IN THE SUPREME COURT OF THE STATE OF NEVADA

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EUREKA COUNTY; DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION; and JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

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; 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

Case No. 72317

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.
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PETITIONERS' REPLY IN SUPPORT OF 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 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 10th day of May, 2017.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Rules:

Petitioners, EUREKA COUNTY and DIAMOND NATURAL RESOURCE PROTECTION & CONSERVATION ASSOCIATION ("DNRPCA") ask this Court to issue a Writ of Prohibition, or in the Alternative, Writ of Certiorari or Mandamus ("Writ Petition") pursuant to Nevada Rule of Appellate Procedure ("NRAP") 21 to halt the show cause 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 ("District Court"), until notice and an opportunity to be heard is provided to all water right holders in the Diamond Valley Hydrographic Basin (153) ("Diamond Valley"). A show cause hearing before the District Court had been set for May 15-19, 2017 on the Alternate Writ of Mandamus issued by the District Court ("Show Cause Hearing" or "Hearing"). On May 3, 2017, the District Court continued the Hearing until after this Court issues a ruling in this case. Reply Appendix at Vol. 1, pp. 410-412.

The District Court has made clear that at the Show Cause Hearing, it could decide that curtailment must occur in Diamond Valley. Even if the Hearing does not determine the "who" and "how" of curtailment, it will decide the most important question—"whether" curtailment will occur at all. The Hearing provides the only meaningful opportunity for unnotified Diamond Valley junior

appropriators to be heard and protect their property interests prior to a determination of whether curtailment will occur.

JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES ("STATE ENGINEER") joined the Writ Petition. Real parties in interest SADLER RANCH, LLC ("SADLER RANCH")[1] and ROGER B. and JUDITH B. ALLEN (the "ALLENS") filed Answers in opposition to the Writ Petition.

This Reply in Support of the Verified Petition is based on the points and authorities below, Petitioners' Appendix ("Appendix") pages 1-409, and Reply Appendix ("Reply App.") pages 410-414, filed with this Verified Petition.

I.

SUMMARY OF ARGUMENT

In its Answer, SADLER RANCH asserts the District Court properly limited the scope of the Show Cause Hearing because the District Court indicated that additional proceedings will occur after the Hearing where due process will be

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[1] SADLER RANCH asserts that the Verified Petition's routing statement incorrectly referenced NRAP 17(a)(8) and 17(a)(10) as justification that the Supreme Court retain this case, citing instead to NRAP 17(a)(9) and 17(a)(13). As this Court is aware, NRAP 17 was amended effective January 1, 2017. The Petitioners' citations are correct.

provided. *See, e.g.*, SADLER RANCH Answer ("SR Answer") at 26-29. The ALLENS assert a similar position. *See* ALLENS Answer at 1-2. The District Court was clear—although it will not decide the "how" and the "who" of curtailment at the Show Cause Hearing, it will decide **whether curtailment is to occur at all**. Appendix at Vol. 2, p. 349. Once the District Court decides curtailment will occur, junior water right holders (who have permits issued by the STATE ENGINEER) will not have a meaningful opportunity to contest whether curtailment should occur. If the District Court orders curtailment to occur, the only issue to resolve in later proceedings, either by the District Court or the STATE ENGINEER, is what amount of pumping to curtail and what year should be the cut-off line. *See* SR Answer at 4.

The priority date of all junior appropriators' permits is set by statute. *See* NRS 533.355 and NRS 534.080(3). Once the decision to curtail is made by the District Court, water right holders below the determined cut-off line will be prohibited from pumping their water rights. Thus, the Hearing will be the only opportunity for junior water right holders to protect their property interests, where they can present evidence of whether curtailment should occur now, or at all. Due process at a later hearing will be meaningless, as the decision whether curtailment will commence will have already been made.

