THE SUPREME COURT OF THE STATE OF NEVADA

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

*** * * AMENDED * * ***

OPENING BRIEF OF THE APPELLANTS

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal under NRAP 3(a). Lower court Order filed May 28, 2015; Notice of Entry of Order filed on July 9, 2015; Notice of Appeal filed on July 17, 2015.

ROUTING STATEMENT [- NRAP 28(5)]

The Appellants direct that the appropriate jurisdiction for this appeal is the Nevada Supreme Court pursuant to NRAP 17(9)(involves an administrative agency and water issues), NRAP 17(13)(case of first impression), and NRAP 17(14)(question of statewide public importance).

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 PRESENTED ON APPEAL

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

2. 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?

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

4. THE ENGINEER'S SECOND ATTEMPT TO ASSERT 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.

5. THE LOWER COURT ERRED IN IGNORING THE VERY DEFINITION OF "PERCOLATING WATER," WHICH DEFINITION CONTAINS ITS OWN JURISDICTIONAL AUTHORITY, DEMONSTRATING THAT ORIGINAL JURISDICTION IS IN THE DISTRICT COURTS, PRECLUDING THE ENGINEER FROM EXERCISING HIS ADMINISTRATIVE AUTHORITY OVER THE APPELLANTS' NON-COMMERCIAL, NON-ARTESIAN PRIVATE DOMESTIC WELLS.

6. THE APPELLANTS' COMPLAINT BELOW *WAS* RIPE FOR REVIEW.

7. THE ENGINEER'S CONDUCT IS AN OPEN ATTACK ON THE PRIVATE OWNERSHIP OF REAL PROPERTY, WHOSE INTENDED PURPOSE IS TO NEGATE CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY AND REPLACE THEM WITH PRIVILEGES

TO BE DETERMINED A CONSTITUTIONAL VACUUM, TO WIT: A LEGISLATIVE TRIBUNAL, WHERE THE BILL OF RIGHTS IS ALIEN TO THE PROCEEDINGS.

(a). The State's position violates the legislatively stated Public Policy regarding private wells, set forth in NRS 533.024(1)(b).

(b). NRS 533.025 violates Article 1, §10 of the United States Constitution (no State shall impair the obligations of a contract). The Appellants are the successors-in-interest of land patents which are binding contracts, the terms and conditions of which cannot be legislatively changed.

(c). NRS 533.025 only applies to water rights lying under unappropriated public lands.

(d.) NRS 533.035 is unconstitutional as applied. The priority date for percolating water is the appropriation date, which is the original date of the issuance of the land patent, with subsequent purchasers being successors-in-interest to that seminal appropriation.

(e). The State violates NRS 533.383(1) by ignoring that the Appellant's are successors-in-interest of land patents which conveyed the rights to water with their land prior to the passage of the NRS.

PROCEDURAL HISTORY / STATEMENT OF THE CASE

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)

Historically, the State Engineer was *only* empowered *authority over artesian wells* and has no power or authority over wells for private domestic purposes or uses. In 2015 the State Engineer requested the Legislature to adopt SB [Senate Bill] 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? 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. Set forth below 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. (Emphasis in the original)

It would appear from the language that the State Engineer (hereinafter "Engineer") is fully aware that he *does not* have jurisdictional authority over ALL underground water and/or private domestic wells and SB 81 is a party admission that he does not. Historically, the State 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)** appropriated water rights *are not* included in the Engineer's authority (only un-appropriated; See ***Bergman,*** *supra*);
>
> **(2)** percolating water is part of the soil, is therefore real property and is owned by the land owner, not the State, who would have to compensate the land owner for taking it;
>
> **(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, non-artesian, private domestic 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, non-artesian, private domestic wells strips these 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 contained in the Bill of Rights.

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

[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.

Granting the Engineer the authority over non-commercial, non-artesian, private domestic wells under NRS 533.025 would make this statute unconstitutional as applied, usurping the sacrosanct ownership of private property, which is not subject to the arbitrary and capricious nature of Article 4 - legislative adjudication, under the Nevada Constitution.

STATEMENT OF THE FACTS

The Appellants filed a Complaint for Class Action Declaratory and Injunctive Relief [ROA; P. 1-12], a Motion for a Certification of the Class [ROA; P. 137-143] and a Motion for a Preliminary Injunction [ROA; P. 13-60] in the Fifth Judicial District Court, Nye County, Nevada. There was an initial date set for the hearing on the Appellants' Motions and the Court expressed its concerns about some procedural problems that it had perceived and continued the hearing to allow the Appellants to amend their documents accordingly. [ROA; P. 173, lis. 8-22] The lower court incorrectly expressed concerns about the filing of an Amended Complaint, when a Motion to Dismiss had already been filed. [ROA; P. 173, lis. 20-25 through P. 174, lis. 1-5] This issue was quelled by the Respondents expressing no objection. [ROA; P. 174, lis. 17-24 and ROA; P. 175, lis. 1-3]

