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THE SUPREME COURT OF THE STATE OF NEVADA

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JOHN BOSTA, FRANK MAURIZIO AND OTHERS SIMILARLY SITUATED,

Appellants,

vs.

JASON KING, THE STATE ENGINEER, IN HIS OFFICIAL AND PERSONAL CAPACITY, DOES I-XX, ROES I-XX,

Respondents.

DOCKET NO.: 68448

D.Ct. Case No.: CV 36505

FILED
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APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal under **NRAP 3**(a).

STANDARD OF REVIEW

This Court, rigorously reviews a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. ***Sanchez v. Wal-Mart Stores, Inc.***, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). A complaint shall be dismissed for failure to state a claim "***only if*** it appears beyond a doubt that ***it could prove no set of facts, which,*** if true, ***would entitle it to relief.***" ***Buzz Stew, LLC v. City of N. Las Vegas***, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). The district Court's legal conclusions are reviewed *de novo*.

ISSUES ON APPEAL

A. DID THE LOWER COURT ERR IN REFUSING TO ADDRESS THE JURISDICTIONAL ISSUES PRESENTED TO IT BEFORE PROCEEDING TO THE MERITS OF THE COMPLAINT?

B. DID THE LOWER COURT ERR IN DISMISSING THE APPELLANT'S COMPLAINT FOR - FAILURE TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED?

PROCEDURAL HISTORY / STATEMENT OF THE CASE AND RELEVANT FACTS

The Appellant's received notice that the State Water Engineer, Jason King, was going to issue more stringent regulations, further restricting the use of percolating water extracted from the Appellant's non-commercial non-artesian private wells. The Appellant's had been doing considerable research regarding their rights under Nevada's nebulous water laws and formed the belief that the Engineer did not have jurisdiction over appropriated non-commercial non-artesian private wells.

Based upon the research of the Appellants they filed a Complaint for Declaratory and Injunctive Relief in the 5th Judicial District Court, the Honorable Kimberly A. Wanker, J., presiding. The Appellant's also filed a Motion for Preliminary Injunction. The State responded with a Motion to Dismiss for a Failure to State a Cause of Action upon which Relief could be granted. The lower court, after considering the points and authorities of the parties and hearing oral argument, rendered a finding that the Appellant's complaint failed to state a cause of action upon which relief could be granted. The Appellants appealed and the matter is now before this Honorable Court.

A Brief Chronology of Nevada Water Law

1872: Nevada Embraces the definition of "Percolating Water." *See*, ***Mosier v. Caldwell***, 7 Nev. 363, 363 (1872), set forth that "Percolating Water" is a Part of the Soil – "Water percolating through the soil is not, and cannot be, distinguished from the soil itself; and of such water, the proprietor of the soil has the ***free*** and ***absolute use***, so that he does not directly invade that of his neighbor, or, consequently, injure the perceptible and clearly defined rights." (Emphasis added)

1879: Land Act of 1879: Chap. 100 - Approved March 8, 1879- An Act accepting from the United States a grant of two million or more acres of land, in lieu of the Sixteenth and Thirty-sixth Sections, and relinquishing to the United State all such Sixteenth and Thirty-sixth Sections as have not been sold or disposed of by the State.

1879: The Land Act of 1879 was codified in NRS 321.596(c): In 1880 Nevada agreed to exchange its 3.9-million-acre school grant for 2 million acres of its own selection from public land in Nevada held by the Federal Government; The Exchange Act of June 16, 1880: In 1880 Congress agreed and passed the Exchange Act of 1880, specifying that the 3.9 million acres (less 63,249 acres of **land already patented**) could be exchanged for **two million acres of land to be selected by the State**. The State thus consented to a reduction of almost half its grant lands. These grant lands were subsequently virtually all patented to private owners.

1879: The Water Act of March 6, 1879; Chap.83 – A groundwater Act- is an Act to encourage the Sinking of Artesian wells within this State, after the first five hundred shall have been sunk, the sum of two dollars per foot, to be paid in the manner provided for in section four of this act. Prior to reaching the five hundred feet depth the person shall file with the County Recorder and when completed demand the bounty from Board of Commissioner.

1885: Riparian Water Doctrine overturned in Nevada. See, ***Jones v. Adams***, 19 Nev. 78, 6 Pac. 442 (1885), where this Court overturns the RIPARIAN WATER DOCTRINE in Nevada, holding that (regarding ***surface water*** - lakes and streams) there is ***no ownership* in the corpus of the water**, but that the use thereof may be acquired, and the basis of such acquisition is ***beneficial use***.

1887: The Water Act March 5, 1887: Chap. 127 – A groundwater Act- is an act to encourage the sinking of artesian wells. The Board of County Commissioners paid the bounties for three wells which furnishes seven thousand gallons of water each twenty-four hours, flowing continuously for thirty days; and provided further, that no two wells shall receive a bounty if located within ten miles of each other. The artesian well was under the authority of the County Commissioners.

1897 Domestic Use: –The appropriation of water for culinary and domestic purposes has been specifically recognized by the courts as a *beneficial use* for *commercial purposes*; *See* ***Silver Peak Mines v. Valcalda,*** 79 Fed. 886, 800 (D. Nev., 1897), wherein the court said: "The fact that the water was used for culinary and domestic purposes by plaintiff, its agents and employees, was of itself sufficient to establish a beneficial use of water."

The 1901 Water Act: Chap76 – A groundwater Act- is an Act to provide for the payment of a bounty to encourage the boring of wells in searching for oil, natural gas and ***artesian water***. Approved March 19, 1901; The first person to sink a well in the State of Nevada not less than six inches in diameter at the bottom, to the depth of one thousand (1,000) feet shall receive a bounty of twenty-five hundred ($2,500) dollars from the State; the person who applies for any of the bounties under this Act shall file the application with the chairman of the Board of County Commissioners.

The 1903 Irrigation Water Act:
This Act appropriates all natural water courses and natural lakes and the waters thereof which are not held in private ownership, belong to the public, and are subject to appropriation for a beneficial use, and right to the use of water so appropriated for irrigation shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right; the use of all water now appropriated, or that may hereafter be appropriated, is hereby declared to be a public use.

The Office of the State Engineer is created and shall cooperate with the Secretary of the Interior in all work of construction, operation, maintenance and management of irrigation works constructed by the Secretary of Interior in and for the benefit of Nevada, under the **RECLAMATION ACT/NEWLAND ACT of 1902.**

The 1913 Water Act: Chap. 54- **A Groundwater Act-** is an Act to provide a law for the conservation of underground waters in the State of Nevada; providing for the casing and capping of artesian wells; and providing a penalty for the violation of the provision of such act. Approved March 7, 1913.

The 1913 Water Act: Chap. 140 – **Surface Water Act-** Approved March 22, 1913- Section 1. The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public. [This type of Act is commonly referred to as a "Public Trust Easement."]