SADLER RANCH's own arguments underscore why due process must attach now. On the one hand, SADLER RANCH contends that, at later proceedings, junior pumpers will somehow be able to influence the decisions of (1) whether curtailment is needed now, (2) what the perennial yield is of Diamond Valley, and (3) whether scarcity exists in the source of supply. SR Answer at 4. Yet on the other hand, both here and in its filings before the District Court, SADLER RANCH advocates its position on those very issues, thereby conceding that they are currently in play. *See* SR Answer at 4-10, 12-16; Appendix at Vol. 1, pp. 46-53, 57-65. To allow SADLER RANCH to present its evidence on those issues when it seeks an order to curtail junior groundwater pumpers, and then not allow the very same junior groundwater pumpers a chance to participate in the same hearing and present their own evidence, is fundamentally unfair. The evidence and arguments of those appropriators who have not been notified could have a substantial impact on the outcome of the Hearing. Due process requires that all water rights holders whose property interests will be affected by the District Court's decisions on the arguments SADLER RANCH advances should have notice and opportunity to be heard now.

Junior water permits, despite being issued subject to senior rights, are still protected by due process. *See, e.g.*, *Rettkowski v. Department of Ecology*, 858 P.2d

232, 237 (Wash. 1993). Petitioners do not dispute the general proposition that those holding senior rights have a superior priority to water in a prior appropriation system, provided that junior users must be accorded notice and an opportunity to be heard prior to the decision to curtail "important property rights." *Id.*

Finally, SADLER RANCH asserts that EUREKA COUNTY intentionally delayed filing this Writ Petition in order to postpone the Show Cause Hearing, alleging unclean hands, which precludes writ relief. SR Answer at 41-48. This accusation is false. SADLER RANCH requested an ex parte stay from the District Court in its curtailment case, then asked to amend its Petition for Curtailment, and then stipulated to a continuance of the Show Cause Hearing when it was set for November 21, 2016. SR Answer at 12, 16. SADLER RANCH's dilatory actions are the primary cause of the status of the District Court litigation. The Parties had also discussed the issue of settlement in November 2016, and the Petitioners only filed this Writ Petition after it was clear the litigation would not settle. EUREKA COUNTY does not have unclean hands.

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II.

ARGUMENT

A. Petitioners have met this Court's standard for writ relief.

SADLER RANCH argues this Court's consideration of the Writ Petition is inappropriate because EUREKA COUNTY can appeal after the District Court enters an order determining whether curtailment is to occur.[2] SR Answer at 22-24. The ALLENS assert the District Court is not acting beyond its jurisdiction and that EUREKA COUNTY has an adequate remedy at law. ALLENS Answer at 10-14. Both SADLER RANCH and the ALLENS are incorrect.

The District Court stated in its Order denying the STATE ENGINEER's Motion to Provide Notice: "At [some] future proceeding due process rights would necessarily attach and all possibly affected appropriators would have a constitutional right to receive notice of the action." Appendix at Vol. 2, p. 349. The District Court stated in its Order denying EUREKA COUNTY's Motion for

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[2] SADLER RANCH cites to *Pan v. Eighth Judicial Dist. Court*, to argue that an appeal would be an adequate legal remedy here. SR Answer at 22. *Pan* is not applicable to this case, as it was considering a writ in the context of *forum non conveniens*, and the Court decided to "exercise [its] original jurisdiction and consider th[e] petition," despite there being an adequate remedy at law. 120 Nev. 222, 228, 88 P.3d 840, 843–44 (2004). The Court dismissed the writ on the basis that the appellant did not meet the basic requirements of NRAP 21. *Id.* at 229, 88 P.3d at 844.

Reconsideration: "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."[3] Appendix at Vol. 2, pp. 392-393. Based on the District Court's own statements, a final appealable order may not be issued following the Show Cause Hearing.

Even after the District Court sets a cut-off line and initiates curtailment, or orders the STATE ENGINEER to do so, it is not clear when a final appealable order will be entered. Indeed, there is no precedent for SADLER RANCH's First Amended Petition for Curtailment filed directly in the District Court and no clear indication from the District Court as to what it deems the boundaries of its jurisdiction in SADLER RANCH's unprecedented and highly irregular proceeding. Under these circumstances, there is no speedy appeal guaranteed to Petitioners in Diamond Valley.