Appellants' counsel at the hearing, Lillian Donohue, Esq., retained in an

unbundled capacity, opened her oral argument by setting the standard for the lower courts decision, stating that before the court could render a decision that it had to address the jurisdictional questions first. [ROA; P. 176, lis. 16-25 through P. 177, lis. 1-10] For whatever reason the lower court became confused with the Appellants' jurisdictional argument and misinterpreted it to mean that the court did not have jurisdiction. [ROA; P. 177, lis. 11 -17] Immediately, the lower court attempted to define the argument as being an attempt by the Appellants to prevent the State Engineer from committing an act that the agency representative suggested that it would do in the future. [ROA; P. 178, lis. 9-20] However, Ms. Donohue, Esq., responded that there were already restrictions that had been put on the wells of the Appellants and the other members of the class. [ROA; P. 178, lis. 21-23] The lower court was unconcerned as the jurisdictional incursion that the Appellants were talking about (the restriction of 2 acre feet a year) had been put on their Appellants' and the members of the classes' wells several years prior. [ROA; P. 179, lis. 1-14]

The court again attempted to define the argument being made by the Appellants below by asking Appellants' counsel below if the Appellants were trying to stop a future action by the Respondents. Ms. Donohue was mislead by this question and answered, "Yes." [ROA; P. 179, lis. 15-21] The lower court continued to pursue this line of thought regarding future actions by the Respondents and Ms. Donohue

responded by expressing some of the Appellants' jurisdictional arguments, *e.g.*, the land patents prevented the Respondents from exercising their jurisdictional authority over the Appellants. [ROA; P. 180, lis. 9-12]

At this juncture, the lower court again attempted to change the nature of the Appellants' argument by determining that the term "jurisdiction" was in the court's opinion not the proper term. Finding the term "jurisdiction" to mean only the court's jurisdiction. [ROA; P. 180, lis. 13-25] The court asked Appellants' counsel what they were attempting to accomplish with their motion for preliminary injunction. [ROA; P. 182, lis. 3-5] Counsel responded that the Motion for Preliminary Injunction was to stop the Respondents from exercising any authority over the Appellants. [ROA; P. 182, lis. 6-9] Appellants' counsel then argued that the Appellants were not a "person" as defined in NRS Chapters 533 or 534. Further, that NRS 0.039, which defines the definition of "person" for general statutes that do not define the term "person" or statutes which cannot stand on their own without adopting the definition of "person" in NRS 0.039 was not applicable. [ROA; P. 183, lis. 1-18]

Again, the court attempted to redefine the Appellants' argument by suggesting that in order to bring a case there had to be a justiciable case or controversy. Requesting from counsel what it was in this case. [ROA; P. 183, lis 22-25 through P. 184, lis. 1-3] Counsel responded that there were no statutes which controlled the

Appellants' (and the members of the class) use of their wells. [ROA; P. 185, lis. 2-7] Counsel continued and argued that percolating water was part of the land. [ROA; P. 185, lis. 13-16]

Respondents' counsel argued that the arguments regarding the definition of "person" were *de minimus*, that statutes don't need to define every single type of person that they apply to. Further, the purpose of NRS 0.039 was to alleviate the Legislature from having to include all possibilities within the statute. [ROA; P. 186, lis. 5-19] The Respondents' argument also gave the example that the Respondents did not have jurisdiction previously over governmental entities and so the definition in NRS 533.010 was made to include government entities. [ROA; P. 186, 1-4 and P. 186, lis. 20-25 through P. 187, lis. 1] This argument, however, merely supported the Appellants' argument, in that the Respondent had only authority over the United States government, state property or any political subdivision thereof. The Respondents suggested that the statute was amended to add within the definition of "persons" in NRS Chapter 533, governmental entities; and, further, that this was the only fair reading of the amendment to the statute. [ROA; P. 187, lis. 2-7] Respondents' further suggested that following the Appellants' argument would wipe out the entire water structure in the State of Nevada and this would in turn wipe out all water rights. [ROA; P. 187, lis. 8-14] Respondents further argued that Respondent

has authority to regulate domestic wells under NRS 534.120 and NRS 534.180; and that the statutes do not state that the regulation of domestic wells may only be executed on wells that are owned or operated by persons defined in the Statute. [ROA; P. 187, lis. 15-23] The Respondent further suggested that governmental entities tend not to use domestic wells and that this would be more applicable to commercial use, or some other use. [ROA; P. 187, lis. 23-25 through P. 188, lis. 1-2]