The 1913 Water Act: Chap. 140 – **Surface Water Act.**

In 1914 this Court held, in ***Ormsby County v. Kearney,*** 37 Nev. 314, 336-338 (1914), that the provisions of the 1913 Act with respect to an investigation and determination of water rights by the State Engineer were valid, but with the reservation that **when questions of constitutionality of particular features arose, it would then be time for the Court to consider them.**

A provision then in the law, purporting to make the determination of the State Engineer conclusive, subject to the right of appeal, was believed by two of the three justices in the ***Ormsby*** case to be *unconstitutional,* ***Id.*** 37 Nev. 314, 355-392 (1914). The statute was amended in 1915 to eliminate the objectionable provision and to prescribe the procedure now extant, which requires the State Engineer's order of determination to be filed in court as the basis of a civil action (Petition for Judicial Review). As so amended, these provisions were held valid by both Federal and State courts, (See page 46 NEVADA LAW OF WATER RIGHTS by Wells A. Hutchins, LLB, for Hugh A Shamberger - State Engineer of Nevada in cooperation with Production Economics Research Branch, Agricultural Research Service, United States Department of Agriculture, Carson City, NV 1955).

This Court did not consider section 1 of the 1913 water act, however, the Federal District Court did in the case of ***Bergman v. Kearney***, 241 F. 884 (March 8, 1917). The Court in ***Bergman*** states unequivocally that the legislative declaration contained in section 1 of said 1913 Water Law, reads as follows,

> "The water of **all sources of water supply** within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public,' is ***insufficient to, and does not, warrant or authorize the acts done and threatened to be done by defendant, as state engineer,*** as alleged in the bill of complaint, because the waters of all sources of water supply within the boundaries of the state are *appropriated* or

unappropriated; ***if appropriated, they belong to the appropriator thereof; if unappropriated, they belong to the United States government***, by virtue of the treaty of the United States of America and the United Mexican States in 1848, and by virtue of the Enabling Act, approved March 21, 1864." (Emphasis added)

The 1915 Water Act: Chap. 210 – An Act to provide a law for the conservation of underground waters, providing for the casing and capping of ***artesian wells***, defining the underground waters which are governed by the laws relating to the appropriation of the of the public waters of the state, providing a penalty for the violation of the provisions of this act, and prescribing the duties of the district attorney in relation thereto. Approved March 24, 1915;

> Section 1. All underground water, **save and except *percolating water*, the course and boundaries of which are incapable of determination,** are hereby declared to be subject to appropriation under the laws of the state relating to the appropriation and use of water. (Emphasis added)

1918: Water Rights are Real Property; See ***Vineyard Land & Stock Co. v. District Court***, 42 Nev. 1 (1918).

Water Act 1935: Chap. 184-Approved April 1, 1935-A groundwater Act amending 1915 Water Act Chap. 210-Section 4. The state engineer shall administer this act and shall prescribe all necessary rules and regulations for such administration. **Note: This is the first act that empowers the *state engineer authority over artesian wells within artesian well basins*.**

The Water Act 1937: Chap. 149 – An Act to amend an act entitled "An act to provide a law for the conservation of underground waters providing for ***the casing and capping of artesian wells***, defining the underground waters which are governed by the laws relating to the appropriation of ***the public waters of the state***, providing a penalty for the violation of the provisions of this act, and prescribing the duties of the district attorneys in relation thereto," approved March 24, 1915, together with the acts amendatory thereof or supplemental thereto.

Water Act of 1939: Chap. 178 is an act to provide for the conservation and distribution of underground waters, providing for the designation of ***artesian well basins*** and defining such wells and providing the method of appropriating the waters

thereof; …

Sec. 2 The word "**person**" as used herein shall be interpreted to mean any firm, partnership, association, company, or corporation, municipal corporation, power district, political subdivision of this or any state or government agency. The word "**aquifer**" as used herein means a geological formation or structure that transmits water. The word "**artesian well**" as used herein means a well tapping an aquifer underlying an impervious material in which the static water level in said well stands above where it is first encountered in said aquifer. The word "**waste**" as used herein is defined as causing, suffering or permitting ***any artesian water*** to reach any previous stratum above the confining strata before coming to the surface of the ground, or suffering or permitting any artesian well to discharge water unnecessarily upon the surface of the ground so that the waters thereof are lost for beneficial use or in any canal or ditch conveying water from a well where the loss of water in transit is more than 20% of the amount of water discharged from said well, or in any event where over 20% of the water discharging from a well is lost from beneficial use.

And,

Sec. 3 This act shall not apply to the developing and use of underground water *for domestic purposes* where the draught does not exceed two gallons per minute and **where the water developed is *not from an artesian well***. (Note: Two gallons per minute is 3.226 acre-feet annually and this act **ONLY empowers the state engineer authority over artesian wells** within ***artesian well basins***.)

1987: *Mosier v. Caldwell* Codified: NRS 534.0135 added the definition of "Percolating waters." "Percolating waters" are underground waters, the course and boundaries of which are incapable of determination. (Added to NRS by 1987, 1770)

It is perfectly and succinctly clear that the State Engineer is ***only*** empowered ***authority over artesian wells*** and has no power or authority over wells for domestic purposes or uses. It is of significant relevance, that in 2015 the State Engineer requested the Legislature to adopt **SB 81 which would give him the power to supervise all underground water and wells**. Why would this change in the law be necessary if the State Engineer already had it? The answer is it wouldn't. **SB 81** failed to make it out of the Finance Committee for approval. Yet, the State Engineer

still makes the argument that he currently has the same authority that he asked for in **SB 81**. The following is the State Engineer's requested amendment on page 5 of the Final Amendment to **SB 81**:

> The order of the State Engineer may be reviewed by the district court of the county pursuant to NRS 533.450. The State Engineer shall supervise all ***underground water and*** wells [tapping artesian water or water in definable underground aquifers drilled after March 22, 1913, and all wells tapping percolating water drilled subsequent to March 25, 1939, except], ***including, without limitation,*** those wells for domestic purposes for which a permit is not required.

It would appear from the language that the State Engineer (hereinafter "Engineer") is fully aware that the State Engineer ***does not*** have jurisdictional authority over **ALL** underground water and/or private domestic wells. Historically speaking, the Engineer (whose *original title* was "State Irrigation Engineer") has never had control over ALL ground water, even after the passage of the alleged Public Trust Easement[1] set forth in **NRS 533.025**. **NRS 533.025** does not grant the Engineer authority over "ALL" water below the surface for the following reasons:

> **(1)** apportioned water rights ***are not*** included in the Engineer's authority (only un-apportioned; See ***Bergman,*** *supra*);
>
> **(2)** percolating water is part of the soil and is owned by the land owner, not the State, who would have to compensate the land owner for taking it;

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[1] A public trust easement of this magnitude is unconstitutional in dimension and would constitute a "taking" under the United States Constitution.

(3) Successors-in-interest to federal land patents take their property ***subject only to the rights presented at the Patent Hearing*** (they are not subject to a public trust easement unless presented at the patent hearing. See ***Summa Corp. v. California***, 466 U.S. 198 (1984); ***United States v. Coronado Beach Co.***, 255 U.S. 472 (1921));

(4) Neither **NRS 533.010** or **NRS 535.020,** the delegating statutes of the Engineer, include a "natural person" in their definition of a "person;"

(5) The exercise of the Engineer's authority over non-commercial private wells constitutes a taking under the 4th Amendment of the United States Constitution;

(6) facilitating the legislative (administrative) authority of the Engineer over non-commercial private wells strips private well owners of their Constitutional Rights and subjects them to a diminished capacity permitting only 14th Amendment protections (privileges and immunities[2]) and eliminating all others in the Bill of Rights.