Yet immediately after the District Court decides curtailment is to occur in Diamond Valley, some or all junior water right holders will be injured. Regardless of what cut-off line the District Court or the STATE ENGINEER selects,

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[3] It is not clear why the District Court believes it has jurisdiction to adjudicate the vested claims when the STATE ENGINEER is currently in the process of a basin-wide adjudication. Appendix at Vol. 1, p. 43 (Order #1266 providing notice of resumption of taking proofs for determination of the relative rights to surface and groundwater in Diamond Valley Hydrographic Basin).

unnotified appropriators will have already had their due process right to notice and opportunity to be heard violated, and they will have been unable to participate in the critical question of whether curtailment should be initiated at all. Junior water appropriators, whose priority is set by statute, will without a doubt have their rights taken without being provided due process when a decision is entered at or following the Show Cause Hearing "whether" curtailment must occur. Notice and a hearing must be granted at a time when the deprivation can still be prevented. Curtailment can only be prevented before, and not after, the Show Cause Hearing results in a decision to curtail.

The ALLENS argue that if on appeal, this Court determines the District Court denied any party due process, this Court will prescribe an appropriate remedy. ALLENS Answer at 14. The ALLENS do not state what the appropriate remedy would be, but even the District Court acknowledges in its Order continuing the Show Cause Hearing that judicial economy and the potential waste of the District Court's and the parties' resources warranted the District Court continuing the Hearing, so it will not have to be held a second time if due process is required now. Reply App. at Vol. 1, p. 411.

"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). SADLER RANCH contends no strong or urgent circumstance exists to justify writ relief. SR Answer at 29-31. SADLER RANCH argues that *Nevada Yellow Cab* is distinguishable from this Writ Petition because in that case, five other lawsuits had been filed in Clark County on similar legal grounds, but here no other water basins in Nevada have been designated as Critical Management Areas ("CMA"). *Id.* This attempt to distinguish *Nevada Yellow Cab* is unpersuasive, because the lack of due process afforded appropriators in Diamond Valley is a constitutional violation regardless of CMA designation. Whether other basins have been designated CMAs does not preclude writ relief; the relevant question is whether other basins in the State are overappropriated, potentially implicating curtailment proceedings.

Nevada has a number of overappropriated water basins that may in the future require curtailment proceedings. *See* Appendix at Vol. 1, p. 193. Thus, the legal question of when due process must attach to water right users in overappropriated basins who face curtailment is likely to reoccur. Circumstances of urgency and judicial economy weigh in favor of hearing this controversy now.

"This court will exercise its discretion to consider petitions for extraordinary writs ... when there ... are ... important legal issues that need clarification in order to promote judicial economy and administration." *State Office of the Attorney Gen. v. Justice Court of Las Vegas Twp.*, 133 Nev. Adv. Op. 12, 392 P.3d 170, 172 (2017) (internal quotations omitted) (determining the Court would consider a writ of mandamus questioning whether the Attorney General should be provided notice when constitutional challenges were made to criminal statutes). Judicial economy is "the primary standard" by which this Court determines whether to consider granting writ relief. *Smith v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).

SADLER RANCH argues that *Matter of Two Minor Children*, 95 Nev. 225, 228, 592 P.2d 166, 168 (1979) is not a persuasive authority because the case considered contempt proceedings initiated by a district court. SR Answer at 30. However, in the case, this Court determined that juveniles' due process rights were violated, so "[a]s a matter of constitutional law, the trial court could go no further with the proceedings." *Id.* at 231, 592 P.2d at 169.

SADLER RANCH also argues that *Watson v. Housing Authority of City of N. Las Vegas*, 97 Nev. 240, 242, 627 P.2d 405, 406 (1981) is not persuasive because the District Court here has not violated due process rights. SR Answer at

31. In *Watson*, the appellant was given a termination letter containing four reasons for her dismissal, but the letter lacked sufficient specificity. 97 Nev. at 241-42, 627 P.2d at 406. A hearing was held at the administrative level, but no evidence was taken and the agency upheld the termination. *Id*. at 242, 627 P.2d at 406. In considering the lack of specific notice given to the employee, this Court stated 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. Thus, SADLER RANCH appears to concede that if this Court believes that due process principles are implicated, writ relief is appropriate.