Respondents turned immediately to the issue of "ripeness." Respondents alleged that there was no injury that had been suffered by the Appellants. [ROA; P. 188, lis. 7-14] Alleging that the Respondents' public statement that they were going to reduce the use of water by the Appellants to one-half acre foot a year, was not an injury because it had not occurred yet. [ROA; P. 188, lis. 22-25] Therefore, no injury. Respondents alleged that because the Appellants had not embraced and gone through the administrative gauntlet, that their case was not ripe for review and should be dismissed. [ROA; P. 189, lis. 4-9] The Respondents raised a point, not brought up in their briefs, that the Appellants' Complaint must also fail as they did not allege that they are the owners of water in the Pahrump Valley, only that they are well owners in Nye County and there being no regulations that would affect Nye County as a whole, their Complaint must fail. [ROA; P. 189, lis. 10-25]

The Respondents argued that the Appellants' issue regarding the Treaty of

Guadlupe-Hildalgo and the patent process were more than adequately addressed in their pleadings before the court. [ROA; P. 190, lis .6-11]

Counsel responded that the Respondents' argument was an amendment by implication and restated the injury as a trespass on the private property rights of the Appellants. Further, that the jurisdiction and delegated authority of the Respondent was an assumption that was not supported by the law and that NRS 0.039 was inapplicable to NRS Chapters 533 and 534. [ROA; P. 190, lis. 15-25]

The lower court then held that not applying NRS 0.039 to NRS Chapters 533 and 534 required the reader to reach an absurd result and the Appellants' suggested interpretation would eviscerate both statutes and didn't make any sense. [ROA; P. 192, lis. 1-21] The court went on to find that the last line in NRS 0.039, that being that the definition of person did not include a "governmental entity," was telling as to the requirement of NRS 0.039 to be used in the interpretation of a "person" as defined in both NRS Chapters 533 and 534. Further, that the Appellants' proffered argument would render NRS 0.039 meaningless. [ROA; P. 194, lis. 6-25] Counsel responded that there was not set decision requiring the reading of NRS Chapters 533 and 534 to be read together with NRS 0.039. [ROA; P. 195, lis. 14-15] The lower court concluded that they must be read together under the court's legal analysis. [ROA; P. 196, lis. 1-6] Counsel then moved on to the land patent issue. [ROA; P.

196, lis. 7-19]

The court's response was to make its finding that there was no case or controversy because the Respondents have not made any decisions that affect the Appellants [ROA; P. 196, lis. 20-25 through P. 197, lis. 1-25] and the Appellants had not gone through the administrative process, *e.g.*, administrative hearing, followed by petitions for judicial review. [ROA; P. 197, lis. 1-25 through P. 198, lis. 1-18] The court outlined the administrative and judicial review process that was required. [ROA; P. 197, lis. 2-25 and P. 198, lis. 1-7] The court held that the Appellant's Cause of Action was not ripe. [ROA; P. 198, lis. 9-11 and P. 201, lis. 1-2] The court held that the legal basis for the granting of the preliminary injunction requires that there be a justiciable controversy and in her opinion, there was none. [ROA; P. 198, lis. 12-25 through P. 200, lis. 1] The lower court found that the Appellants did not set forth a cause of action. [ROA; P. 201, lis10-16] As to the issue of the Land Patents the court held that it disagreed with the Appellants' argument, but did not elucidate. [ROA; P. 201, lis. 17-20] The court then held that the Respondent had jurisdiction over the Appellants and that the Appellants had to avail themselves of the administrative process before coming to court and that the standard cited by the Appellants was incorrect. [ROA; P. 202, lis. 1-5] Counsel Donohue withdrew from the case and the Appellants filed a proper person appeal. [ROA; P. 167-168] The

matter is now before this Honorable Court. This is a case of first impression in Nevada.

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.

It is black letter law that - once challenged, jurisdiction cannot be assumed it must be proven to exist. Here, the Appellants challenged the jurisdiction of the Engineer through two distinct methods: (1) they filed their action in the district court, forgoing the initiation of an action in the administrative theater; and (2) openly and legally informed the lower court that the State Water Engineer had no statutory delegated authority of their Non-commercial, Non-artesian, Private, Domestic, Percolating Water Wells [hereinafter, "Private Wells"]. The lower court refused to hear these arguments. The lower court refused to follow the Rule of Law, and decided to hang its hat on procedural issues that were not ripe for consideration prior to the condition precedent, to wit: addressing 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 side-stepped the jurisdictional challenges and went directly to consideration of procedural issues; in direct violation of this most basic principle of law. The Appellants clearly challenged the jurisdictional authority of the Engineer over them personally and over their Private Wells. The Oregon Supreme Court held in ***Kotera v. Daioh Int'l, U.S.A. Corp.***, 40 P.3d 506, 521 (Or.01/30/2002) that,

> "In the absence of agency based on actual authority, plaintiff 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, generally, not just the suggested changes that he was about to make regarding Private Wells, but also the restrictions that he had already implemented and was exercising over the Appellants' wells. Below, the Engineer alleged that with the passage of NRS 533.025, that his authority is all encompassing and thus eliminates all arguments to divest the Engineer of his authority over *natural persons*. 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, 189, 56 S.Ct. 780, 80 L.Ed. 1963 (1936);

Here, the Engineer has merely 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, 591, 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.)