Granting the Engineer the authority over private domestic wells under **NRS 533.025** would make this statute unconstitutional as applied, usurping the sacrosanct ownership of private property by "free men."

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[2] "Privileges and Immunities" are rights granted by legislatures and are not inalienable rights, such as those provided by the Bill of Rights in the United States Constitution.

LAW AND ARGUMENT

I.

THE LOWER COURT COMMITTED ERROR IN REFUSING TO ADDRESS THE JURISDICTIONAL ARGUMENTS OF THE APPELLANT'S BEFORE PROCEEDING TO THE MERITS OF THE COMPLAINT.

This Court is well aware of the following: "Jurisdiction, once challenged, **cannot be assumed and must be decided**." ***Maine v. Thiboutot***, 448 U.S. 1, 100 S.Ct. 2502 (1974). Here, the Appellants challenged the jurisdiction of the Engineer. The lower court refused to hear this argument. Demonstrating no fidelity to the Rule of Law, and decided to hang its hat on procedural issues that were not ripe for consideration prior to the court making a decision on the jurisdictional challenges. It is a fortiorari that, "However, late this objection [speaking to a jurisdictional challenge] has been made, or may be made in any cause, in an inferior or appellate court of the United States it must be considered and decided, ***before* any court can move one further step in the cause; as *any movement is necessarily the exercise of jurisdiction***." ***Rhode Island v. Massachusetts***, 37 U.S. 657, 718, 9 L.Ed. 1233 (1838). The lower court pressed on, side-stepping the jurisdictional issues and going directly to consideration of procedural issues in violation of this principle of law. The Appellants clearly challenged the jurisdictional authority of the Engineer over them

personally and over their non-commercial private wells. The Oregon Supreme Court held in ***Kotera v. Daioh Int'l, U.S.A. Corp.***, 40 P.3d 506 (Or.01/30/2002) that,

> "In the absence of agency based on actual authority, plaintiff (Franchise Tax Board) was required to produce evidence of apparent agency to support personal jurisdiction over (Defendant)."

In the case at bar the Appellants challenged the validity of the Engineer's acts, not just the suggested changes that he was about to make regarding non-commercial non-artesian private wells, but also the restrictions that he had already implemented and was exercising over the Appellants' wells. The California Supreme Court, in ***City Street Improvement Co. v. Pearson***, 181 Cal. 640, 185 P. 962 (1919) held that,

> Jurisdiction is essential to give validity to the determination of administrative agencies and where jurisdictional requirements are not satisfied, the action of the agency is a nullity. . . ." (Emphasis added.)

Below, the Engineer alleged that with the passage of **NRS 533.025**, that his authority is all encompassing and eliminates all arguments to divest the Engineer of his authority. However, it is the Appellants' position that

> "Jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction maybe relieved of his burden by any formal procedure." ***McNutt v. General Motors Acceptance Corp. of Indiana***, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1963 (1936);

Here, the Engineer has mere alluded to his authority by averment. Further, the Appellants can challenge the jurisdictional authority of the Engineer at any time.

> Lack of subject matter jurisdiction can be raised by the parties or the court at any time, including on appeal. ***Landreth v. Malik***, 127 Nev. Adv. Opn. 16, 251 P.3d 163, 166 (quoting ***Swan v. Swan***, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990)).

This Court held in ***Sardis v. Second Judicial District Court of Washoe County, Dept. 1***, 85 Nev. 585, 460 P.2d 163 (1969), that,

> The modern doctrine of jurisdiction, the excess of which habeas corpus may relieve against, goes *not only to* **jurisdiction over the person** and the subject-matter, but to the power or jurisdiction to render the particular judgment. * * * With this modern doctrine, which is more in accord with reason and justice, this court is already in accord. * * * (Citations omitted.)
>
> * * * 'There are three essential elements necessary to render convictions valid. These are that the court must have jurisdiction over the subject-matter, the person of the defendant, and authority to render the particular judgment. If either of these elements is lacking, the judgment is fatally defective, and the prisoner held under such judgment maybe released on habeas corpus. * * *' ***Sardis*** at 591. (Emphasis added.)

As it was the position of the Appellants, below, that the Engineer had no authority over their non-commercial private wells in the first instance, this jurisdictional question should have been addressed before the lower court proceeded any further, instead of presuming the jurisdictional authority of the Engineer and hearing their motion to dismiss, whose arguments were based upon the presumption that the Engineer had authority. Thus, the lower court's failure to address these jurisdictional issues below, negated its decision regarding the Respondents' Motion to Dismiss.

These jurisdictional arguments, setting forth that the Engineer has not authority over their non-commercial private wells, are the core of the Appellants' Complaint below. These jurisdictional arguments were never addressed below. They are as follows.

II.

THE LOWER COURT COMMITTED ERROR IN FINDING THAT THE APPELLANT'S COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED.

A district court order granting an **NRCP 12(b)(5)** motion to dismiss is subject to rigorous appellate review. ***Munda v. Summerlin Life & Health Co.***, 267 P.3d 711 (Nev. 2011, Dec. 29). In reviewing the dismissal order, every reasonable inference is drawn in the Appellants' favor. ***Sanchez v. Wal-Mart Stores***, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009); *see also*, ***Squires v. Sierra Nev. Educational Found.***, 107 Nev. 902, 905, 823 P.2d 256, 257 (1991). In reviewing orders granting a motion to dismiss, this Court considers whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. ***Pemberton v. Farmers Ins. Exchange***, 109 Nev. 789, 792, 858 P.2d 380, 381 (1993). In making its determination, this court is to accept ***all factual allegations*** in the complaint ***as true***. ***Id.*** at 792, 858 P.2d at 381(citing ***Marcoz v. Summa Corporation***, 106 Nev. 737,

739, 801 P.2d 1346, 1347 (1990)). This Court "reviews *de novo* a district court's order to dismiss, and such an order will not be upheld 'unless it appears beyond a doubt that the **Appellant could prove no set of facts**. . . . [that] would entitle him [or her] to relief.'" ***Vacation Village v. Hitachi America***, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994)(*quoting* ***Edgar v. Wagner***, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985)(Emphasis added). A complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief." ***Edgar v. Wagner***, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) (citing ***Conley v. Gibson***, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The allegations in the complaint must be accepted as true. ***Hynds Plumbing & Heating Co. v. Clark County Sch. Dist.***, 94 Nev. 776, 587 P.2d 1331 (1978).

On appeal from an order granting an **NRCP 12(b)(5)** motion to dismiss, "[t]he sole issue presented . . . is whether a complaint states a claim for relief." ***Merluzzi v. Larson***, 96 Nev. 409, 411, 610 P.2d 739, 741 (1980), *overruled on other grounds by* ***Smith v. Clough***, 106 Nev. 568, 796 P.2d 592 (1990). This court's "task is to determine whether the . . . challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." ***Edgar***, *supra*, 101 Nev. at 227, 699 P.2d at 111. The test for determining whether the allegations of a complaint are sufficient

to assert a claim for relief is: Whether the allegations give *fair notice of the nature and basis of a legally sufficient claim and the relief requested*. ***Ravera v. City of Reno***, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984); *See also* ***Western State Constr. v. Michoff***, 108 Nev. 931, 840 P.2d 1220, 1223 (1992). (Emphasis added.)