Had SADLER RANCH properly petitioned the STATE ENGINEER to initiate curtailment proceedings 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. Appendix at Vol. 1, pp. 130-32. By skipping the step of first requesting curtailment from the STATE ENGINEER and instead directly petitioning the District Court for

curtailment, in addition to failing to exhaust its administrative remedies, SADLER RANCH circumvented this constitutional due process mechanism. Appropriators must be given notice now, so they have an opportunity to review and challenge the evidence prior to the District Court determining whether curtailment is required. After the District Court orders curtailment must occur in Diamond Valley, junior right holders will have no meaningful opportunity to prevent deprivation of a property right. Circumstances of urgency necessitate this Court grant this Writ Petition.[4]

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[4] The urgency associated with this Writ Petition is highlighted by the District Court's erroneous construction of NRS 534.110(6) and (7). The District Court's construction of these provisions aggravates the issues associated with lack of due process because junior water users are voluntarily working to resolve the water issues in Diamond Valley with a groundwater management plan following designation of Diamond Valley as a CMA. Appendix at Vol. 1, pp. 205-208; Vol. 2, pp. 209-316. The STATE ENGINEER designated the basin a CMA on August 25, 2015. Appendix at Vol. 1, pp. 33-37. On July 20, 2016, the District Court determined that curtailment may be ordered immediately despite the CMA designation. Appendix at Vol. 1, pp. 120-121. Thus, discretion was taken from the STATE ENGINEER to address Diamond Valley water issues by the District Court's Order, and efforts by water users to pursue a groundwater management plan as provided by NRS 534.037 may be rendered meaningless by the District Court's Order.

Finally, both issues presented in this Writ Petition are important legal matters.[5] Indeed, both the ALLENS and SADLER RANCH concede that this Writ Petition presents issues of law regarding due process and statutory interpretation of NRS 534.110. ALLENS Answer at 9; SR Answer at 30. Judicial economy weighs in favor of immediately considering the important questions of law presented. Petitioners request this Court issue the requested writ prohibiting the District Court from proceeding with the Show Cause Hearing until notice and an opportunity to be heard are provided to all water appropriators in the Diamond Valley Hydrographic Basin.

B. <u>The Show Cause Hearing will violate due process.</u>

i. Unnotified appropriators should participate in the Show Cause Hearing.

The ALLENS assert only a "pure question of law" will be considered at the Show Cause Hearing, so notice to all appropriators is unnecessary. ALLENS Answer at 9. This begs the question why the District Court would set a week-long evidentiary hearing for the Show Cause Hearing.

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[5] SADLER RANCH improperly asserts that "this Court lacks a complete factual record with which to make determinations with respect to the allegations raised by Petitioners." SR Answer at 24. There are no factual issues in need of development raised by the Writ Petition. Any factual record before the District Court has time to develop once the basic and purely legal question of when due process attaches has been determined, not before.

SADLER RANCH filed its First Amended Petition for Curtailment in Diamond Valley ("Petition for Curtailment") in District Court and included 45 exhibits in support. Appendix at Vol. 1, pp. 44-75. The District Court's Alternate Writ of Mandamus directed the parties to file Answers and exhibits in response to SADLER RANCH's Petition for Curtailment. Appendix at Vol. 1, p. 124. EUREKA COUNTY, DNRPCA, the STATE ENGINEER and RUBY HILL MINING, LLC filed Answers and exhibits. SADLER RANCH Appendix at 866-1046. SADLER RANCH's Reply to Answers to the First Amended Petition for Curtailment in Diamond Valley also included approximately 20 new exhibits. *See* SADLER RANCH Appendix at 1088-1129.

Unnotified appropriators in Diamond Valley who wish to participate in the Show Cause Hearing will have additional evidence in their possession that will help to demonstrate the STATE ENGINEER has not abused his discretion. The parties to the Hearing have provided the District Court with their exhibits attached to their Answers showing reasons for the decreased flows of SADLER RANCH's springs, unrelated to junior groundwater pumping in Diamond Valley. SADLER RANCH Appendix at 866-1046. The Answers filed in the District Court also contain legal reasons why the STATE ENGINEER has not abused his discretion. *Id.* These unnotified Diamond Valley appropriators must be given notice and an

opportunity to present their evidence at the Show Cause Hearing. Contrary to the ALLENS' assertion, factual evidence will be introduced at the Show Cause Hearing, and, 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).

ii. The Show Cause Hearing will determine the most important question—"whether" curtailment is to occur.