It was the position of the Appellants, below, that the Engineer had no authority over their Private Wells in the first instance. These jurisdictional questions should have been addressed before the lower court proceeded any further. Instead the lower court heard the Respondents' Motion To Dismiss, whose arguments were based upon the

presumption that the Engineer had jurisdictional authority. Thus, the lower court's failure to address these jurisdictional issues below constituted clear error and an abuse of discretion. This negated the lower court's decision on Respondents' Motion to Dismiss.

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.***, 127 Nev. Adv. Opn. 83, 267 P.3d 711, 923 (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, 778, 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, 182, 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, 437, 272 P.2d 492 (1954).

The dismissal of their action was too severe a sanction against them. The lower court's dismissal violated the State of Nevada's public policy that issues should be heard on their merits. This Court held in ***Hotel Last Frontier Corp. v. Frontier Properties, Inc.***, 79 Nev. 150, 380 P.2d 293 (1963) that,

> "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." Also cited in, ***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).

In their Motion to Dismiss the Respondents were attempting 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, 668,918 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 exactly that they are being sued over. If, in fact, the Appellants' jurisdictional arguments are correct, then the ripeness issue is *non sequitur*.

These jurisdictional arguments, setting forth that the Engineer has no *delegated authority* over their Private Wells is the core of the Appellants' Complaint below. These arguments are therefore reasserted and made as follows:

III.

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

Before the lower court could render a decision on the Respondents' Motion to Dismiss, the court's first order of business was to determine whether or not the Appellants were a "person" as defined in the relevant statutes and therefore subject to the authority in same. The Respondents cited that their jurisdictional authority over the Appellants was found in NRS 533.010, *et seq*. and NRS 534.010, *et seq*. The Appellants challenged this position by demonstrating that the definition of a "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" 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, in ***U.S. v. Dottterweich***, 320 U.S. 277, 286, 64 S.Ct. 134, 140 (1943), the Court stated that,

> ". . . 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)." (Emphasis added).

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* when its statutory definition may be used, "*unless* otherwise *specified* in the chapter or necessary *to give meaning* to the statute . . ." The only time that NRS 0.039 can be used is when it meets either of these requirements.

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

The next question is, "Can the Statute stand alone without using NRS 0.039?" In *other words*, "can the Statutes stand alone with their own definition of a 'person' or is the definition of a 'person' found in NRS 0.039 *necessary* to give meaning to the statute?" The answer is "Yes," the Statute can stand alone and "No" the definition of "person" in NRS 0.039 is not needed to give meaning to NRS 533.010 or NRS 534.014?

Below the Respondents' never addressed the issue 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 didn't they just leave out the definition of "person" completely and rely on NRS 0.039 instead?

The answer is provided in the body of NRS 0.039 itself and is further provided by this Court's own *stare decisis* on statutory interpretation, to wit: "The expression of one thing, is the exclusion of another." S***tate v. Wyatt***,84 Nev. 731, 73, 448 P.2d 827, 829 (1969); See also, ***Leake v. Blasdel***, 6 Nev. 40, 44 (1870); ***State v. Arrington***, 18 Nev. 412, 4 P. 735, 737 (1884); ***Ex Parte Arascada***, 44 Nev. 30, 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: "<u>It is true that the constitution does not expressly inhibit the power which the legislature</u>

> 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 the Appellants)

Nevada law also provides that omissions of subject mater are presumed to have been intentional. 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. 541, 548 (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.

The Respondents' cite to NRS 0.039 actually supports the Appellants' position that the definition of "person" in that statute does not include "natural persons," removing them from the Engineer's 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 intended. 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 interpretation advanced by the Engineer 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. Advancing the argument that NRS 0.039 applies in this case is an intentional misrepresentation of the clear legislative intent. This Court cannot condone creativity when it is in clear violation of the tenants of statutory construction and the Legislature's clear intent. Therefore, the Engineer has no delegated authority over the Appellants/natural persons.

IV.

THE ENGINEER'S SECOND ATTEMPT TO ASSERT 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 exercise jurisdictional authority over the Appellants was his reference to NRS 533.025. Below the Appellants asserted their rights as successors-in-interest to the Federal and State Land Patents issued on their property. It is commonly known that perhaps the strongest and most ironclad form of title to land, is the Land Patent. The Appellants hereby put this Court on judicial notice that historically, all of the lands in the Pahrump Valley are derived from the GUADALUPE-HIDALGO TREATY of 1848, then Federal Land Patents were 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. While the significance of this is *generally* unknown, these facts constitute *prima facie* evidence that the

Appellants' subsurface percolating 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, 200 (1984). In ***Summa***, the California State Supreme Court, below, 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." (Emphasis added)

In ***Summa Corp.*** at 209, the United States Supreme Court cited to ***United States v. Coronado Beach Co.***, 255 U.S. 472 (1921), which stated that,

> "[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 ***Summa Corp.*** Court went on to say at p. 209 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 the ***Summa Corp.*** 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*. (Emphasis added.)

