a duty within the purview of the office of the State Engineer. NRS 534.120. Thus, the District Court's order to the State Engineer to show cause why he should not initiate curtailment is within its statutory jurisdiction.

Petitioners argue that the District Court will exceed its jurisdiction by hearing a case that is constitutionally deficient, and ask this Court to determine that such a deficiency results from the District Court's refusal to require notice to all water right holders. The District Court has twice issued well-reasoned orders that explain to Petitioners why due process does not require such notice. The District Court's explanation, cited (and quoted in part) above, succinctly stated why notice is not necessary at this stage of the litigation, and it need not be repeated here. Due process is simply not triggered by litigation to determine whether the State Engineer must initiate curtailment. The District Court Case is not constitutionally deficient and the District Court will not exceed its jurisdiction by proceeding with the show cause hearing.

2. The District Court has not Failed to Perform any Duty Required by Law.

Mandamus is not available here. "[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." NRS 34.160; *Hickey*, 105 Nev. at 731, 782 P.2d at 1337. The District Court has not ordered curtailment of any pumping; it has only ordered the State Engineer to show cause why he has not ordered curtailment when faced with the undisputed fact of overpumping. (V.1, at pp. 123-24.) The District Court requiring the State Engineer to justify his inaction in Diamond Valley, and considering whether that inaction was improper, is not an abuse of discretion.

Petitioners again characterize the District Court's refusal to require notice to every groundwater right holder in Diamond Valley, and to invite those water right holders to participate in the District Court Case, as a constitutional violation. Allen again defers to the District Court's common-sense explanation regarding why it did not require basin-wide notice. Any order resulting from the District Court case will immediately affect *only* the State Engineer, and not any individual water appropriator, so the District Court has not abused its discretion. Where there is no abuse of discretion, mandamus is not appropriate.

C. Petitioners Have a Plain, Speedy, and Adequate Remedy at Law Available.

Petitioners have a plain, speedy and adequate remedy at law through an appeal if they still believe that they have an appealable issue after the District

Court rules on the hearing based on the Show Cause Order. All final judgments of the District Court are appealable. NRAP 3A(b)(1). A district court order denying a writ of mandamus has been held to be a final judgment within the meaning of NRAP 3A(b)(1). *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 856 P.2d 244 (1993). Therefore, presumably a district court order approving mandamus is also a final judgment within the meaning of NRAP 3A(b)(1). Regardless of the outcome of the District Court Case, it is appealable. Appeals involving water law decisions by are retained by this Court. NRAP 17(a)(9). Therefore, Petitioners' appeal of the District Court Case will be before this Court.

Petitioners continue to forward a patently false position to support the claim that no plain, speedy, or adequate remedy at law is available. They state that "...if [Petitioners] wait to appeal a final determination until after the [show cause] hearing and the District Court orders curtailment proceedings be initiated, unnotified appropriators will have already had their due process rights violated...." Petition, at p. 14. Virtually everything in that sentence is inaccurate. Petitioners essentially argue that an appeal cannot provide relief because any possible damage will be done notwithstanding the outcome of the appeal. First and foremost, that argument again wrongly states that individual appropriators' water rights will be affected in any way as a result of the District Court Case. As noted above, no water right will be affected until after a subsequent proceeding

on the details of curtailment. It also ignores the remedy at law that would result from a successful appeal: a reversal of the curtailment order. If, on appeal, this Court determines that the District Court denied any party due process, it will prescribe an appropriate remedy.

Alternatively, Petitioners urge the Supreme Court to "intervene" under circumstances of "urgency" and "strong necessity." Petition, at p. 14. Notwithstanding the use of inflammatory rhetoric by Petitioners, there is no urgency or strong necessity that this Court grant the requested writ relief. Contrary to the assertion by Petitioners that "judicial economy" requires granting the Petition (p. 15), Petitioner's request, if granted, would greatly and unnecessarily increase the time, complexity and cost of the District Court Case. It would open the door to hundreds of potential litigants to intervene, and to weigh in on whether the State Engineer, in light of undisputed facts, failed to perform a duty mandated by law. There is simply no need for hundreds of additional voices to weigh in on that question of law.

D. NRS 534.110 is Irrelevant to Whether Due Process Requires Notice to all Water Users.

By way of answer to Petitioners inserting extensive argument relating to the District Court's interpretation of NRS 534.110 into the Petition (see, pp. 14-16), Allen denies that such issue has any relevance with respect to the issue of due

process notice which is the basis for the Petition. Petitioners are attempting to take a premature appeal of this issue by inserting it into the Petition, which they are not permitted to do, since the District Court ruling on the interpretation of NRS 534.110 is not a final order. The District Court's interpretation of NRS 534.110 is the proper subject of an appeal, should a party disagree with it, only at such time as there is a final order from which an appeal may be taken. There is no such final order present in this case. Accordingly, the entire discussion under Section VI E (pp. 27-37) should be stricken by the Court as being outside the scope and issues presented by the Petition.

V. CONCLUSION

For the reasons articulated above, Allen prays the above honorable Court to deny the Writ Petition.

DATED: April 6, 2017

PARSONS BEHLE & LATIMER

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), 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 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 25 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 NRAP 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.

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: April 10, 2017

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 6th day of April, 2017, I caused to be delivered via electronic transmission and by mailing, first class, postage prepaid, a true and correct copy of the foregoing document, addressed as follows:

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