NRCP 12(b)(5) states in pertinent part that a Motion to Dismiss ". . . shall be treated as one for Summary Judgment and disposed of as provided in **Rule 56**." **NRCP 56(d)** states in pertinent part that,

> ". . . the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It ***shall* thereupon *make an order* specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy,** and directing such further proceedings in the action as are just." (Emphasis added).

In granting a summary judgment, the district court must take great care. ***Johnson v. Steel, Inc.***, 100 Nev. 181, 678 P.2d 676 (1984). Summary judgment should be granted where there is no issue of material fact and the moving party is entitled to judgment as a matter of law. ***Bird v. Casa Royale West***, 97 Nev. 67, 69-70, 624 P.2d 17, 18 (1981). "Orders granting summary judgment are reviewed *de novo*." ***Bulbman, Inc. v. Nevada Bell***, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). Summary judgment is only appropriate when, after a review of the record viewed in

the light most favorable to the nonmoving party, there remain no issues of material fact. ***Butler v. Bogdanovich***, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985). Summary judgment may not be used as a shortcut to the resolving of disputes upon facts material to the determination of the legal rights of the parties. ***Parman v. Petricciani***, 70 Nev. 427, 272 P.2d 492 (1954).

The Plaintiffs are in proper person and dismissal of their action would be too severe a sanction against them. The lower court's dismissal violates the State of Nevada's has a public policy that issues be heard on their merits. On appeal from an order, exercise of *discretion may properly be guided by the underlying policy to have each case decided upon its merits*, and because of such policy, an appellate court is more likely to affirm a trial court's ruling to set aside a default judgment than it is to affirm refusal to do so. ***Hotel Last Frontier Corp. v. Frontier Properties, Inc.***, 79 Nev. 150, 380 P.2d 293 (1963), *cited*, ***Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co.***, 83 Nev. 126, at 130, 424 P.2d 884 (1967) ***Gassett v. Snappy Car Rental***, 111 Nev. 1416, at 1419, 906 P.2d 258 (1995), ***Abreu v. Gilmer***, 115 Nev. 308, at 314, 985 P.2d 746 (1999), ***Civil Serv. Comm'n v. Second Judicial Dist. Court***, 118 Nev. 186, at 190, 42 P.3d 268 (2002)(28 other cites omitted).

The Respondents were attempting in their Motion to Dismiss to resolve factual matters between the Appellants and the Respondents. The dispositive resolution of

questions of fact are not part of a motion to dismiss on the pleadings. *See*, ***Breliant v. Preferred Equities Corp.***, 112 Nev. 663, 918 P.2d 314 (1996). The Plaintiffs believe that they have submitted more than enough factual allegations that if accepted as true, notifies the Respondents as to what it is that they are being sued over. In a nutshell those issues consisted of the following:

- At the time of the filing of the Appellants' Complaint the Engineer was exercising dominion and control over the Appellants and their non-commercial non-artesian private wells;

- The Engineer had exercised dominion over the Appellants and their wells by setting a maximum limit as to the amount of water that the Appellants could pump from their wells at 2 acre feet [*af*] of water, per year. This limit was in existence for some time and more importantly was in existence before the Appellants filed their Complaint for Declaratory and Injunctive Relief;

- The Appellant's complained that the Engineer had NO authority over them and provided no less than four specific jurisdictional arguments supporting their legal reasoning.

- None of these jurisdictional arguments were considered on their merits by the lower court.

- The Appellants argued that the Ripeness for Review Doctrine does not apply to them. The Appellants argue that forcing them to go through the Administrative Process to "exhaust" their remedies is both *illegal* and *unConstitutional*, if the Engineer does not have jurisdiction over them;

- The Appellants were seeking relief in the form of a declaration of their rights in relation to the Engineer, based upon the law of the land (decisions of the United Stats Supreme Court and this Court's decisions).

- The Appellants are now arguing that since water rights, particularly percolating

water, are considered part and parcel of the soil and the Nevada Constitution has given the district courts original jurisdiction over matters dealing with the ownership and/or rights in real property, then the Statutes delegating authority to the Engineer have amended the Nevada Constitution;

- That a statute cannot amend the State Constitution.

If in fact the Appellants' jurisdictional arguments are correct, then the ripeness issue is *non sequitur*.

III.

THE ENGINEER'S ATTEMPT TO DERIVE HIS AUTHORITY OVER THE APPELLANT'S FROM NRS 533.010 AND NRS 534.014 IS ERROR.

Clearly before the lower court could render a decision on the Respondents' Motion to Dismiss, its first order of business was to first determine whether or not the Appellants' challenge as to whether they were a "person" as defined in the relevant statutes. The Respondents cited as their jurisdictional authority over the Appellants to be found in **NRS 533.010**, *et seq*. and **NRS 534.010**, *et seq*. However, when the Appellants challenged this position by demonstrating that the definition of "person" in both relevant statutory sections did not include the definition of a "natural person."

The Appellants' position was supported by relevant case law, to wit:

> The word "person" as used and employed in most statutory language [and civil law] is ordinarily construed to exclude the [citizen] sovereign, and that for one as such to be bound by statute, they must be 'specifically named.'" ***Wilson v. Omanha Indian Tribe***, 442 U.S. 653

(1979); ***Will v. Michigan State Police***, 491 U.S. 58, 105 L.Ed.2d 45 (1989); ***U.S. v. General Motors Corporation***, D.C. Ill, 2 F.R.D. 528, 530)

And,

> The Supreme Court, in numerous instances, has reluctantly overturned the rulings of inferior State supreme courts, maintaining that the word "person" in legal terminology is perceived as a general word which normally includes in its scope a variety of entities *other than human beings*." ***Church of Scientology v. U.S. Dept. Of Justice***, 612 F.2d 417, 425 (1979)).

Finally,

> ". . . the tenderness of the law ***for the rights of individuals'*** entitles each person, regardless of economic or social status, to an unequivocal warning from the legislature as to whether he is within the class of persons subject to vicarious liability. Congress cannot be deemed to have intended to punish anyone who is not 'plainly and unmistakably' within the confines of the statute." (***United States v. Lacher***, 134 U.S. 624, 628, 10 S.Ct. 625, 626, 33 L.Ed. 1080 (1890); ***United States v. Gradwell***, 243 U.S. 476, 485, 37 S.Ct. 407, 61 L.Ed. 857 (1917). FN. 1, ***United States v. Wiltberger***, 18 U.S. 76, 5 Wheat. 76, 95, 5 L.Ed. 37 (1820)).

Below the Respondents were quick to assert that **NRS 0.039** is some how relevant to the definition of a person in the statutes in question. This assertion is belied by the fact that **NRS 0.039** states specifically, "unless otherwise specified in the chapter or necessary to give meaning to the statute . . ." So the only time that **NRS 0.039** can be used is when it meets either of these requirements.