What is clear from a perusal of the land patents issued in and around the Pahrump Valley, 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 attempt to apply the *public trust easement* set forth in NRS 533.025, is inapposite 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 VERY DEFINITION OF "PERCOLATING WATER," WHICH DEFINITION CONTAINS ITS OWN JURISDICTIONAL AUTHORITY, DEMONSTRATING THAT ORIGINAL JURISDICTION IS IN THE DISTRICT COURTS, PRECLUDING THE ENGINEER FROM EXERCISING HIS ADMINISTRATIVE AUTHORITY OVER THE APPELLANTS' 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, 321 (1881). Under the Common Law we see that percolating waters are the property of the land owner. See ***Mosier v. Caldwell***, 7 Nev. 363, 366-67 (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," also called "the American rule."] (Emphasis added.)

The decisions of this Court regarding Water Rights are few and most come to this Court by way of appeals from Petitions for Judicial Review, constituting legislative (administrative) adjudications which would deny the Appellants the Constitutional protections that they are entitled to under the Nevada Constitution and the Bill of Rights. Because Nevada law is incomplete on this issue, the Appellants have turned to other States, whose judicial systems have been in existence much longer. Those

decisions are relevant to the water law in Nevada under NRS 1.030, which states in pertinent part that the Common Law of England shall be the rule of all of the Courts in the State of Nevada. All States have and follow the common law except Louisiana who follows Napoleonic law. How these other States have addressed these same issues pertains to this case. For example, the Court in

> "If underground water in its percolating and filterations from its peculiar nature, and from an ignorance of its course, and the laws that control it is not subject to the law as it applies to running water, then that of it which is on any man's land like any other thing which makes the soil, or is contained in it absolutely the owner's. The entire dominion of the owner over his soil is beyond question. ***Chatfield v. Wilson***, 28 Vt. 49, 52, 2 Willams 49, 1855 WL 4119 (1855)."

Further, in ***Frazier v. Brown***, 12 Ohio St. 294, 311 (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, 29, 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 made a party admission of his jurisdiction by including 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 to municipalities and/or utility companies. If the Engineer's position is correct and, pursuant to NRS 533.025, the State owns ALL of the water above and below the surface, how then is this activity even be possible? The exercise of this property right is completely contradictory to the PUBLIC TRUST EASEMENT alleged to be set forth in NRS 533.025, which appears to circumvent the private ownership of water above and beneath the surface. Unless of course, NRS 533.025 is only referring to water in or on "unappropriated" land.

This very issue was discussed by the Nevada Federal District Court in ***Bergman v. Kearney***, 241 F. 884, 890 (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)

Bergman settles, once and for all the true nature of the water issue - as it relates to "above or beneath the surface" - which 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 in their water.

However, if per chance, the Engineer's allegations are true, then the truth of the matter is that there exists NO PRIVATE OWNERSHIP OF PROPERTY IN NEVADA. Not only must this position be false, but this position is repugnant to America's legacy of law. This raises the question as to how this position can even be taken by government officials who swear an oath to support and defend the very document which they have labored and warred against to circumvent. Their position is alien to our Republican form of government (United States Constitution Art. 4, cl. 1) and this Court should find it repugnant as well.

As the government usurpation of private property is one of the tenets of Communism, this should raise this panel's eyebrows. Authorizing government administrative agencies *carte blanc* authority over private citizen's to eviscerate their Constitutional rights, is not a power which this Court embodies.

Without question, the government's position constitutes a "taking," under the 4th Amendment's *takings clause* of the United States Constitution. This clearly violates the directive of Congress set forth in the Enabling Acts of this State requiring that this State guarantee to every citizen a Republican form of government. (See also, United States Constitution Art. 4, cl. 1) As such, this would require remuneration by the State for the Engineer's conversions of all of the private land owners water rights that he has trespassed on without the appropriate delegated authority. The costs to the State would be in the high millions, if not billions of dollars. Therefore, the State's position is not only legally incorrect, but an untenable one.

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. It order to make this finding, this required the lower court to consider and decide all of the Appellants' numerous jurisdictional arguments set forth in the Appellants' Memorandum As To Ripeness For Review [AA; P. 116-123], which the lower court did not decide. Evidenced in the lower court's Findings of Fact and Conclusions of Law, setting forth no findings of fact and/or conclusions of law regarding these jurisdictional issues. Therefore the only logical conclusion that can be drawn is the Court made no decision regarding these issues - whatsoever. A review of the record reveals that the State expresses that their view the Plaintiffs' arguments are certainly novel. However, the Honorable KimberlyA.Wanker, J., expressed her position that she did not agree with any of the Appellants' arguments.