SADLER RANCH argues "the district court will not be ordering any immediate curtailment of pumping as a result of the show cause hearing," thus the scope of the Hearing is limited so as to not implicate due process protections. SR Answer at 28-29; *see also* ALLENS Answer at 3, 5-6, 13-14. The Hearing's scope, even if limited as SADLER RANCH suggests, implicates the due process rights of junior appropriators.

If the District Court determines that curtailment must occur, even if the case is remanded to the STATE ENGINEER to comply with the "typical" curtailment process, there will be no meaningful opportunity provided junior appropriators to protect their property rights. The deprivation will have already occurred, prior to notice and an opportunity to be heard, because the STATE ENGINEER's hearing will be inconsequential—the District court would have already determined that curtailment must occur.

There is no question that many junior priorities in Diamond Valley will fall below whatever cut-off line 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 that determines if curtailment will occur at all. *See Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (1972) ("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." (internal quotations omitted)). 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 violates due process rights of appropriators.

C. Junior water permit holders are guaranteed due process rights, even if issued subject to senior uses.

There is no dispute that procedural due process safeguards generally protect water appropriators from unlawful deprivation of their rights through the mechanism of notice and a hearing. *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."). "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." *Id.* at 217, 954 P.2d at 743. "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." *Fuentes*, 407 U.S. at 81-82, 92 S. Ct. at 1994-95 (1972).

Based on principles of prior appropriation, SADLER RANCH contends that because all permits in Nevada are issued subject to existing senior rights, curtailment does not deprive a junior user of a property right. SR Answer at 32-33; *see also* ALLENS Answer at 4.[6] SADLER RANCH cites no case law that supports this concept. In fact, case law supports the opposite premise—even if subject to senior rights, junior permit holders are still entitled to notice and an opportunity to be heard prior to deprivation of their right to pump. *See Rettkowski v. Department of Ecology*, 858 P.2d 232 (Wash. 1993). All permit holders, junior or otherwise, must have the ability to present evidence on their own behalf because permit holders have a vested property interest in their water rights. *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949); *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992).

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[6] The ALLENS assert that pursuant to *Desert Valley Water Co. v. State*, 104 Nev. 718, 766 P.2d 886 (1988), due process does not require notice until specific parties' rights are implicated. ALLENS Answer at 5. As set forth in the Writ Petition pages 23-25, *Desert Valley* does not discuss constitutional due process, instead only considering notice under NRS 533.450. 104 Nev. at 720-21, 766 P.2d at 887. In any event, a curtailment order would implicate parties' rights.

This rule is exemplified in *Rettkowski*, where a group of ranchers complained to the Department of Ecology ("DOE") that groundwater pumping by irrigators was negatively impacting the flows in a stream. 858 P.2d at 233. The DOE determined the ranchers' permits had priority and ultimately issued cease and desist orders prohibiting the irrigators from pumping groundwater. *Id.* at 233-34. The Supreme Court of Washington ultimately held the DOE violated the irrigators' due process rights by issuing its orders without a pre-deprivation notice or an opportunity to be heard and an opportunity to present evidence on their own behalf. *Id.* at 235, 238. In doing so, the Supreme Court confirmed that junior permit holders have a vested property interest in their water rights to the extent that the water is beneficially used.

> "Permit holders have a vested property interest in their water rights to the extent that the water is beneficially used. . . . Unlike the permitting process, in which *Ecology* only tentatively determines the existence of claimed water rights, a later decision that an existing permit conflicts with another claimed use and must be regulated necessarily involves a determination of the *priorities* of the conflicting uses. In order to properly prioritize competing claims, it is necessary to examine when the use was begun, whether the claim had been filed pursuant to the water rights registration act, RCW 90.14 and whether it had been lost or diminished over time. These determinations necessarily implicate important property rights."

Id. at 237 (internal citations omitted); *see also Sheep Mountain Cattle Co. v. State, Dept. of Ecology*, 726 P.2d 55, 57 (Wash. Ct. App. 1986), ("Property owners have

a vested interest in their water rights, . . . and these rights are entitled to due process protection. . . . It is well established that *prior to* an action affecting an interest in life, liberty or property protected by the due process clause, notice must be given which is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (internal quotations and citations omitted)); NRS 534.320(2) (requiring the STATE ENGINEER to provide notice and a hearing to any person violating a permit issued by the STATE ENGINEER).