The relevant question below then became: "Do the Statutory Chapters in question [**NRS 533.010** and **NRS 534.014**] define the term "person." The answer is "Yes" they do. Therefore, **NRS 0.039** could not be applied through this threshold

requirement.

The next question, before application of **NRS 0.039** can be made is, "Can the Statute stand alone with its own definition of a "person" or is the addition of the definition of a person in **NRS 0.039** *necessary* to give meaning to the statute?" The answer is "Yes," the Statute can stand alone and "No" it does not need the application of **NRS 0.039** to have meaning.

Below the Respondents' never addressed the issues as to why, if the Legislature intended for **NRS 0.039** to be included in the definition of a "person" in **NRS 533.010** and **NRS 534.014**, why they just didn't leave out the definition of person and rely on **NRS 0.039** instead.

The answer as to why **NRS 0.039** does not apply is provided by this Court's own *stare decisis* on statutory interpretation, to wit: "The expression of one thing, is the exclusion of another." ***In re Bailey's Estate***, 31 Nev. 377, 103 P.232 (1909); ***Leake v. Blasdel***, 6 Nev. 40 (1870); ***State v. Arrington***, 18 Nev. 412, 4 P. 735 (1884); ***Ex Parte Arascada***, 44 Nev. 30, 189 P. 169 (1920). It should also be noted that this Court stated in ***Galloway v. Truesdell***, 83 Nev. 13, 26 (1967) that,

> The language in ***State v. Hallock***, 14 Nev. 202 (1879), is also very important in this regard. There this Court said: "It is true that the constitution does not expressly inhibit the power which the legislature has assumed to exercise, but *an express inhibition is not necessary*. The affirmation of a distinct policy upon any specific point in a state

> constitution implies the negation of any power in the legislature to establish a different policy. *'Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision*. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance.' ***People v. Draper***, 15 N.Y. 544." (Emphasis from original.) (Italics & underlined emphasis are that of this Appellants)

As recently as 2005 this Court has echoed its findings that, "This court has, for more than a century, recognized that the Legislature's 'mention of one thing or **person** is, in law, an exclusion of all other things or *persons*.'" (Emphasis added.) See, ***State, Dep't of Taxation v. DaimlerChrysler***, 121 Nev. Adv. Opn. 56 (2005)). This Court also stated in ***Stockmeier v. Psychological Review Panel***, 122 Nev. 385, ___, 135 P.3d 807, 810 (2006) that,

> "[W]hen interpreting a statute, we first determine whether it's language is ambiguous. If the language is clear and unambiguous, we do not look beyond its plain meaning, and we give effect to *its apparent intent from the words used*, unless that meaning was clearly not intended."

In other words, in order for the lower court to embrace the Engineer's definition of a "person" to includes a natural person, as defined in **NRS 0.039**, the lower court would literally have to refuse to follow the *stare decisis* of this Court's own statutory interpretation. The Engineer does not get to determine what the definition of "person" includes or doesn't include, the State *stare decisis* on the rules of statutory

construction does.

NRS 0.039 actually supports the Appellants' position that the definition of "person" in that statute does not included "natural persons" within any of the Engineers delegated authority. The adoption of the definition of "person" as set forth in **NRS 0.039** expands the meaning of the statute beyond that which the Legislature gave it. This Court stated in ***Butler v. State***,120 Nev. at 893, 102 P.3d at 81 (2004), that "Only when the statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, do we 'look beyond the language [of the statute] to consider its meaning in light of its spirit, subject matter, and public policy.'" Thus the Engineer's interpretation is based on an ***ad hoc*** agency determination and the Appellants are not a "person" as defined in either **NRS 533.010** or **NRS 534.014**. The Engineer has no delegated authority over the Appellants.

IV.

THE ENGINEER'S SECOND ATTEMPT TO SHOW JURISDICTION OVER THE APPELLANTS WAS HIS CITE TO NRS 533.025

a. The Appellant's have superior title to the water under their land than that given by NRS 533.025.

The Engineer's second attempt to presume jurisdiction over the Appellants was his cite to **NRS 533.025**. Below the Appellants asserted their rights as successors-in-interest to the Federal Land Patents that their property is derived from. It is

commonly known that the strongest most impenetrable form of title to land, is a Federal Land Patent. The Appellants hereby put this Court on judicial notice that historically, all of the lands in the Pahrump Valley are derived from Federal Land Patents, issued by the Federal Government to the State. Therefrom, the State to private owners. **[See AA; P. 211; Platt Map of Pahrump Valley]** After looking at the language that is in every title transfer, there can be no question that the owners of the property are successors-in-interest to the Federal Land Patents. **[See AA; P. 210]** As such there exists no evidence that the State of Nevada, reserved any water rights to itself upon disposing of property derived from these land patents. Nor did the State present their "Public Trust Easement" at the Federal Land Patent hearings. These ffacts constitute *prima facie* evidence that the Appellants' water under their land is their exclusive property.

The passage of **NRS 533.025** is defined as a "Public Trust Easement." The application of "public trust easements" to Land Patents was discussed in detail in the case of ***Summa Corp. v. California***, 466 U.S. 198 (1984). In ***Summa***, the California State court held that

> ". . . the lagoon was *subject to the public trust easement* claimed by the city and the State, who had a right to construct improvements in the lagoon without exercising the power of eminent domain or compensating the land owners."

In ***Summa Corp.***, the United States Supreme Court cited to ***United States v. Coronado Beach Co.***, 255 U.S. 472 (1921), stating that even though,

> "[T]he Government argued that even if the land owner had been awarded title to tidelands by reason of a Mexican land grant, a condemnation award should be reduced to reflect the interest of the State in the tidelands which it acquired when it entered the Union. The Court expressly rejected the Government's argument, holding that *the patent proceedings were conclusive on this issue*, and could not be collaterally attacked by the Government. ***Id.***, at 487-488. (Emphasis added).

The United States Supreme Court went on to say that,

> The necessary result of the ***Coronado Beach*** decision is that even "sovereign" claims such as those raised by the State of California in the present case **must**, like other claims, be asserted in the patent proceedings or be barred.

The United States Supreme Court concluded their decision with the finding that,

> *We hold that California cannot at this late date assert its public trust easement* over petitioner's property, when petitioner's predecessors-in-interest had their interest confirmed without any mention of such an easement in proceedings taken pursuant to the Act of 1851. The interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest, like the Indian claims made in ***Barker*** and in ***United States v. Title Ins. & Trust Co.***, must have been presented in the patent proceeding **or be barred**.

What is clear from a perusal of the land patents issued for the Pahrump Valley and surrounding areas, is that the State of Nevada made no claims to a *public trust easement* in any land patent proceedings. Therefore, the land patents to the Plaintiffs' properties goes all the way back to the same treaty and land patenting process that

was spoken of in ***Summa Corp.***, under the GUADALUPE-HIDALGO TREATY. Therefore, any application of the *public trust easement* set forth in **NRS 533.025**, has absolutely no application to the Appellants' water rights. The Engineer has a pretty high bar that he must over come in order to assert jurisdiction over the Plaintiffs' land and/or water rights. Therefore, the State's attempt to enforce the *public trust easement* in **NRS 533.025** on the Plaintiffs or over their property and water rights - must fail.