The decision below contains not one word regarding the Appellants' jurisdictional arguments requiring a finding that the Engineer had authority over the Appellants in the first instance. This means that the condition precedent for the lower court to consider the merits of the Appellants' Complaint were never achieved. Therefore, any statement that the decision below was correct, is simply in error.

This issue was settled once and for all in ***Bergman v. Kearney***, 241 F. 884, 890 (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 by the State or reversed. Nor does the State ever cite to this case 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 questions before it. 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, 189, 56 S.Ct. 780, 80 L.Ed. 1963 (1936), stating that,

> ". . .[J]urisdiction 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 Honorable 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. Oregon's Supreme Court held in ***Kotera v. Daioh Int'l, U.S.A. Corp.***, 40 P.3d 506, 521 (Or. 01/30/2002) that,

> "In the absence of agency *based on actual authority*, plaintiff was *required to produce evidence of apparent agency* to support personal jurisdiction over [defendants]." (Emphasis added.)

Contrary to the State's opinion, the Appellants' case below was not filed in an attempt to side step Nevada's Administrative Procedures Act or the Engineer's Agency authority to hear controversies or to circumvent judicial review. This case was filed to determine whether or not the Administrative Procedures Act even applies to the Appellants in the first place. The Appellants' position is that, before the lower court made its decision as to the issue of "ripeness for review," the determination of jurisdictional authority over the Appellants was a paramount threshold requirement. The Appellants jurisdictional challenges are clearly set forth in their Complaint and Motions below.

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: "Repeals by implication are not favored and will not be indulged if there is any other reasonable construction." *Cf.,* ***State v. Thompson***, 89 Nev. 320, 322-23, 511 P. 2d 1043, 1045(1973).

VII.

THE ENGINEER'S CONDUCT IS AN OPEN ATTACK ON THE PRIVATE OWNERSHIP OF REAL PROPERTY, WHOSE INTENDED PURPOSE IS TO NEGATE CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY AND REPLACE THEM WITH PRIVILEGES TO BE DETERMINED A CONSTITUTIONAL VACUUM, TO WIT: A LEGISLATIVE TRIBUNAL, WHERE THE BILL OF RIGHTS IS ALIEN TO THE PROCEEDINGS.

(a). Violates Nevada's Public Policy regarding private wells; NRS 533.024(1)(b).

(b). NRS 533.025 violates Article 1, §10 of the US Constitution (obligations of a contract).

(c). NRS 533.025 only applies to water rights lying under unappropriated public lands.

(d.) NRS 533.035 is unconstitutional as applied. The priority date for percolating water is the appropriation date of the land patent.

(e). Violates NRS 533.383(1) ignoring that the Appellant's are successors-in-interest of land patents with notice of the deed to *all persons*.

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The Respondent's position is an embodiment of "Statism," more popularly known as "Marxism," which is designed to morph the Constitutional Rights of citizens into mere privileges and immunities possessed by Colonial citizens or subjects. This political ideology effectuates a shift from Constitutional/Inalienable Rights to legislatively granted privileges and immunities. This is effectuated by sub-delegating Constitutionally protected property rights to be heard by administrative agencies. This administrative tribunals are more commonly called legislative courts. These courts do not recognize the Bill of Rights and immediately strip citizens of their Constitutional protections even before they appear before the tribunal. Legislative Courts are primarily used to perform legislative function that are sub-

delegated to unelected officials. This paradigm shift is antipodal to the spirit and letter of the Declaration of Independence, the Bill of Rights and other Organic Law Documents that are incorporated into the Constitution.

Statism embodies the ideology that rights must be made into mere privileges or immunities. Holding that permission for *everything* must be obtained from government. In other words, "All roads lead to Rome." Privileges and/or immunities are granted by government. The maxim of law, "That which creates has the power to destroy," is not lost on the Statist Ideologue, whose entire purpose is to reduce the Continental American Citizen[3] to the status of a *territorial United States citizen*[4] - having no rights, only governmental privileges, which the government may give and/or take away at will.

The Respondent's position violates the declared public policy of the State. The Legislature in NRS 530.024(1)(b) states that,

> 1. It is the policy of this State:
> . . .
> (b) To recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which

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[3] A citizen of one of the fifty states and not a citizen of a territory or possession of the United States.

[4] 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 States (because the 'rights' of those citizens are in truth mere "privileges").

cannot reasonably be mitigated.