Thus, junior permits in Diamond Valley have a vested property interest in their rights and are entitled to due process protections. *See Filippini*, 66 Nev. at 22, 202 P.2d at 537. While their rights are subject to senior uses, the junior rights cannot be impeded absent notice and an opportunity to be heard. The Show Cause Hearing presents the only meaningful opportunity for these permit holders to be afforded real and meaningful due process.

D. Due process requires that unnotified appropriators be given an opportunity to be heard along with notice.

SADLER RANCH argues EUREKA COUNTY could have provided notice of the upcoming Show Cause Hearing to junior water right holders if it was really interested in doing so. SR Answer at 24. The problem with this argument is that even if EUREKA COUNTY provided such notice, a junior water right holder

could not participate in the Show Cause Hearing based upon the District Court's relevant orders. *See, e.g.,* Appendix at Vol. 2, pp. 349, 392-393. Due process requires these appropriators be given the opportunity to be heard, an opportunity that will not be provided at the Show Cause Hearing. *See, e.g., Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998). Moreover, as the petitioner in the District Court, SADLER RANCH cannot sidestep its own notice obligation by foisting that responsibility on EUREKA COUNTY.

Had SADLER RANCH filed its request for curtailment with the STATE ENGINEER, as the administrative exhaustion doctrine requires, the STATE ENGINEER would have notified all water rights holders of that proceeding and provided an opportunity to dispute evidence. Appendix at Vol. 1, pp. 130-132. By filing in the District Court instead, SADLER RANCH cannot assert that it is unfair to take the time now to provide constitutionally required notice and an opportunity to be heard. Although they admit notice must eventually be given, the District Court, SADLER RANCH, and the ALLENS fail to identify any alleged harm that might arise from giving notice and opportunity to be heard now, instead of at some indeterminate time in the future, after an evidentiary hearing.

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E. The District Court's construction of NRS 534.110 was erroneous because it divested the STATE ENGINEER of his statutory discretion.

SADLER RANCH contends the Writ Petition argued that NRS 534.110(7)(a) "prevents the State Engineer from ordering a curtailment during the ten year period immediately following the designation of a basin as a CMA." SR Answer at 35-36. It also contends that Petitioners' interpretation provides the STATE ENGINEER "with fewer tools to manage a CMA basin than it did to manage basins with less of a problem." *Id.* at 36. Petitioners did not make these arguments in the Writ Petition.[7] Rather, Petitioners contend the District Court erred in deciding, less than a year after the CMA designation, that the STATE ENGINEER abused his discretion in designating Diamond Valley a CMA, as allowed by NRS 534.110(6)-(7), rather than ordering curtailment. This District Court's interpretation of the statute divested the STATE ENGINEER of his clear statutory discretion to determine whether a CMA designation or curtailment is necessary.

The STATE ENGINEER designated Diamond Valley a CMA on August 25, 2015, but on July 20, 2016, the District Court issued its Alternate Writ of

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[7] Petitioners' argument is that these statutes provide the STATE ENGINEER with discretion, and the District Court inappropriately divested the STATE ENGINEER of that discretion through his construction of NRS 533.110(6) and (7).

Mandamus determining that SADLER RANCH had pled adequate facts to conclude the STATE ENGINEER abused his discretion by not ordering curtailment. Appendix at Vol. 1, pp. 33-37, 120-121. The District Court's statutory analysis and corresponding conclusion ignored 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) provides the STATE ENGINEER with general curtailment authority except as provided for in Subsection 7. NRS 534.110(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 and the basin has been designated a CMA for at least 10 consecutive years.

Less than one year after the STATE ENGINEER designated Diamond Valley a CMA, the District Court issued its Alternate Writ of Mandamus. As stated in the District Court's Order Granting in Part and Denying in Party Motion to Dismiss, the Alternate Writ of Mandamus should have only been issued if the STATE ENGINEER's actions were "an arbitrary or capricious exercise of discretion." Appendix at Vol. 1, p. 115. The STATE ENGINEER was clearly

acting within his discretion when he decided to designate Diamond Valley a CMA rather than ordering curtailment at this time. There is nothing arbitrary or capricious about his decision.