V.

THE LOWER COURT ERRED IN IGNORING THE JURISDICTIONAL STANDING OF "PERCOLATING WATER," WHICH GRANTS ORIGINAL JURISDICTION TO THE DISTRICT COURTS, PRECLUDING THE ENGINEER FROM EXERCISING HIS AUTHORITY OVER THE APPELLANTS' NON-COMMERCIAL NON-ARTESIAN PRIVATE WELLS.

In 1872 this Court in ***Mosier v. Caldwell***, 7 Nev. 363, 363 (1872), defined "Percolating Water" in Nevada Law as being part and parcel of the Soil; to wit:

> "Water percolating through the soil is not, and cannot be, distinguished from the soil itself; and of such water, the proprietor of the soil has the free and absolute use, so that he does not directly invade that of his neighbor, or, consequently, injure the perceptible and clearly defined rights."

Percolating waters were also defined by this Court as, "Those oozing or percolating through the soil in varying quantities and uncertain directions." *See* ***Strait v. Brown***, 16 Nev. 317 (181). Under the Common Law we see that percolating waters are the property of the land owner. See ***Mosier v. Caldwell***, 7 Nev. 363 (1872), where percolating waters rights were discussed:

> Under the general doctrine as to **rights in percolating waters**, known

> as the common-law or English rule, **they are regarded as belonging to the owner of the freehold, like the rocks, soil and minerals found there**, and such owner may, in the absence of malice, intercept, impede, and appropriate such waters while they are upon his premises, and make whatever use of them as he pleases, regarding the fact that his use cuts off the flow of such waters to adjoining land, and deprives the adjoining landowner of their use. (It will be observed that some of the jurisdictions represented in this group have by later decisions adopted the rule of "reasonable use," or American rule, so-called." (Emphasis added.)

The decisions of this Court regarding water rights are few. Thus, the Appellants have turned to other States, whose judicial systems have been in existence much longer, to see what they have decided these issues. For example, the Court in ***Galgay v. Great Southern & W.R. Co.***, 4 Ir. C.L.Rep. 456 (1854), said that,

> "The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law. ***Chatfield v. Wilson***, 28 Vt. 49 (1855)."

Further, in ***Frazier v. Brown***, 12 Ohio St. 294 (1861), the court held,

> In the absence of express contract, and of positive, authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters and causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with

sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.

The rule is well established that *the principles of law which govern the right to waters flowing upon the surface of the earth are inapplicable to waters which are beneath its surface and percolate through the soil the water which is held by the soil is a portion of the soil itself,* and **belongs to the owner of the land as fully as any other ingredient of the land** . . . *This rule is not changed by the character of the material through which the water percolates, whether it be loose sand, or a more compact sandstone.* ***So long as the water is in the condition of filtration or percolation, it is a part of the soil,* and the subject to the sole dominion of the proprietor of the land in which it is found**." *See also* ***Gould v. Eaton***, 111 Cal. 639, 52 Am. St. Rep. 201, 44 P. 319 (1896).

In ***Texas Co. v. Burkett***, 117 Tex. 16, 54 A.L.R. 1397, 296 S.W. 273 (*affirming* 1923); ___ Tex. Civ. App. ___, 255 S.W. 763 (1927), the court articulated the Common Law's position on "percolating waters,"

> "*Percolating waters* supplying a well **are the exclusive property of the owner of the surface of the soil**, and subject to barter and sale as any other property." (Emphasis added).

The Engineer has made party admission, after party admission that this is the case. See Well Application No. 1600 and No. 1601 where on May 7, 1920, the Engineer included language in the permits, to wit:

> **It is assumed by the approval of this application that the waters sought to be appropriated *are not percolating and therefore come within the jurisdiction of the State Engineer.*** The State reserves the right to regulate the use of the water herein granted at any and all times. It is distinctly understood that the applicant agrees to the terms herein contained. (Emphasis added). **[AA; P. 206-209]**

Entities are now purchasing land in Nye County for the sole purpose of severing the percolating water rights from the land, intending on selling or transferring these water rights independently from the surface soil. If the Engineer's position is correct and, pursuant to **NRS 533.025**, the State does own all of the water above and below the surface, then how is this activity even be possible? This activity is completely contradictory to the Public Trust Easement set forth in **NRS 533.025**, which charges statutory ownership of all water above and beneath the surface. Unless of course, **NRS 533.025** is only talking about "unappropriated" water and/or land.

This very issue was discussed in ***Bergman v. Kearney***, 241 F. 884 (Nev. D. March 8, 1917). The Court in ***Bergman*** states, unequivocally, that the legislative declaration contained in **§1** of said 1913 WATER LAW, reads as follows,

> "The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public,' is ***insufficient to, and does not, warrant or authorize the acts done and threatened to be done by defendant, as state engineer***, as alleged in the bill of complaint, because the waters of all sources of water supply within the boundaries of the state are *appropriated* or *unappropriated*; **if appropriated, they belong to the appropriator thereof**; ***if unappropriated, they belong to the United States government***, by virtue of the treaty of the United States of America and the United Mexican States in 1848, and by virtue of the Enabling Act, approved March 21, 1864." (Emphasis added)

This settles, once and for all the nature of the water issue - are it relates to "above or beneath the surface" - that the Engineer alleges he has jurisdiction over. The

Appellants have "appropriated" their water rights and they have several other layers of protection over their real property rights, which includes their water rights.

However, if per chance, the Engineer's allegations are true, then there exists no private ownership of property in Nevada. Interestingly, this is a known tenant of Communism and you would think that this would raise a few eye brows on this judicial panel as being alien to our Republican form of government.

Without question, this constitutes a "taking," under the takings clause of the United States Constitution. As such, this would require remuneration for the Engineer's conversion of all of the private land owners water rights that have been trespassed on.

VI.

THE APPELLANTS' COMPLAINT BELOW WAS RIPE FOR REVIEW.

The lower court's finding that this case was not ripe for review required the lower court to first make a finding that the Engineer had jurisdiction over the Appellants. This would have required the lower court to consider and decide the Appellants' numerous jurisdictional arguments set forth in the Appellants' Memorandum As To Ripeness For Review **[AA; P. 116-123]**, which challenged both personal and subject matter jurisdiction. However, the lower court's findings of fact and conclusions of law set forth no findings of fact and/or conclusions of law regarding these jurisdictional issues.

The lower court's decision contains not one word regarding the Appellants'

arguments requiring a finding that the Engineer had authority over the Appellants in the first instance. This would have required the lower court to first hear and consider the Appellants' jurisdictional challenges and made a finding that . and it presumes that the lower court made findings on the jurisdictional issues raised before the court by the Appellants. No such consideration was given to the jurisdictional arguments of the Appellants. Therefore, this statement or position is simply in error.