Instead of effectuating this policy the State Engineer has chosen to attack the use of domestic wells used by private home owners by putting more and more restrictive measures on these wells. During the pendency of this case, since there is a legitimate question as to the State Engineer's authority over private domestic wells, he has instructed the companies that drill any new domestic wells, to put meters on them. Clearly the State Engineer intends to reduce private well water usage, which he has already stated he intends to do by reducing the allowable usage from 2 acre feet of water a year to 1/4 acre foot. The State Engineer has already stated that he intends to put meters on every domestic well. If the water is part of the private property owners title to his land, then the State Engineer has no business even thinking about doing this. The Engineer's attempt to establish these new protocols violates and does violence to the public policy of the State. Instead of creating a protectible interest the Engineer is attacking the real property rights of private property owners.

NRS 533.025 as applied to private property owners and especially successors-in-interest to land patents violates Article 1, §10 of the United States Constitution. The Legislature's decision to pass this into law violates the prohibition against the State passing laws that interfere with the obligations of private contracts. A grant, bargain and sale deed transfers all of the seller's title into the hands of the buyer. When a person owns title by way of a land patent, especially a land patent that does not reserve the water rights, then application of NRS 533.025 to percolating water impairs the obligations of that contract and violates the Constitutional prohibition. The Appellants are the successors-in-interest of land patents. Land patents are the most binding real estate contracts there are, the terms and conditions of which cannot be legislatively changed. NRS 533.025, as applied to land patents, attempts to change

the terms and conditions which interferes and impairs the title contracted between buyer and seller.

NRS 533.025 can only apply to water rights lying under unappropriated public lands. See ***Bergman v. Kearney***, 241 F. 884, 890 (Nev. D. March 8, 1917), states that the Engineer only has jurisdiction over "unappropriated" land/water.

NRS 533.035 is unconstitutional as applied as it relates to the priority date of percolating water. The priority date for percolating water must the appropriation date, which is the date of the issuance of the land patent, with subsequent purchasers being successors-in-interest to that seminal appropriation. If the land owner is the sole owner of the percolating water underneath his land, then beneficial use has no real practical application because the Appellants are not "a person" over whom the Engineer has delegated authority. Although the Appellants concede this would apply to a river, stream or lake, unless it is conceivably entirely on the owner's property.

The State violates NRS 533.383(1) by ignoring that the fact that the Appellant's are successors-in-interest to land patents which conveyed the right to water with their land prior to the passage of NRS 533.383(1). Further, since the Appellants are not a "person" named in the statute, then this statutory section should not even apply to the Appellants. Applying the statute in this manner makes the Statute void for vagueness, because it does not differentiate between the different types of water and the different legal aspects associated therewith.

The State violates NRS 533.383(1) by ignoring that the Appellant's are successors-in-interest of land patents which conveyed the rights to water with their land prior to the passage of this statute which states that the recording of a deed shall be deemed to impart notice of the contents of the deed to *all persons* at the time the deed is recorded.

The State violates NRS 533.383(1) by ignoring the fact that the Appellant's are successors-in-interest of Land Patents which are filed and conveyed the rights to water with their land *prior* to the passage of this statute which states that the recording of a deed shall be deemed to impart notice of the contents of the deed to *all persons* at the time the deed is recorded. Further, the patents are part of the State Select Act, not the Desert Entry Act or Desert Land Act. Any representations which the State may make that they are not would clearly be a lie and, in doing so, the Appellants will file a Motion to strike and demand for sanctions for lying to this Court, when they know otherwise.

Article 1(federal) Courts and Article 4 (State) Courts are reserved for citizens who do not fall under the full penumbra of the Bill of Rights. The United States Supreme Court has already determined that the Constitution does not follow the flag. In other words, the citizens of the territories and possessions of the United States do not have Constitutional Rights. (See the Appellants' argument in their Motion for Preliminary Injunction [ROA; P. 13-29]) The inhabitants of the various territories of the United States only have the *privileges* and *immunities* that Congress has determined they should have, even in derogation of Bill of Rights and other Constitutional guarantees.

Putting the Appellant's under the administrative (legislative court) authority takes away their *rights* over which *only* the judicial branch of government (the courts) have province and who must enforce legislative intent, not the *ad hoc* adjudications of an unelected administrative functionary. Thus, allowing them to sit as their own judge in their own cause.[5] This guts the core of Constitutional law and violates due

[5] There is no question that the State Engineer has an agenda.

process (5th Amendment[6]) straight across the board, leaving only the 14th Amendment, which only protects "privileges and immunities."

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 an amendment of the Constitution through the passage of 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 circumvent the District Court's original jurisdiction and authority to hear cases relating to real property. Further, the Respondents are arguing that the delegating statutes of the Engineer repeal other statutes by implication. This Court has already recognizes that water rights are real property, requiring them to be recorded with the County Recorder's office and the definition of percolating water also embodies this pronouncement. Therefore, the District Court has "original jurisdiction" of cases relating to water issues of Private Wells - not the State Engineer.