The District Court's decision to enter the Alternate Writ of Mandamus that either orders curtailment now, or that orders the STATE ENGINEER to initiate the curtailment process, deprives the STATE ENGINEER of the discretion afforded by the CMA designation. The District Court has erred by inserting itself prematurely into the over-appropriation issue in Diamond Valley, without requiring SADLER RANCH to first go before the STATE ENGINEER, without allowing water appropriators time to work out the parameters of a groundwater management plan to be approved by the STATE ENGINEER as provided in NRS 534.037, and by not first requiring notice to all appropriators.

The District Court's determination that it can order curtailment proceedings right now in Diamond Valley, notwithstanding the STATE ENGINEER's CMA designation, accentuates why notice of the Show Cause Hearing is necessary. The STATE ENGINEER's discretion to resolve the overappropriation issues in Diamond Valley by a groundwater management plan proposed by water appropriators in that basin has been taken away by the District Court's Alternate Writ of Mandamus. Likewise, the groundwater holders' ability to propose a

groundwater management plan pursuant to NRS 543.037 to resolve Diamond Valley water issues has been effectively taken away by the District Court. The Answers filed by SADLER RANCH and the ALLENS underscore that, by holding proceedings on SADLER RANCH's Petition for Curtailment, the District Court is exceeding its jurisdictional authority and infringing on matters concerning the Legislature's grant of authority to the STATE ENGINEER. *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 695 n.3 (3d Cir. 1979) ("Failure to exhaust administrative remedies may also raise constitutional problems: 'The general rule regarding the requirement of exhaustion of remedies is clear—when Congress has provided an administrative procedure which is capable of resolving a controversy such procedure must be utilized. . . . For the courts to act prematurely, prior to the final decision of the appropriate administrative agency, would raise a serious question regarding the doctrine of the separation of powers, and in any event would violate a congressional decision that the present controversy be initially considered by the (agency).'" (quoting *Am. Fed'n of Gov't Emp. v. Resor*, 442 F.2d 993, 994 (3d Cir. 1971)). Particularly under these circumstances, notice <u>now</u> is an absolute necessity for all water holders in Diamond Valley.

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F. SADLER RANCH's assertion that EUREKA COUNTY has unclean hands is a blatant mischaracterization of the proceedings below.

EUREKA COUNTY did not file its Writ Petition for purposes of delay. The District Court proceedings had been delayed for months because SADLER RANCH sought an immediate stay of these proceedings, then desired to amend its Petition for Curtailment, and then supported a continuance of the previously set Show Cause Hearing to commence on November 21, 2016. *See* SADLER RANCH Appendix at 688-704, 756-792. SADLER RANCH supported a continuance of the November 21-22, 2016 Show Cause Hearing, *see* Reply App. at Vol. 1, p. 411, because it wanted to review the groundwater management plan for Diamond Valley that had recently been submitted to the STATE ENGINEER, and it informed the District Court the parties were involved in settlement discussions. EUREKA COUNTY was hopeful the case would settle. Only when it appeared settlement would not occur and the May 15, 2017 Show Cause Hearing would go forward did EUREKA COUNTY file its Writ Petition.[8] The doctrine of unclean hands is simply not applicable.

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[8] SADLER RANCH cites no authority indicating that NRAP 4(a)(1)'s 30-day requirement for appeals is applicable to writ petitions.

III.

CONCLUSION

Petitioners respectfully request this Court grant the Writ Petition and issue a writ prohibiting the District Court from proceeding with the Show Cause Hearing once set to begin May 15-19, 2017 unless and until all Diamond Valley appropriators are provided constitutionally sufficient notice and an opportunity to be heard. There is no sound basis in law or policy to postpone the attachment of due process to proceedings initiated by SADLER RANCH before the District Court.

DATED this 10th day of May, 2017.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this reply 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 Office Word 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,765 words.

3. Finally, I hereby certify that I have read this reply, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 this 10th day of May, 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 all parties to this action by:

✓ Court's electronic notification system

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