This issue was settled once and for all in ***Bergman v. Kearney***, 241 F. 884 (Nev. D. March 8, 1917), where it was held that the Engineer ***does not have jurisdiction over all water*** above and below the surface - he only has jurisdiction over "unappropriated" water above and below the surface. This case has never been challenged or reversed by the State to the Appellants' knowledge. The United States Supreme Court in ***Rhode Island v. Massachusetts***, 37 U.S. 657, 718, 9 L.Ed. 1233 (1838), has made it perfectly clear that,

> However, late this objection [speaking to a jurisdictional challenge] has been made, or may be made in any cause, in an inferior or appellate court of the United States it must be considered and decided, **before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction**.

Therefore, to move forward to the issue of Ripeness for Review necessarily required the lower court to side-step the jurisdictional question before this Court. The Court cannot do this without doing violence to the United States Supreme Court's holding

in ***McNutt v. General Motors Acceptance Corp. of Indiana***, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1963 (1936), stating that,

> "Jurisdiction **precludes the idea that jurisdiction may be maintained *by mere averment*** or that the party asserting jurisdiction maybe relieved of his burden by any formal procedure." It is Black Letter Law that, "**Jurisdiction, once challenged, cannot be assumed and must be decided**."

There should be no question in this Court's mind that before the lower court makes any ruling as to ripeness of review, it had to make a finding that jurisdiction was clearly established by the Engineer. "In the absence of agency based on actual authority, plaintiff (Franchise Tax Board) was required to produce evidence of apparent agency to support personal jurisdiction over (defendants)." ***Kotera v. Daioh Int'l, U.S.A. Corp.***, 40 P.3d 506 (Or. 01/30/2002).

Contrary to some opinions, this case was not filed in an attempt to side step Nevada's Administrative Procedures Act, or the Engineer's Agency's authority to hear controversies or to circumvent judicial review. This case was filed to determine whether or not these administrative procedures even apply to the Appellants in the first place. The Appellants' position is that, before lower court made its decision as to the issue of "ripeness for review," the determination of jurisdictional authority over the Appellants was paramount. The Appellants jurisdictional challenges were several; Those being:

- The Engineer does not have delegated authority over the Appellants as they are not a "person" defined in the statutory scheme (**NRS 533.010** and/or **NRS**

534.014);

- The Engineer has no authority over *percolating water* under the land owned by a "natural person" who is engaged in non-commercial activities;
- The Appellants are the successors-in-interest of the Federal Land Patents which were originally issued by the Federal Government. As the successors-in-interest, they are entitled to the rights that were presented and recognized at the Land Patent hearing. The State did not present its public trust easement at the Patent hearing and therefore, they are forever foreclosed from making same.
- The Appellants water rights exist on "appropriated" land and therefore Section 1 of the 1913 amendment to Nevada's Water Law (the public trust easement) does not apply to them, as Bergman states it only applies to "unappropriated" land.
- The presumed jurisdiction of the Engineer denies the Appellants' their Constitutional Rights, *e.g.*, the right to a jury trial (which the delegated authority of the Engineer allows him to circumvent). The Engineer alleged legislative/administrative authority fails to take into consideration the fact that the District Court's have original jurisdiction in all matters having to do with real property (**Nevada Constitution; Article 6, §6**) and this Court has held that water rights are real property, *See*, ***Vineyard Land & Stock Co. v. District Court***, 42 Nev. 1 (1918) and **NRS 534.0135** (percolating water defined); see, See ***Mosier v. Caldwell***, 7 Nev. 363 (1872)(stating that percolating water is part of the land and belongs to the owner thereof).

The Engineer is trying to accomplish exactly what this Court in ***State v. Economy***, 61 Nev. 394, 397, 130 P.2d 264 (1942) stated it was opposed to, "**Repeals by**

implication are not favored and will not be indulged if there is any other reasonable construction." *Cf.*, ***State v. Thompson***, 511 P. 2d 1043(1973).

VII.

THE ENGINEER'S ATTEMPT TO TAKE CONTROL OF THE PRIVATE OWNERSHIP OF LAND AND WATER RIGHTS IS AN EMBODIMENT OF THE MARXIST EVOLUTIONARY MODEL FOR THE SHIFT FROM THE RULE OF LAW TO THE RULE OF UNELECTED APPOINTEES OPERATING UNDER LEGISLATIVE JURISDICTION (ADMINISTRATIVE PROCEEDINGS), WHICH DEPRIVE NEVADA'S CITIZENS OF THEIR BIRTHRIGHT CONSTITUTIONAL RIGHTS.

The Appellants will be brief here. Forcing administrative law upon the owners of non-commercial private wells is an embodiment of one the Ten Planks of Communist Manifesto, to wit: the abolishment of private property. Forcing us private land owners under administrative law strips us of our inalienable Constitutional Rights as set forth under the Bill of Rights. The Marxist evolutionary theory of the law states that rights must be made into mere privileges or immunities. Privileges and/or immunities are granted by government, not Constitutions. The maxim of law, "That which creates has the power to destroy," is not lost on the Marxist Evolutionary Ideologue, whose entire purpose is to reduce the American Citizen to the status of a territorial citizen[3] - having no rights, only governmental privileges, which the

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[3] See the INSULAR CASES, which set forth that the Constitution does not follow the flag and that the Citizens of Puerto Rico and other territories (Washington, D.C. being one of them) do not have the full protection of the Constitution (unless Congress allows them some). Congress, not the Constitution has *complete and total control* over these citizens under **Article 4, §3, Para. 2** of the United States Constitution. Therefore, any decision that originates in one of these territories has no application in the Fifty

government may give and/or take away at will.

Putting the Appellant's under the administrative authority of the Engineer, strips them of their right to have a jury trial regarding their disputes over the ownership of their real property. This takes away their **rights** over which the judicial courts have province and who must enforce legislative intent; leaving them only with privileges and immunities, over which administrative agencies, who write their own regulations (the law of ***unelected*** officials[4]), have province. Gutting the core of Constitutional law and violating due process (5th Amendment and 14th Amendment) straight across the board.

The statutes granting the delegated authority of the Engineer also unconstitutionally strips the District Court of its jurisdictional authority over the title to or boundaries of real property. See **Nevada Constitution; Article 6, §6; NRS 13.010(2)(a); NRS 4.370(b)**. Holding that the Engineer's delegated authority includes deciding the ownership of real property, to wit: Water Rights, constitutes the amending of the Constitution through the passage of a Statute. This Court dealt extensively with this issue in ***Trujillo v. State***, 129 Nev. Adv. Opn. 75 (Oct. 10, 2013). It was argued in that case, and this Court held, that the Constitution cannot be amended by a statute. Here, the State is arguing that the statutes delegating the authority to the Engineer amend the Nevada Constitution by authorizing the Engineer to violate the District Court's authority to hear cases relating to real estate. Further,

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States. Modern jurists seem to be completely ignorant of this fact.

[4] Unlike elected officials, unelected officials cannot be recalled by the voters. These people are appointed and the only way that they can be removed is by filing a law suit - which is what the Appellants did, in an attempt to limit the rogue agency's undelegated and *ad hoc* assumed powers.

the Respondents are arguing that the delegating statutes of the Engineer repeal other statutes by implication. This Court has already stated that water rights are real property and the definition of percolating water also embodies this pronouncement. Therefore, the District Court has "original jurisdiction" of cases relating to water issues of non-commercial non-artesian private wells - not the Engineer.