As such, the lower court's decision that the Appellants were required to go through the entire administrative process in order to facilitate the "ripeness" for review standard, was not only erroneous but constitutes a denial of the Appellants' Constitutional Rights and the voids the Nevada Constitutional provisions granting original jurisdiction on real property matters to the district courts. This absurdity is

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[6] The Fourteenth Amendment is specifically not cited as it only applies to "privileges and immunities,"which are not rights granted by a Constitution, but privileges granted by a legislature and are not protected by the 5th Amendment.

manifest in the fact that the mere act of forcing the Appellants through the administrative process, forces them to waive both subject matter, personal jurisdiction and venue in an Article 6 (State Constitution) court, foreclosing their issues on an appeal from a Petition for Judicial Review. This denies them their First Amendment Rights - the right to petition the 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, 510, 92 S.Ct. 609, 612, 30 L.Ed.2d 642 (Cal. 1972))

Therefore, this is a paradigm shift from the "rule of law" to the rule of an unelected official's own self-serving personal opinions, *aka: ad hoc* adjudication of the Appellants' rights, which have been transmuted into privileges. This is unacceptable 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.

Artificial persons, *e.g.*, corporations, limited liability companies, *etc.*, are government creations, who operate and exist under government privilege. *See* ***Metropolitan Life Ins. Co. v. Ward***, 470 U.S. 869, 884, 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." (See Dissent by O'Conner, Brennan, Marshall and Renquist) (Emphasis added.)) "The term citizen . . . applies only to natural persons, members of the body politic,

owning allegiance to the state, not to artificial persons created by the legislature, possessing only the attributes which the legislature has prescribed." ***Paul v. Virginia***, 8 Wall, 168, 177, 19 L.Ed. 357 (1868). As such, the "persons" who are defined and described in the Statutes which delegate the authority of the State Engineer are such persons that may be denied all constitutional rights. This does not and cannot encompass *natural persons*, who *may not* be denied their inalienable rights - especially by an administrative appointee.

The State courts have embraced these Insular Case decisions without any understanding and have improperly applied them *indiscriminately* - across the board - to the citizens of their respective States in complete disregard of the status and dichotomy of citizenship of each other. Constitutionally speaking, this is no different than applying English Colonial law or even Sharia law to the citizens of the fifty States. Although, it is both lawful and Constitutional for Congress to apply Sharia law in a Territory or Possession of the United States - if they so please. Congress is not duty bound by the Bill of Rights when dealing with a territory, which is under military rule, they are only bound by United States Constitution, Art. 4, §3, Cl. 2, to wit:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State. (Emphasis added).

Therefore, Congress' will reigns supreme over *even* the Bill of Rights, but ONLY in a territory or possession of the United States, such as Washington, D.C. The State has attempted to emulate the Federal Administrative model which contains contingencies, such as insular possessions and military governance of civilians, systems which do

not exist in a State system.

CONCLUSION

The lower court erred in granting the Respondent's Motion to Dismiss. It did so by ignoring the jurisdiction challenge of the Engineer and assumed jurisdiction, instead of requiring the Engineer to show his delegated authority, violating the Constitutional requisites of due process. Instead of examining the jurisdictional arguments of the Appellants by-passed them, immediately applied administrative procedures making a finding that the Appellants' case was not ripe for review before deciding whether or not the Engineer's administrative process even applied to them. In doing so, the lower court's entire decision is *void ab initio*.

The Appellants renew their jurisdictional challenges now in this Honorable Court. These issues are paramount to a thorough understanding of the jurisdictional elements regarding *natural persons* who own Private Wells and how the delegated authority of the State Water Engineer relates to their special circumstances. This Court in ***State v. Loveless***, 62 Nev. 17, 24, 136 P.2d 236 (1943), stated that,

> ". . . it is the duty and province of the courts to keep strict watch and protect fundamental rights in ***all*** matters coming before them, and *where jurisdictional or fundamental error is apparent on the face of the record*, *such error may be considered* by the appellate court though not assigned." (Emphasis added).

. . .

. . .

. . .

The Constitution nullifies sophisticated as well as simple-minded modes of infringing on Constitutional protections. ***Lane v. Wilson,*** 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281 (1939); ***Harman v. Forseenius****,* 380 U.S. at 540-541, 85 S.Ct. at 1185. *Cited in* ***U.S. Term Limits, Inc. v. Thorton***, 514 U.S. 779, 829, 115 S.Ct. 1842 (1995).

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:

[X] Proportionately spaced, has a typeface of 14 points or more, and **contains <u>10,634 words</u>** [the maximum of 14,000 words]; or

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[ ] Does not exceed 30 pages.

[ ] Exceeds the limit by_but is accompanied by a Motion to Exceed limit.

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 1st day of October, 2016

/s/ Thomas J. Gibson
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CERTIFICATE OF SERVICE

I certify that I am a non-interested party person to this action and that on this 1st day of October, 2016, I served a copy of the foregoing Opening Brief, on the following by United States Postal Service, postage pre-paid, to:

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