CONCLUSION

Whether or not the case below was ripe for review was made without any consideration of the Appellants' jurisdictional challenges to the Engineer's delegated authority. Without deciding these jurisdictional issues, how could the lower court even make a determination that the Appellants' case was not ripe for review when it was never determined whether or not the Engineer's administrative process even applied.

The lower court erred initially by failing to decide the jurisdictional issues first before proceeding directly to the other substantive and/or procedural issues. In doing so, the lower court's entire decision is *void ab initio*. Without first determining jurisdictional issues, the court cannot move forward because doing so is the exercise of jurisdiction itself, which had not yet been determined.

The Appellants position is resolute in that the Engineer has no authority over their non-commercial non-artesian private wells. As such, the lower court's decision that they were required to go through the entire administrative process in order to facilitate the "ripeness" for review standard, was not only absurd but constitutes a denial of the Appellants' Constitutional Rights and the voids the Nevada Constitutional provisions granting original jurisdiction on real estate matters to the district courts. This absurdity is manifest in the fact that the mere act of forcing the Appellants through the administrative process would negate their jurisdictional

challenges and force them to waive both subject matter and personal jurisdiction, foreclosing their issues. Thus denying them their First Amendment Rights - the right to petition to government for redress of grievances. The right to petition the government for redress of grievances extends to ALL departments of government (See ***California Motor Transport Co. v. Trucking Unlimited***, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (Cal. 1972))

Further, forcing the Appellants' to run the gauntlet of the Engineer's administrative hearing process, immediately denies the Appellants to their Constitutional right to a have their water rights determined by a jury of their peers. The administrative process is stifling to substantive and procedural Constitutional rights. Immediately, the first Ten Amendments are simply swept away into oblivion and the Appellants are transformed into second class citizens being protected by only the 14th Amendment which does not protect "rights," but only "privileges and immunities." Therefore, creating a paradigm shift from the "rule of law" to the rule of an unelected official's own self-serving personal opinion, *aka: ad hoc* adjudication of the Appellants' rights. This is far from acceptable to the Appellants. See the APPELLANTS' AMENDED COMPLAINT **[AA; P. 7-8; P. 6-7] and** PLAINTIFFS' REPLY TO STATE'S MOTION TO DISMISS FIRST AMENDED COMPLAINT **[AA; P. 94-98; P. 3-7]**, wherein they outline the fact that there are different kinds of citizens in the United States and each of them are entitled to different levels of protection under the United States Constitution and Laws of this State. "United States Citizens[5]" are second class (colonial) citizens (as are corporations). They consist of the citizens of the Territories

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[5] Just as there is a legally recognized difference between the jurisdiction and authority of "United States District Court" and the "District Court of the United States." *See*, ***Mookini v. United States***, 303 U.S. 201 (1938).

and Possessions of the United States. In these federal enclaves, Congress - not the Constitution - reigns supreme. In order to understand this, all one need do is read the Insular Cases. The residents of Puerto Rico, an United States Territory, do not have 22 U.S. Constitutional Rights that are enjoyed by the Citizens of the Fifty States.

Artificial persons, *e.g.*, corporations, limited liability companies, *etc.*, are government creations, who operate and exist under government largess. *See* ***Metropolitan Life Ins. Co. v. Ward***, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751, 53 USLW 4399, US Ala. March 26, 1985 (No.83-1274)(The "Equal protection clause does not apply to ***corporations*** or ***artificial persons, because they are not 'citizens'*** **protected by the *privileges and immunities* clauses of the Constitution**." (Emphasis added.)) "Corporations are not Citizens under Article IV section 2 of the Constitution of the United States." ***Paul v. Virginia***, 8 Wall. 168, 19 L.Ed. 357 (1868). As such, the "persons" who are defined and described in the Statutes delegating the authority of the State Engineer are such persons that may be denied all constitutional rights and do not encompass natural persons who may not be denied their inalienable rights.

The jurists of this State, as well as all of the other Fifty States, have failed to recognize the dichotomy between the different kinds or classes of citizenship, as well as the lack thereof. As a result, the decisions of the United States Supreme Court which address these types of citizens or non-citizens, have been improperly applied - across the board - to the citizens of Nevada. The vast majority of these decisions are ruling on the rights of citizens of the various Territories (including Washington, D.C.[6], also a territory of the United States), and have embraced them and applied

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[6] Decisions that *originated in* the Territory of Washington, D.C., have no application in the fifty states. See ***Berman v. Parker***, 348 U.S. 26, 75 S.Ct. 98 (1954), the seminal case resulting in the ruling in ***Kelo v. City of New London***, 545 U.S. 469, 125

them, across the board, to the citizens of the various States. Constitutionally speaking, this is no different than applying English Colonial law to the citizens of the various States.

As such, administrative agencies do not have jurisdictional *carte blanche* over natural persons or inalienable rights. Administrative agencies were designed to administer regulations over artificial persons and over natural persons operating under privileges and/or licenses granted by government. The private ownership of land, with a non-commercial, non-artesian well does not permit the Engineer jurisdictional authority over them.

Therefore, the lower court erred in exercising jurisdictional authority, prior to hearing and deciding the jurisdictional challenges presented to it by the Appellants, acted in excess of its own judicial requirements. Except and until jurisdictional questions have been heard and answered squarely, the lower court had no jurisdiction to move forward on to any other substantive or procedural issues.

There is a reason why most of the cases relating to the powers of the State Engineer do not apply to the Appellants. All of the other litigants that challenged the Engineer asked the wrong questions. When you ask the wrong questions, you get the wrong answers. Nobody has ever asked the questions that the Appellants' are asking in this case.

S.Ct. 2655 (2005), holding that the rights of a citizen in Connecticut are the same as those of a Territorial citizen in Washington, D.C. The ***Berman*** decision was addressing property issues of citizens in the District of Columbia. The rights of the citizens in Connecticut are not and cannot be fundamentally the same. The holding in ***Kelo*** therefore cannot be correct and is fundamentally flawed (except under the Marxist evolutionary model of law, which embraces judicial activism instead of the legislative or amendment process).

In the case at bar, the lower court never addressed the Appellants challenges, negating the lower court's entire decision. The Appellants renew their jurisdictional challenges now in this Honorable Court.

Respectfully submitted,

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Respectfully submitted,

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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:

[X] This brief has been prepared in a proportionally spaced typeface using [*Word Perfect 11*] in [14 point font and Times New Roman font style]; or

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2. I further certify that this brief complies with the page- or type-volume limitations of **NRAP 32(a)(4)-(6)** because, excluding the parts of the brief exempted by **NRAP 32(a)(7)(c)**, it is either:

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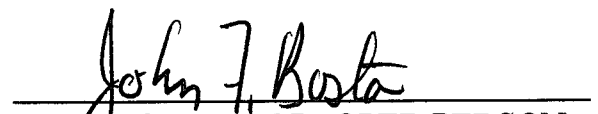
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular **NRAP 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 14th day of February, 2017.



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CERTIFICATE OF SERVICE

I certify that I am a non-interested party person to this action and that on this 15th day of February, 2015, I served a copy of the foregoing Opening Brief & ~~Appendix (digital copy)~~, on the following by United States Postal Service, postage pre-paid, to:

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